Agriculture & Natural Resources Subcommittee

Meeting Packet

Tuesday, January 24, 2012
8:30 AM
Reed Hall (102 HOB)

Dean Cannon
Speaker

Steve Crisafulli
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Agriculture & Natural Resources Subcommittee

Start Date and Time:	Tuesday, January 24, 2012 08:30 am
End Date and Time:	Tuesday, January 24, 2012 10:30 am
Location:	Reed Hall (102 HOB)
Duration:	2.00 hrs

Consideration of the following bill(s):

HB 313 Premises Liability by Bembry, Steube
CS/HB 599 Mitigation by Transportation & Highway Safety Subcommittee, Pilon
HB 1389 Water Storage and Water Quality Improvements by Perman
HB 4187 Cattle by Albritton
HB 4189 Florida Agricultural Exposition by Albritton

Consideration of the following proposed committee bill(s):

PCB ANRS 12-06 -- Judah P. Benjamin Memorial at Gamble Plantation Historical Site Advisory Council
PCB ANRS 12-07 -- Numeric Nutrient Criteria

NOTICE FINALIZED on 01/20/2012 16:18 by Love.John

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 313 Premises Liability
SPONSOR(S): Bembry and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 802

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Caridad	Bond
2) Agriculture & Natural Resources Subcommittee		Deslatte JD	Blalock NFB
3) Judiciary Committee			

SUMMARY ANALYSIS

Current law provides that private property owners who offer public opportunities for outdoor recreation on their property have limited liability for incidents occurring on the land if the property owner:

- Does not charge for entry to the property nor conduct commercial or other activity where profit is derived from public patronage on any part of the property; or
- Leases the property to the state for outdoor recreational purposes.

The bill allows private property owners who provide outdoor recreational opportunities on their land to enter into written agreements with the state, as opposed to a lease, and still receive the benefit of the limitation of liability.

The bill also provides limitation of liability protection to private landowners who make their land available to specific persons, as opposed to only the general public, for the purpose of hunting, fishing, or wildlife viewing. To benefit from this limitation of liability, the landowner must provide notice of the liability limits to the person or persons using the land in addition to the current requirement that the landowner make no profit from nor charge a fee for using the land.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Liability to Persons on Land - In General

In tort law, a plaintiff must prove that a lawful duty exists, that the duty was breached, and that the plaintiff suffered damages as a result of the breach. Current tort law related to a landowner's duty to persons on his or her land is governed by the status of the person. There are two basic categories of persons on land: invitees and trespassers.

An invitee is a person who was invited to enter the land. Section 768.075(3)(a)1., F.S., defines invitation to mean "that the visitor entering the premises has an objectively reasonable belief that he or she has been invited or is otherwise welcome on that portion of the real property where injury occurs." A landowner owes certain duties to invitees, and can be sued in tort should the landowner fail a duty and a person is injured due to that failure. The duties owed to most invitees are: the duty to keep property in reasonably safe condition; the duty to warn of concealed dangers which are known or should be known to the property holder, and which the invitee cannot discover through the exercise of due care; and the duty to refrain from wanton negligence or willful misconduct.

A trespasser is any person who is not an invitee. This bill does not affect tort law related to trespassers.

Background

Under current law, a private property owner who provides public opportunities for outdoor recreation on his or her property has limited liability for incidents occurring on the land if the property owner:

- Does not charge for entry to the property nor conduct commercial or other activity where profit is derived from public patronage on any part of the property; or
- Leases the property to the state for outdoor recreational purposes.[1]

A private property owner who qualifies under one of these two categories owes no duty of care to keep the property safe for people coming on the land or using the land, and has no duty to warn anyone entering the property about hazardous conditions, structures, or activities on the land. The law also provides that the private landowner is not liable for an injury caused by the acts or omissions of others on the property. However, the statute does not relieve the landowner of liability if there is a deliberate, willful, or malicious injury to persons or property.

Under current law, if a private landowner enters into a lease with the state, he or she may benefit from the liability protections under the statute. However, he or she will not receive protection from any other type of formal agreement for use of the property (i.e. an easement), and arguably has no protection if utilizing something short of a lease (i.e. oral license).[2]

Private landowners who make their land available to the general public for outdoor recreational activities are also afforded liability protection. However, this protection does not apply in instances where the landowner wishes to make the property available only to individuals or groups of individuals, instead of the general public. By contrast, other neighboring states do provide liability protection to landowners who provide limited public access.[3]

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[1] Section 375.251, F.S.

[2] An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road)." Black's Law Dictionary (9th ed. 2009).

[3] Georgia and Alabama provide landowner liability protection to landowners who allow people other than the general public to use their land for recreational purposes. *See, e.g.,* s. 51-2-22, GA Code ("Except as specifically recognized by or provided in Code Section 51-3-25, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give warning of a dangerous condition , use, structure, or activity on the premises to persons entering for recreational purposes.").

Outdoor recreational purposes include, but are not limited to: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, motorcycling, and visiting historical, archaeological, scenic, or scientific sites.

Effect of Proposed Changes:

The bill amends s. 375.251, F.S., to provide that a private property owner who provides outdoor recreational opportunities on his or her land may enter into other types of "written agreements" with the state, as opposed to only a lease, and still receive the liability protections under the statute. The change also allows the state to execute written agreements with landowners without taking a leasehold interest in the property where the activities are conducted.

This bill also revises s. 375.251, F.S, to provide limitation of liability protection to a private landowner who makes his or her land available to any person — not only the general public — for the purpose of hunting, fishing, or wildlife viewing. To benefit from the limitation of liability, the landowner must provide notice of the liability limits to the person or persons using the land in addition to the current requirement that the landowner make no profit from nor charge a fee for using the land.

B. SECTION DIRECTORY:

Section 1 amends s. 375.251, F.S., regarding limitations on liability for private landowners who make their property available to others for outdoor recreational purposes.

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 does not appear to have any impact on state government revenues.

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any impact on the private sector.

D. FISCAL COMMENTS:

There is the potential for a positive fiscal impact on the private sector in the form of reduced litigation. However, individuals using the land will be limited in the lawsuits they can bring against the landowners.

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:

Tort limitations may implicate judicial review under the access to courts provision of the state constitution. The Florida Supreme Court has held that the current statute does not deny access to courts.[4]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

[4] *See Abdin v. Fischer*, 374 So.2d 1379 (1979) (holding that s. 375.251, F.S., limiting liability of owners and lessees who provide the public with a park area for outdoor recreational purposes, is a reasonable exercise of legislative power and does not violate Art. I, s. 21, Fla. Const., regarding access to courts)

A bill to be entitled

An act relating to premises liability; amending s. 375.251, F.S.; providing that an owner or lessee who makes an area available to another person for hunting, fishing, or wildlife viewing is entitled to certain limitations on liability if notice is provided to a person upon entry to the area; providing that an owner of an area who enters into a written agreement with the state for the area to be used for outdoor recreational purposes is entitled to certain limitations on liability; deleting a requirement that the area be leased to the state in order for the limitations on liability to apply; defining the term "area"; making technical and grammatical changes; providing an effective date.

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

Section 1. Section 375.251, Florida Statutes, is amended to read:

375.251 Limitation on liability of persons making available to public certain areas for recreational purposes without charge.—

(1) The purpose of this section ~~act~~ is to encourage persons to make land, water areas, and park areas available to the public ~~land, water areas and park areas~~ for outdoor recreational purposes by limiting their liability to persons using these areas ~~going thereon~~ and to third persons who may be

damaged by the acts or omissions of persons using these areas ~~going thereon~~.

(2)(a) An owner or lessee who provides the public with an ~~a park~~ area ~~or other land~~ for outdoor recreational purposes owes no duty of care to keep that ~~park~~ area ~~or land~~ safe for entry or use by others, or to give warning to persons entering or going on that ~~park~~ area ~~or land~~ of any hazardous conditions, structures, or activities on the area ~~thereon~~. An owner or lessee who provides the public with an ~~a park~~ area ~~or other land~~ for outdoor recreational purposes ~~shall not by providing that park area or land~~:

1. Is not ~~be~~ presumed to extend any assurance that the ~~such park~~ area ~~or land~~ is safe for any purpose;~~,~~

2. Does not incur any duty of care toward a person who goes on the ~~that park~~ area ~~or land~~;~~,~~ or

3. Is not ~~Become~~ liable or responsible for any injury to persons or property caused by the act or omission of a person who goes on the ~~that park~~ area ~~or land~~.

(b) Notwithstanding the inclusion of the term "public" in this subsection and subsection (1), an owner or lessee who makes available to any person an area primarily for the purposes of hunting, fishing, or wildlife viewing is entitled to the limitation on liability provided herein so long as the owner or lessee gives notice of this provision to the person upon entry to the area.

(c) ~~(b)~~ The Legislature recognizes that an area offered for outdoor recreational purposes may be subject to multiple uses. The limitation of liability extended to an owner or lessee under

this subsection applies only if no charge is made for entry to or use of the area for outdoor recreational purposes and no other revenue is derived from patronage of the area for outdoor recreational purposes. ~~This section shall not apply if there is any charge made or usually made for entering or using such park area or land, or any part thereof, or if any commercial or other activity , whereby profit is derived from the patronage of the general public, is conducted on such park area or land, or any part thereof.~~

(3)(a) An owner of an ~~land or water~~ area who enters into a written agreement concerning the area with ~~leased to~~ the state for outdoor recreational purposes owes no duty of care to keep the ~~that land or water~~ area safe for entry or use by others, or to give warning to persons entering or going on the area ~~that land or water~~ of any hazardous conditions, structures, or activities thereon. An owner who enters into a written agreement concerning the area with ~~leases land or water area to~~ the state for outdoor recreational purposes ~~shall not by giving such lease~~:

1. Is not ~~be~~ presumed to extend any assurance that the ~~such land or water~~ area is safe for any purpose;~~,~~

2. Does not incur any duty of care toward a person who goes on the ~~leased land or water~~ area that is subject to the agreement;~~,~~ or

3. Is not ~~become~~ liable or responsible for any injury to persons or property caused by the act or omission of a person who goes on the ~~leased land or water~~ area that is subject to the agreement.

(b) This subsection applies to all persons going on the area that is subject to the agreement, including invitees, licensees, and trespassers. ~~The foregoing applies whether the person going on the leased land or water area is an invitee, licensee, trespasser, or otherwise.~~

(4) This section ~~act~~ does not relieve any person of liability that ~~which~~ would otherwise exist for deliberate, willful, or malicious injury to persons or property. This section does not ~~The provisions hereof shall not be deemed to~~ create or increase the liability of any person.

(5) As used in this section, the term:

(a) "Area" includes land, water, and park areas.

(b) "Outdoor recreational purposes" includes ~~as used in this act shall include~~, but is not ~~necessarily be~~ limited to, hunting, fishing, wildlife viewing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, motorcycling, and visiting historical, archaeological, scenic, or scientific sites.

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

Amendment No.

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

Committee/Subcommittee hearing bill: Agriculture & Natural Resources Subcommittee

Representative Bembry offered the following:

Amendment

Remove line 74 and insert:

for outdoor recreational purposes, where such agreement recognizes that the state may be responsible for personal injury or loss of property resulting from negligence or wrongful acts or omissions of the state to the extent authorized under s. 768.28 ~~shall not by giving such~~

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 599 Mitigation Requirements for Transportation Projects
SPONSOR(S): Pilon
TIED BILLS: None **IDEN./SIM. BILLS:** SB 824

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Transportation & Highway Safety Subcommittee	12 Y, 0 N, As CS	Kiner	Kruse
2) Agriculture & Natural Resources Subcommittee		Deslatte SD	Blalock AFB
3) Transportation & Economic Development Appropriations Subcommittee			
4) Economic Affairs Committee			

SUMMARY ANALYSIS

The bill relates to environmental mitigation efforts to offset the impacts of transportation projects proposed by the Florida Department of Transportation ("DOT"). The bill amends current Florida law to provide DOT the option to choose between water management districts ("WMDs") and private mitigation banks when undertaking mitigation efforts for transportation projects. The bill makes this change by:

- Revising legislative intent to encourage the use of public and private mitigation banks and other mitigation options that satisfy state and federal requirements;
- Providing an opt-out clause authorizing DOT (and WMDs and participating transportation authorities) to exclude projects from the statutory mitigation plan carried out by WMDs provided specified criteria have been met and specified investigations have been conducted;
- Providing that funds held in escrow for the benefit of a WMD may be released if the associated transportation project is excluded in whole or in part from the mitigation plan;
- Requiring that mitigation plans be approved by the Florida Department of Environmental Protection ("DEP"), in addition to current WMD approval, before implementation; and
- Revising the circumstances under which a governmental entity may create or provide mitigation for a project other than its own.

The bill has a potentially negative fiscal impact on local government. Although the proposed change does not appear to apply to transportation projects, mitigation banks and offsite regional mitigation areas permitted prior to December 31, 2011, mitigation for mining activities, and single family lots or homeowners, the proposed language appears to place additional financial assurance requirements on local governmental entities. The bill has a potentially negative fiscal impact for state government. The DOT must provide a cost-effectiveness analysis when determining which projects to include in or exclude from the mitigation plan, and the DEP must approve a WMD's mitigation plan before it can be implemented.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Background, Legislative Intent and Purpose

Environmental mitigation as it relates to wetlands regulatory programs is generally defined as the creation, restoration, preservation or enhancement of wetlands to compensate for permitted wetlands losses.[1] Mitigation banking is a concept designed to increase the success of environmental mitigation efforts and reduce costs to developers of individual mitigation projects.[2]

Section 373.4135, F.S., as part of the Environmental Reorganization Act of 1993, directs the Florida Department of Environmental Protection ("DEP") and water management districts ("WMDs") to participate in and encourage the establishment of private and public mitigation banks and offsite regional mitigation.[3] Section 404 of the federal Clean Water Act[4] and early Florida law attempted to regulate wetlands impacts. However, these pieces of legislation did not specifically establish a wetlands protection program. As such, the Florida Legislature responded to the lack of both a comprehensive policy and a regulatory framework to handle environmental mitigation efforts with passage of s. 373.4135, F.S.[5] With few exceptions, it was intended that the provisions for establishing mitigation banks, creating and providing mitigation would apply equally to both public and private entities.[6] Among the exceptions is that DEP and the WMDs may treat public (or governmental) and private entities differently, by rule, with respect to financial assurances required.[7]

Mitigation Banking Process

In 1994, rules were adopted to govern the establishment and use of mitigation banks.[8] The substantive aspects of these rules, which were later codified[9] in s. 373.4136, F.S., and further specified in Ch. 62-342.700, F.A.C., address the following:

- The establishment of mitigation banks by governmental, nonprofit or for-profit entities;
- Requirements to ensure the financial responsibility of nongovernmental, private entities[10] proposing to develop mitigation banks – including the requirement that these entities show financial responsibility (effective prior to release of any mitigation credits) through a surety or performance bond, irrevocable letter of credit, or trust fund for the construction, implementation and perpetual management phases of the project (equal to 110% of the cost);
- Requirements to ensure the financial responsibility of governmental entities[11] proposing to develop mitigation banks – including the requirement that a governmental entity provide

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[1] John J. Fumero, *Environmental Law: 1994 Survey of Florida Law – At a Crossroads in Natural Resource Protection and Management in Florida*, 19 Nova L. Rev. 77, 101 (1994).
[2] Id. at 103.
[3] Section 29., Ch. 93-213, Laws of Florida.
[4] 33 U.S.C. s. 1344
[5] John J. Fumero, *Environmental Law: 1994 Survey of Florida Law – At a Crossroads in Natural Resource Protection and Management in Florida,* 19 Nova L. Rev. 77, 103 (1994).
[6] Section 373.4135, F.S.
[7] Section 373.4135(1)(a), F.S.
[8] The rules have been amended several times and may now be found in Ch. 62-342.700, F.A.C., effective May, 2001.
[9] In 1996, the Florida Legislature revised the statutes on mitigation banking and the substantive sections of the rules were placed in s. 373.4136, F.S. *See* the "Legal Authority" section of the Florida Department of Environmental Protection's website on the Mitigation Banking Rule and Synopsis. This information may be viewed at http://www.dep.state.fl.us/water/wetlands/mitigation/synopsis.htm (Last viewed 1/12/2012). Chapter 62-342, F.A.C. was subsequently revised in May, 2001, providing, among other things, specific financial assurance requirements.
[10] These requirements may be found in Ch. 62-342.700(1)-(11), F.A.C.
[11] These requirements may be found in Ch. 62-342.700(12), F.A.C.

"reasonable assurances" that it can meet the construction and implementation requirements in the mitigation bank permit and establish a trust fund for the perpetual management of the mitigation bank;
- Circumstances in which mitigation banking is appropriate or desirable: only when onsite mitigation is determined not to have comparable long-term viability and the bank itself would improve ecological value more than on-site mitigation;
- A framework for determining the value of a mitigation bank through the issuance of credits;
- Criteria for withdrawal of mitigation credits by projects within or outside the regional watershed where the bank is located;
- Measures to ensure the long-term management and protection of mitigation banks; and
- Criteria governing the contribution of funds or land to an approved mitigation bank.[12]

A 'banker' is an entity that creates, operates, manages, or maintains a mitigation bank.[13] A banker must apply for a mitigation bank permit before establishing and operating a mitigation bank.[14] Mitigation banks are permitted by DEP or one of the WMDs that have adopted rules based on the location of the bank and activity-based considerations, such as whether the ecological benefits will preserve wetlands losses resulting from development or land use activities or will offset losses to threatened and endangered species.[15] The mitigation bank permit authorizes the implementation and operation of the mitigation bank and sets forth the rights and responsibilities, including financial responsibilities, of the banker and DEP for its implementation, management, maintenance and operation.[16] Specific state mitigation bank permit requirements are contained within s. 373.4136, F.S., Ch. 62-342.450, F.A.C., and Ch. 342.700, F.A.C. Mitigation banks must also go through a federal permitting process overseen by the United States Army Corps of Engineers.

There are separate and distinct requirements for mitigation efforts related to transportation projects.

Mitigation Requirements for Specified Transportation Projects

In 1996,[17] the Florida Legislature found that environmental mitigation efforts related to transportation projects proposed by the Florida Department of Transportation ("DOT") or transportation authorities could be more effectively achieved through regional, long-range mitigation planning rather than on a project-by-project basis. As such, s. 373.4137, F.S., requires DOT to fund mitigation efforts to offset the adverse impacts of transportation projects on wetlands, wildlife and other aspects of the natural environment. Mitigation efforts are required to be carried out by a combination of WMDs and through the use of mitigation banks.

DOT's Role in the Mitigation Process

Section 373.4137, F.S., requires DOT (and transportation authorities) to annually submit (by July 1st) a copy of its adopted work program along with an environmental impact inventory of affected habitats (WMDs are responsible for ensuring compliance with federal permitting requirements). The environmental impact inventory must be submitted to the WMDs and must include the following:

- A description of habitats impacted by transportation projects, including location, acreage and type;
- A statement of the water quality classification of impacted wetlands and other surface waters;
- Identification of any other state or regional designations for the habitats; and

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[12] John J. Fumero, *Environmental Law: 1994 Survey of Florida Law – At a Crossroads in Natural Resource Protection and Management in Florida,* 19 Nova L. Rev. 77, 104 (1994).
[13] Ch. 62-342.200(1), F.A.C. (2001).
[14] Ch. 62-342.200(1), F.A.C. (2001).
[15] *See* the Florida Department of Environmental Protection's website on the Mitigation and Banking Rule and Procedure Synopsis at http://www.dep.state.fl.us/water/wetlands/mitigation/synopsis.htm. (Last viewed 12/9/2011).
[16] Id.
[17] Section 1., Ch. 96-238, Laws of Florida

- A survey of threatened species, endangered species and species of special concern affected by the proposed project.

WMDs Decision to Involve Mitigation Banks in the Mitigation Process

By March 1st of each year, each WMD must develop a mitigation plan in consultation with DEP, the United States Army Corps of Engineers, DOT, transportation authorities and various other federal, state and local governmental entities and submit the plan to its governing board for review and approval.[18] This plan is, in part, based off of the information provided in the environmental impact inventory and compiled in coordination with mitigation bankers.[19] Among other things, WMDs are required to consider the purchase of credits from properly permitted public or private mitigation banks when developing the plan and shall include this information in the plan when the purchase would:

- Offset the impact of the transportation project;
- Provide equal benefits to the water resources than other mitigation options being considered; and
- Provide the most cost-effective mitigation option.[20]

For each transportation project with a funding request for the next fiscal year, the mitigation plan must include a brief explanation of why a mitigation bank was or was not chosen as a mitigation option, including an estimation of identifiable costs of the mitigation bank and nonbank options to the extent practicable. Currently, factors such as time saved, liability for success of the mitigation and long-term maintenance are not required.

Florida law also provides that a specific project may be excluded from the mitigation plan in certain instances if DOT, the applicable transportation authority and WMD agree that the efficiency or timeliness of the planning or permitting process would be hampered were the project included. Additionally, a WMD may unilaterally exclude a project from the mitigation plan if appropriate mitigation for the project is not identifiable.[21] At this time, Florida law does not allow DOT to unilaterally elect which projects to include or exclude from the mitigation plan.

Mitigation Credits

Each quarter, DOT and transportation authorities must transfer sufficient funds into escrow accounts within the State Transportation Trust Fund to pay for mitigation of projected acreage impacts resulting from projects identified in the approved mitigation plan. By statute, the amount transferred must correspond to $75,000/acre of acreage projected to be impacted and must be spent down through the use of 'mitigation credits' throughout the fiscal year. This $75,000/acre statutory figure was originally based on estimates of the historical average cost per acre that DOT was spending on mitigation on a project-by-project basis in the early 1990's (usually this mitigation was conducted strictly on-site to restore or enhance wetlands directly linked to the impacted area). Over time, the process has changed. Now, this amount is adjusted on July 1st of each year based on the percentage change in the average of the Consumer Price Index. For fiscal year 2011-2012, the adjusted amount is $104,701 per acre. As defined by statute, a 'mitigation credit' is a unit of measure which represents the increase in ecological value resulting from mitigation efforts on a proposed project or projects.[22] One mitigation credit equals the ecological value gained by successfully creating one acre of wetlands.[23]

At the end of each quarter, the projected acreage impacts are compared to the actual acreage impacts and escrow balances are adjusted accordingly. Pursuant to the process, and with limited exceptions, WMDs may request a release of funds from the escrow accounts no sooner than 30 days prior to the

[18] Section 373.4137(4), F.S.
[19] Section 373.4137(4), F.S.
[20] Id.
[21] Id.
[22] Section 373.403(20), F.S.
[23] Ch. 62-342.200(5), F.A.C.

date the funds are needed to pay for costs associated with the development or implementation of the mitigation efforts. Associated costs relate to, but are not limited to, the following:

- Design costs;
- Engineering costs;
- Production costs; and
- Staff support.

Mitigation Expenditures

From 2007 to 2011, DOT's mitigation expenditures have totaled $169,921,562. WMDs have received $116,456,080 (68.54%) of the total expenditures, while public and private mitigation banks have received $38,107,600 (22.43%) of the total expenditures.[24] During this time, DOT also carried out its own mitigation in cases where mitigation banks were unavailable or the WMD could not identify the appropriate amount of mitigation within the existing statutory scheme. These related expenditures amount to $15,357,882 (9.04%) of total expenditures.

From inception of the DOT mitigation program in 1996 through present time, many acres of wetlands impacts have been – or plan to be – offset across the state. According to its 2011 DOT Mitigation Plan, the St. John's River Water Management District has, as of September 30, 2010, provided 35,036.68 acres of mitigation to offset 1305 acres of wetlands and other surface waters impacts. This total includes the mitigation acreage associated with 132.09 mitigation bank credits. The Southwest Florida Water Management District, according to its draft 2012 DOT Mitigation Plan, has provided (including proposed projects) a total of 814 acres of wetlands impacts.[25] This total includes mitigation acreage associated with 44.01 mitigation bank credits purchased from four mitigation banks and two local government regional off-site mitigation areas.[26]

Statewide Anticipated Mitigation Inventory for Fiscal Year 2012-2013

For fiscal year 2012-2013,[27] the total anticipated mitigation inventory is $20,068,232. It is anticipated that WMDs will receive $10,374,303 of the total, while public and private mitigation banks are anticipated to receive $9,643,929 of the total. DOT also anticipates it will carry out its own mitigation totaling $50,000.

Effect of Proposed Changes

The bill amends current Florida law to provide DOT the option to choose between water management districts ("WMDs") and private mitigation banks when undertaking mitigation efforts for transportation projects. The bill makes this change by:

- Revising legislative intent to encourage the use of public and private mitigation banks and other mitigation options that satisfy state and federal requirements;
- Providing an opt-out clause authorizing DOT (and WMDs and participating transportation authorities) to exclude projects from the statutory mitigation plan carried out by WMDs provided specified criteria have been met and specified investigations have been conducted;
- Providing that funds held in escrow for the benefit of a WMD may be released if the associated transportation project is excluded in whole or in part from the mitigation plan;
- Requiring that mitigation plans be approved by the Florida Department of Environmental Protection ("DEP"), in addition to current WMD approval, before implementation; and

[24] According to DOT, "itemizing mitigation bank purchases by project is not readily available because of the ability to purchase advance mitigation credits and the ability to lump various projects within a single mitigation bank credit purchase."
[25] This plan is projected to be approved by the Southwest Florida Water Management District Governing Board on January 31, 2012. The draft plan may be viewed at http://www.swfwmd.state.fl.us/projects/mitigation/ (Last viewed 1/5/2012).
[26] Id.
[27] According to DOT, these figures are current as of 11/17/2011and are subject to change based on DOT work program changes and/or coordination with WMDS and the U.S. Army Corps of Engineers

- Revising the circumstances under which a governmental entity may create or provide mitigation for a project other than its own.

Revising Legislative Intent to Encourage the Use of Public and Private Mitigation Banks

The bill amends s. 373.4137(1), F.S., by revising legislative intent to encourage the use of public and private mitigation banks and any other mitigation options that satisfy state and federal requirements. The effect of the proposed change is a removal of legislative intent specifically referencing that mitigation projects be carried out by WMDs. However, the proposed change does not completely remove WMDs from the process. WMDs will still be involved in the statutory program to the following extent:

- The Department of Transportation must submit to the WMDs a list of projects in DOT's adopted work program (along with an environmental impact inventory) which may be impacted by DOT's plan of construction for transportation projects in the next 3 years of the tentative work program;
- The Department of Transportation and participating transportation authorities will still transfer funds held in escrow to the WMDs to carry out mitigation efforts;
- Water management districts will still develop mitigation plans in consultation with DOT and various other agencies;
- The governing board(s) of the WMDs will still be required to review and approve the mitigation plan(s);
- Mitigation plans will require approval by DEP, which has supervisory authority[28] over all WMDs, before the plans may be implemented;
- Water management districts will be given authority to elect to opt-out of the statutory program provided specified criteria has been met and specified investigations have been conducted; and
- Water management districts will be required to ensure that DOT's environmental impact inventory and implementation of the mitigation plan meet federal permitting requirements.

Legislative intent related to DOT's funding of these projects is left unchanged.

Release of Funds Held in Escrow for the Benefit of WMDs When Projects are Excluded

The bill amends s. 373.4137(3)(c), F.S., providing that funds identified for or maintained in an escrow account for the benefit of a WMD may be released if the associated transportation project is excluded in whole or in part from the mitigation plan. The proposed change is in line with the opt-out clause authorizing DOT, a participating transportation authority or a WMD to unilaterally exclude a project from the mitigation plan.

DEP Approval of Mitigation Plan before Implementation

The bill amends s. 373.4137(4), F.S., to require mitigation plans to be submitted to and approved by DEP before implementation. The effect of the proposed change adds an additional requirement that the plan be approved above and beyond the already required approval from the governing board of the applicable WMD. DEP approval of the mitigation plan was a requirement eliminated during the 2005 Regular Legislative Session.[29]

Opt-out Clause Allowing Projects to be Excluded from the Mitigation Plan(s)

The bill amends s. 373.4137(4)(b), F.S., to provide an opt-out clause authorizing DOT, an applicable transportation authority or the appropriate WMD to unilaterally choose to exclude a project from the mitigation plan provided specified criteria has been met and specified investigations have been conducted. The proposed change strikes the condition precedent that an agreement be reached among DOT, an applicable transportation authority and the appropriate WMD that the efficiency of the planning or permitting process would be hampered were a specified project included. The proposed change also

[28] Section 373.026(7), F.S.
[29] Chapter 2005-281, Laws of Florida (HB 1681).

eliminates a WMD's authority to unilaterally choose to exclude a project in whole or in part if the WMD is unable to identify mitigation that would offset impacts of the project. Instead, s. 373.4137(4)(c), F.S., provides specified criteria that must be used in determining which projects to include or exclude from the mitigation plan. The specified criteria require the following:

- A cost-effectiveness investigation (including a written analysis), which uses credits from a private mitigation bank and considers various factors, such as the nominal cost of using a private mitigation bank compared to the nominal cost of other included (or proposed) projects;
- The value of complying with federal requirements for federal aid projects;
- The value private mitigation banks provide through expedited approval during the federal permitting process as overseen by the U.S. Army Corps of Engineers; and
- The value private mitigation banks provide with regard to state and federal liability for the success of the mitigation project.

Mitigation by a Governmental Entity for a Project Other Than its Own

The bill creates a new subparagraph (b) in s. 373.4135, F.S., to provide that a governmental entity may not create or provide mitigation for a project other than its own, unless the governmental entity uses land that was not previously purchased for conservation and unless the governmental entity provides the same financial assurances as required for mitigation banks permitted under s. 373.4136, F.S., and regional offsite mitigation areas.

The proposed change only applies when a governmental entity enters the market and acts similarly to a private mitigation bank. To mirror private mitigation bank requirements, a governmental entity must:

- Show financial responsibility (effective prior to release of any mitigation credits) for the construction and implementation phase of the bank, equal to 110% of the cost, through a surety or performance bond, irrevocable letter of credit, or trust fund[30];
- Show financial responsibility for the perpetual management phase of the bank through a surety or performance bond, irrevocable letter of credit, trust fund or standby trust fund, in an amount sufficient to be reasonably expected to generate annual revenue equal to the annual cost of perpetual management at an assumed average rate of return of six percent per annum[31].

The proposed change does not apply to the following:

- Mitigation banks permitted prior to December 31, 2011;
- Off-site regional mitigation areas established prior to December 31, 2011;
- Mitigation for transportation projects proposed by the Department of Transportation;
- Mitigation for impacts from mining activities; or
- Mitigation provided for single family lots or homeowners.

Effective Date

The bill is effective upon becoming a law.

B. SECTION DIRECTORY:

Section 1: Revises legislative intent; provides an opt-out clause authorizing exclusion of projects from the mitigation plan in certain instances; provides for the release of funds held in escrow for excluded projects; requires that mitigation plans be approved by DEP before implementation; revises circumstances under which a governmental entity may create or provide mitigation.

Section 2: Provides an effective date.

[30] Rule 62-342.700
[31] *Id.*

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

Expenditures:

The bill has a potentially negative fiscal impact on the DOT and the DEP. The DOT must provide a cost-effectiveness analysis when determining which projects to include in or exclude from the mitigation plan. The DEP must approve a WMD's mitigation plan before it can be implemented.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See fiscal Comments.

2. Expenditures:

See Fiscal Comments.

Although the proposed change does not appear to apply to transportation projects, mitigation banks and offsite regional mitigation areas permitted prior to December 31, 2011, mitigation for mining activities, and single family lots or homeowners, the proposed language appears to place additional financial assurance requirements on local governmental entities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill has a potentially positive fiscal impact for mitigation bankers.

D. FISCAL COMMENTS:

To the extent the bill results in the exclusion of mitigation projects from the statutory mitigation plan carried out by the WMDs that would not otherwise be excluded, the bill will result in a decrease in revenues received by the WMDs from DOT and a corresponding decrease in associated expenditures.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect municipal or county government. The bill does not appear to require counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 11, 2012, the Transportation & Highway Safety Subcommittee adopted one amendment which made the following corrections:

- Made a technical change to correct an error in terminology on line 185. The bill as originally filed referred to "the department" on line 185 and was intended to be a reference to the Department of Transportation. However, "the department" as defined in s. 373.019(4), refers to "the Department of Environmental Protection or its successor agency or agencies." The adopted amendment corrected this error by changing "the department" to "the Department of Transportation."
- Moved and revised proposed language prohibiting a governmental entity from creating or providing mitigation outside of the statutory program established by s. 373.4137, F.S., to s. 373.4135, F.S. The revised language now provides the circumstances under which a governmental entity may create or provide mitigation for a project other than its own.
- Changed the effective date from "July 1, 2012," to "upon becoming a law."

A bill to be entitled

An act relating to mitigation; amending s. 373.4137, F.S.; revising legislative intent to encourage the use of other mitigation options that satisfy state and federal requirements; providing the Department of Transportation or a transportation authority the option of participating in a mitigation project; requiring the Department of Transportation or a transportation authority to submit lists of its projects in the adopted work program to the water management districts; requiring a list rather than a survey of threatened or endangered species and species of special concern affected by a proposed project; providing conditions for the release of certain environmental mitigation funds; prohibiting a mitigation plan from being implemented unless the plan is submitted to and approved by the Department of Environmental Protection; providing additional factors that must be explained regarding the choice of mitigation bank; removing a provision requiring an explanation for excluding certain projects from the mitigation plan; providing criteria that the Department of Transportation must use in determining which projects to include in or exclude from the mitigation plan; amending s. 373.4135, F.S.; authorizing a governmental entity to create or provide mitigation for projects other than its own under specified circumstances; providing applicability;

providing an effective date.

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

Section 1. Subsections (1) and (2), paragraph (c) of subsection (3), and subsections (4) and (5) of section 373.4137, Florida Statutes, are amended to read:

373.4137 Mitigation requirements for specified transportation projects.—

(1) The Legislature finds that environmental mitigation for the impact of transportation projects proposed by the Department of Transportation or a transportation authority established pursuant to chapter 348 or chapter 349 can be more effectively achieved by regional, long-range mitigation planning rather than on a project-by-project basis. It is the intent of the Legislature that mitigation to offset the adverse effects of these transportation projects be funded by the Department of Transportation and be carried out by ~~the water management districts, including~~ the use of mitigation banks and any other mitigation options that satisfy state and federal requirements ~~established pursuant to this part~~.

(2) Environmental impact inventories for transportation projects proposed by the Department of Transportation or a transportation authority established pursuant to chapter 348 or chapter 349 shall be developed as follows:

(a) By July 1 of each year, the Department of Transportation or a transportation authority established pursuant to chapter 348 or chapter 349 which chooses to

participate in the program shall submit to the water management districts a list ~~copy~~ of its projects in the adopted work program and an environmental impact inventory of habitats addressed in the rules adopted pursuant to this part and s. 404 of the Clean Water Act, 33 U.S.C. s. 1344, which may be impacted by its plan of construction for transportation projects in the next 3 years of the tentative work program. The Department of Transportation or a transportation authority established pursuant to chapter 348 or chapter 349 may also include in its environmental impact inventory the habitat impacts of any future transportation project. The Department of Transportation and each transportation authority established pursuant to chapter 348 or chapter 349 may fund any mitigation activities for future projects using current year funds.

(b) The environmental impact inventory shall include a description of these habitat impacts, including their location, acreage, and type; state water quality classification of impacted wetlands and other surface waters; any other state or regional designations for these habitats; and a list ~~survey~~ of threatened species, endangered species, and species of special concern affected by the proposed project.

(3)

(c) Except for current mitigation projects in the monitoring and maintenance phase and except as allowed by paragraph (d), the water management districts may request a transfer of funds from an escrow account no sooner than 30 days before ~~prior to~~ the date the funds are needed to pay for activities associated with development or implementation of the

approved mitigation plan described in subsection (4) for the current fiscal year, including, but not limited to, design, engineering, production, and staff support. Actual conceptual plan preparation costs incurred before plan approval may be submitted to the Department of Transportation or the appropriate transportation authority each year with the plan. The conceptual plan preparation costs of each water management district will be paid from mitigation funds associated with the environmental impact inventory for the current year. The amount transferred to the escrow accounts each year by the Department of Transportation and participating transportation authorities established pursuant to chapter 348 or chapter 349 shall correspond to a cost per acre of $75,000 multiplied by the projected acres of impact identified in the environmental impact inventory described in subsection (2). However, the $75,000 cost per acre does not constitute an admission against interest by the state or its subdivisions and ~~nor~~ is not ~~the cost~~ admissible as evidence of full compensation for any property acquired by eminent domain or through inverse condemnation. Each July 1, the cost per acre shall be adjusted by the percentage change in the average of the Consumer Price Index issued by the United States Department of Labor for the most recent 12-month period ending September 30, compared to the base year average, which is the average for the 12-month period ending September 30, 1996. Each quarter, the projected acreage of impact shall be reconciled with the acreage of impact of projects as permitted, including permit modifications, pursuant to this part and s. 404 of the Clean Water Act, 33 U.S.C. s. 1344. The subject year's transfer

of funds shall be adjusted accordingly to reflect the acreage of impacts as permitted. The Department of Transportation and participating transportation authorities established pursuant to chapter 348 or chapter 349 are authorized to transfer such funds from the escrow accounts to the water management districts to carry out the mitigation programs. Environmental mitigation funds that are identified for or maintained in an escrow account for the benefit of a water management district may be released if the associated transportation project is excluded in whole or part from the mitigation plan. For a mitigation project that is in the maintenance and monitoring phase, the water management district may request and receive a one-time payment based on the project's expected future maintenance and monitoring costs. Upon disbursement of the final maintenance and monitoring payment, the escrow account for the project established by the Department of Transportation or the participating transportation authority may be closed. Any interest earned on these disbursed funds shall remain with the water management district and must be used as authorized under this section.

(4) Before ~~Prior to~~ March 1 of each year, each water management district, in consultation with the Department of Environmental Protection, the United States Army Corps of Engineers, the Department of Transportation, participating transportation authorities established pursuant to chapter 348 or chapter 349, and other appropriate federal, state, and local governments, and other interested parties, including entities operating mitigation banks, shall develop a plan for the primary purpose of complying with the mitigation requirements adopted

pursuant to this part and 33 U.S.C. s. 1344. In developing such plans, the districts shall use ~~utilize~~ sound ecosystem management practices to address significant water resource needs and shall focus on activities of the Department of Environmental Protection and the water management districts, such as surface water improvement and management (SWIM) projects and lands identified for potential acquisition for preservation, restoration, or enhancement, and the control of invasive and exotic plants in wetlands and other surface waters, to the extent that the ~~such~~ activities comply with the mitigation requirements adopted under this part and 33 U.S.C. s. 1344. In determining the activities to be included in the ~~such~~ plans, the districts shall ~~also~~ consider the purchase of credits from public or private mitigation banks permitted under s. 373.4136 and associated federal authorization and shall include the ~~such~~ purchase as a part of the mitigation plan when the ~~such~~ purchase would offset the impact of the transportation project, provide equal benefits to the water resources than other mitigation options being considered, and provide the most cost-effective mitigation option. The mitigation plan shall be submitted to the water management district governing board, or its designee, for review and approval. At least 14 days before ~~prior to~~ approval, the water management district shall provide a copy of the draft mitigation plan to any person who has requested a copy. The plan may not be implemented until it is submitted to and approved by the Department of Environmental Protection.

(a) For each transportation project with a funding request for the next fiscal year, the mitigation plan must include a

brief explanation of why a mitigation bank was or was not chosen as a mitigation option, including an estimation of identifiable costs of the mitigation bank and nonbank options and other factors such as time saved, liability for success of the mitigation, and long-term maintenance ~~to the extent practicable~~.

(b) Specific projects may be excluded from the mitigation plan, in whole or in part, and are ~~shall~~ not ~~be~~ subject to this section upon the election ~~agreement~~ of the Department of Transportation, ~~or~~ a transportation authority if applicable, or ~~and~~ the appropriate water management district ~~that the inclusion of such projects would hamper the efficiency or timeliness of the mitigation planning and permitting process~~. ~~The water management district may choose to exclude a project in whole or in part if the district is unable to identify mitigation that would offset impacts of the project.~~

(c) When determining which projects to include in or exclude from the mitigation plan, the Department of Transportation shall investigate using credits from a permitted private mitigation bank before those projects are submitted to, or are allowed to remain in, the plan.

1. The investigation shall include the cost-effectiveness of private mitigation bank credits.

2. The cost-effectiveness analysis must be in writing and consider:

a. How the nominal cost of the private mitigation bank credits compares with the nominal cost for any given project to be included in the plan;

b. The value of complying with federal transportation

policies for federal aid projects;

c. The value that private mitigation bank credits provide as the result of the expedited approvals by the Army Corps of Engineers when private mitigation banks are used; and

d. The value that private mitigation banks provide to the state and its residents as a result of the state and federal liability for the success of the mitigation transferring to the private mitigation bank when credits are purchased from the private mitigation bank.

(5) The water management district shall ensure ~~be responsible for ensuring~~ that mitigation requirements pursuant to 33 U.S.C. s. 1344 are met for the impacts identified in the environmental impact inventory described in subsection (2), by implementation of the approved plan described in subsection (4) to the extent funding is provided by the Department of Transportation, or a transportation authority established pursuant to chapter 348 or chapter 349, if applicable. During the federal permitting process, the water management district may deviate from the approved mitigation plan in order to comply with federal permitting requirements.

Section 2. Paragraphs (b) through (e) of subsection (1) of section 373.4135, Florida Statutes, are redesignated as paragraphs (c) through (f), respectively, and a new paragraph (b) is added to that subsection to read:

373.4135 Mitigation banks and offsite regional mitigation.—

(1) The Legislature finds that the adverse impacts of activities regulated under this part may be offset by the

creation, maintenance, and use of mitigation banks and offsite regional mitigation. Mitigation banks and offsite regional mitigation can enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management. Therefore, the department and the water management districts are directed to participate in and encourage the establishment of private and public mitigation banks and offsite regional mitigation. Mitigation banks and offsite regional mitigation should emphasize the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands. This is best accomplished through restoration of ecological communities that were historically present.

(b) Notwithstanding subsection (5), a governmental entity may not create or provide mitigation for a project other than its own unless the governmental entity uses land that was not previously purchased for conservation and unless the governmental entity provides the same financial assurances as required for mitigation banks permitted under s. 373.4136 and regional offsite mitigation areas permitted under subsection (6). This paragraph does not apply to:

1. Mitigation banks permitted prior to December 31, 2011, under s. 373.4136;

2. Offsite regional mitigation areas established prior to December 31, 2011, under subsection (6);

3. Mitigation for transportation projects under ss.

373.4137 and 373.4139;

4. Mitigation for impacts from mining activities under s. 373.41492; or

5. Mitigation provided for single-family lots or homeowners under subsection (7).

Section 3. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1389 Water Storage and Water Quality Improvements
SPONSOR(S): Perman
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1858

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee		Deslatte JD	Blalock ALB
2) Agriculture & Natural Resources Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

Current law encourages and supports the development of creative public-private partnerships and programs, including opportunities for water storage and quality improvement on private lands and water quality credit trading, to facilitate or further the restoration of the surface water resources of the Lake Okeechobee watershed, the Caloosahatchee River watershed, and the St. Lucie River watershed. During periods of abnormally high rainfall, agricultural lands in normal production can provide temporary water storage that protects urban areas from flooding. In many regions of South Florida, significant areas of agricultural lands lie fallow during a large part of the wet season. In these areas, the fields alleviate flood conditions. Also, ranch areas containing both improved and unimproved pasturelands may provide flood protection to urban areas by retaining water on these lands as part of normal farming operations. The ability to hold floodwaters on agricultural lands for longer periods than water can be held in an urban setting also assists the overall hydrologic system in maintaining recharge rates over more extended periods of time[1].

Since 2005, the South Florida Water Management District (SFWMD) has been working with a number of agencies, including the Department of Environmental Protection (DEP) and the Department of Agriculture and Consumer Services (DACS), along with ranchers to store excess surface water on private, public, and tribal lands. The Dispersed Water Management Program encourages property owners to retain water on their land rather than drain it, accept and detain regional runoff, or do both. Management of the water reduces the amount of water delivered into Lake Okeechobee during the wet season and discharged to coastal estuaries for flood protection. Dispersed water is defined as shallow water distributed across parcel landscapes using simple structures. Private landowner involvement typically includes cost-share cooperative projects, easements or payment for environmental services[2]. However, owners of agricultural lands are hesitant to provide their land for water storage or water quality improvements that create wetlands or other surface waters on their property, due to the fear that once the agreement expires, they may be required to mitigate impacts to these created wetlands or surface waters, or that they may be precluded altogether from carrying out other activities on their land in the future that may impact these created wetlands or surface waters.

The bill states that the Legislature encourages public-private partnerships to accomplish water storage and water quality improvements on private agricultural lands in the Lake Okeechobee watershed. The bill provides that when agreements are entered into to establish such partnerships, a baseline condition determining the extent of wetlands and other surface waters on the property must be established and documented in the agreement before improvements are constructed. The determination for the baseline condition must be conducted using the methods set forth in the rules adopted pursuant to s. 373.421, F.S.[3] The baseline condition documented in the agreement must be considered the extent of wetlands and other surface waters on the property for the purpose of regulation under chapter 373, F.S., after the expiration of the agreement.

The bill has a potentially positive fiscal impact on state and local governments for water supply development and water quality improvements.

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[1] Department of Agriculture and Consumer Services website, www.floridaagwaterpolicy.com/PDF/Florida_Agricultural_Water_Policy_Report.pdf - 2006-09-19

[2] South Florida Water Management District's Dispersed Water Management Program Fact Sheet, www.sfwmd.gov/portal/page/portal/.../jtf_dispersed_water_mgmt.pdf

[3] Section 373.421, F.S., establishes criteria for adopting a unified statewide methodology for the delineation of wetlands in the state. Chapter 62-340, F.A.C., was adopted to implement this statute.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Section 373.4595(1)(n), F.S., encourages and supports the development of creative public-private partnerships and programs, including opportunities for water storage and quality improvement on private lands and water quality credit trading, to facilitate or further the restoration of the surface water resources of the Lake Okeechobee watershed, the Caloosahatchee River watershed, and the St. Lucie River watershed. During periods of abnormally high rainfall, agricultural lands in normal production can provide temporary water storage that protects urban areas from flooding. In many regions of South Florida, significant areas of agricultural lands lie fallow during a large part of the wet season. In these areas, the fields alleviate flood conditions. Also, ranch areas containing both improved and unimproved pasturelands may provide flood protection to urban areas by retaining water on these lands as part of normal farming operations. The ability to hold floodwaters on agricultural lands for longer periods than water can be held in an urban setting also assists the overall hydrologic system in maintaining recharge rates over more extended periods of time.

Since 2005, the SFWMD has been working with a number of agencies, including the DEP and the DACS, along with ranchers to store excess surface water on private, public, and tribal lands. The Dispersed Water Management Program encourages property owners to retain water on their land rather than drain it, accept and detain regional runoff, or do both. Management of the water reduces the amount of water delivered into Lake Okeechobee during the wet season and discharged to coastal estuaries for flood protection. Dispersed water is defined as shallow water distributed across parcel landscapes using simple structures. Private landowner involvement typically includes cost-share cooperative projects, easements or payment for environmental services. However, owners of agricultural lands are hesitant to provide their land for water storage or water quality improvements that create wetlands or other surface waters on their property, due to the fear that once the agreement expires, they may be required to mitigate impacts to these created wetlands or surface waters, or that they may be precluded altogether from carrying out other activities on their land in the future that may impact these created wetlands or surface waters.

Since October, 2011, 131,500 acre-feet of water retention/storage has been made available through a combination of public and private projects. There are more than 100 participating landowners providing water retention or storage ranging from 1 acre-foot to 30,000 acre-feet.[4]

Effect of Proposed Changes

The bill creates s. 373.4591, F.S., to provide that the Legislature encourages public-private partnerships to accomplish water storage and water quality improvements on private agricultural lands in the Lake Okeechobee watershed. The bill also provides that when agreements are entered into to establish such partnerships, a baseline condition determining the extent of wetlands and other surface waters on the property must be established and documented in the agreement before improvements are constructed. The determination for the baseline condition must be conducted using the methods set forth in the rules adopted pursuant to s. 373.421, F.S.[5] The baseline condition documented in the agreement must be considered the extent of wetlands and other surface waters on the property for the purpose of regulation under chapter 373, F.S., after the expiration of the agreement.

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[4] South Florida Water Management District's Dispersed Water Management Program Fact Sheet, www.sfwmd.gov/portal/page/portal/.../jtf_dispersed_water_mgmt.pdf

[5] Section 373.421, F.S., establishes criteria for adopting a unified statewide methodology for the delineation of wetlands in the state. Chapter 62-340, F.A.C., was adopted to implement this statute.

B. SECTION DIRECTORY:

Section 1. Creates s. 373.4591, F.S., requiring a specified determination as a condition of an agreement for water storage and water quality improvements on private agricultural lands in the Lake Okeechobee watershed; providing a methodology for such determination; providing for regulation of such lands after expiration of the agreement.

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:

The bill could provide a savings in state expenditures for water supply development and water quality improvements.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill could provide a savings in local expenditures for water supply development and water quality improvements.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could provide some economic benefit to agricultural landowners by increasing their ability to store water and provide water quality benefits on their land without incurring the permitting restrictions associated with creating wetlands.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

A bill to be entitled

An act relating to water storage and water quality improvements; creating s. 373.4591, F.S.; requiring a specified determination as a condition of an agreement for water storage and water quality improvements on private agricultural lands in the Lake Okeechobee watershed; providing a methodology for such determination; providing for regulation of such lands after expiration of the agreement; providing an effective date.

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

Section 1. Section 373.4591, Florida Statutes, is created to read:

373.4591 Improvements on private agricultural lands in the Lake Okeechobee watershed.—The Legislature encourages public-private partnerships to accomplish water storage and water quality improvements on private agricultural lands in the Lake Okeechobee watershed. When agreements are entered into to establish such partnerships, a baseline condition determining the extent of wetlands and other surface waters on the property shall be established and documented in the agreement before improvements are constructed. The determination for the baseline condition shall be conducted using the methods set forth in the rules adopted pursuant to s. 373.421. The baseline condition documented in the agreement shall be considered the extent of wetlands and other surface waters on the property for the

purpose of regulation under this chapter after the expiration of the agreement.

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

Amendment No.

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	_____

Committee/Subcommittee hearing bill: Agriculture & Natural Resources Subcommittee

Representative Perman offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 373.4591, Florida Statutes, is created to read:

373.4591 Improvements on private agricultural lands.-The Legislature encourages public-private partnerships to accomplish water storage and water quality improvements on private agricultural lands. When an agreement is entered into between a water management district or department and a private landowner to establish such partnership, a baseline condition determining the extent of wetlands and other surface waters on the property shall be established and documented in the agreement before improvements are constructed. The determination for the baseline condition shall be conducted using the methods set forth in the rules adopted pursuant to s. 373.421. The baseline

condition documented in the agreement shall be considered the extent of the wetlands and other surface waters on the property for the purpose of regulation under this chapter both during and after the expiration of the agreement.

T I T L E A M E N D M E N T

Remove lines 6-7 and insert:

private agricultural lands; providing a methodology for such

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		Kaiser DK	Blalock AFB
2) State Affairs Committee			

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

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.

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		Kaiser NK	Blalock MRB
2) State Affairs Committee			

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.

A bill to be entitled

An act relating to the Florida Agricultural Exposition; repealing s. 570.071, F.S., relating to the Florida Agricultural Exposition and the authority of the Department of Agriculture and Consumer Services and the Department of Corrections to receive donations of funds and expend funds for the exposition; amending ss. 570.53 and 570.54, F.S.; deleting cross-references to conform to the repeal by the act of s. 570.071, F.S.; providing an effective date.

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

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

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

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

(6)

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

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

570.54 Director; duties.—

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

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

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB ANRS 12-06 Judah P. Benjamin Memorial at Gamble Plantation Historical Site Advisory Council
SPONSOR(S): Agriculture & Natural Resources Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Agriculture & Natural Resources Subcommittee		Kaiser DK	Blalock MRB

SUMMARY ANALYSIS

The Judah P. Benjamin Confederate Memorial at Gamble Plantation Historic State Park (park) serves as a living history of life on a sugar plantation that existed before the Civil War.[1] Gamble Mansion is the only surviving antebellum plantation house in south Florida. The mansion was the home of Major Robert Gamble and the headquarters of an extensive sugar plantation of over 3,500 acres. In May of 1865, after the fall of the Confederacy, Confederate Secretary of State Judah P. Benjamin took refuge in the house until his safe passage to England could be secured. In 1925, the mansion and 16 acres were acquired by the United Daughters of the Confederacy and donated to the state. Today, it is furnished in the style of a successful mid-19th century plantation.[2]

Under current law, there is created the Judah P. Benjamin Memorial at Gamble Plantation Historical Site Advisory Council (advisory council), that is composed of five members who are citizens and residents of Manatee County. Three of the members must be appointed from the membership of the Judah P. Benjamin Chapter of the United Daughters of the Confederacy. One member must be appointed from the membership of the Manatee County Historical Commission, and one member must be appointed at large from Manatee County. Members of the advisory council serve without compensation. It is the duty of the advisory council to advise the Division of Recreation and Parks (division) of the Department of Environmental Protection (DEP) in the operation, restoration, development, and preservation of the Judah P. Benjamin Memorial at Gamble Plantation Historical Site. According to the DEP, the advisory council only meets on average once a year and does not regularly advise the division. In addition, the park works more closely with its citizen support organization, the Bureau of Natural and Cultural Resources, the United Daughters of the Confederacy, and the Division of Historical Resources in order to get input on the operation, restoration, development, and preservation of the park.

The bill repeals the current law creating the Judah P. Benjamin Memorial at Gamble Plantation Historical Site Advisory Council.

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

[1] http://www.floridastateparks.org/gambleplantation/default.cfm
[2] Id.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Judah P. Benjamin Confederate Memorial at Gamble Plantation Historical Site

The Judah P. Benjamin Confederate Memorial at Gamble Plantation Historic State Park (park) serves as a living history of life on a sugar plantation that existed before the Civil War. Gamble Mansion is the only surviving antebellum plantation house in south Florida. The mansion was the home of Major Robert Gamble and the headquarters of an extensive sugar plantation of over 3,500 acres. In May of 1865, after the fall of the Confederacy, Confederate Secretary of State Judah P. Benjamin took refuge in the house until his safe passage to England could be secured. In 1925, the mansion and 16 acres were acquired by the United Daughters of the Confederacy and donated to the state. Today, it is furnished in the style of a successful mid-19th century plantation. Today, it is furnished in the style of a successful mid-19th century plantation.

Judah P. Benjamin Confederate Memorial at Gamble Plantation Historical Site Advisory Council

Section 258.155, F.S., provides for the Judah P. Benjamin Memorial at Gamble Plantation Historical Site Advisory Council (advisory council), to be created, and be composed of five members who are citizens and residents of Manatee County. The members of the advisory council must be appointed by the Governor for 4-year staggered terms. Initially, the Governor appointed two members for 4-year terms, one member to a 3-year term, and two members for 2-year terms. Three of the members must be appointed from the membership of the Judah P. Benjamin Chapter of the United Daughters of the Confederacy. One member must be appointed from the membership of the Manatee County Historical Commission, and one member must be appointed at large from Manatee County. Members of the advisory council serve without compensation. Section 258.155, F.S., also states it is the duty of the advisory council to advise the Division of Recreation and Parks (division) of the Department of Environmental Protection (DEP) in the operation, restoration, development, and preservation of the Judah P. Benjamin Memorial at Gamble Plantation Historical Site.

According to the DEP, the advisory council only meets on average once a year and does not regularly advise the division. In addition, the park works more closely with its citizen support organization, the Bureau of Natural and Cultural Resources, the United Daughters of the Confederacy, and the Division of Historical Resources in order to get input on the operation, restoration, development, and preservation of the park.

Effect of Proposed Changes

The bill repeals s. 258.155, F.S., creating the Judah P. Benjamin Memorial at Gamble Plantation Historical Site Advisory Council.

B. SECTION DIRECTORY:

Section 1: Repeals s. 258.155, F.S., creating the Judah P. Benjamin Memorial at Gamble Plantation Historical Site Advisory Council.

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. The bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None

BILL ORIGINAL YEAR

A bill to be entitled

An act relating to the Judah P. Benjamin Memorial at Gamble Plantation Historical Site Advisory Council; repealing s. 258.155(1) and (2), F.S., relating to Judah P. Benjamin Memorial at Gamble Plantation Historical Site Advisory Council; providing an effective date.

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

Section 1. Section 258.155, Florida Statutes, is repealed.

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

PCB ANRS 12-06

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

V

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 Agriculture & Natural Resources Sub-Committee*

January 24, 2012

Chair: *Representative Steve Crisafulli*

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 #: PCB ANRS 12-07 Numeric Nutrient Criteria
SPONSOR(S): Agriculture & Natural Resources Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Agriculture & Natural Resources Subcommittee		Camechis	Blalock

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

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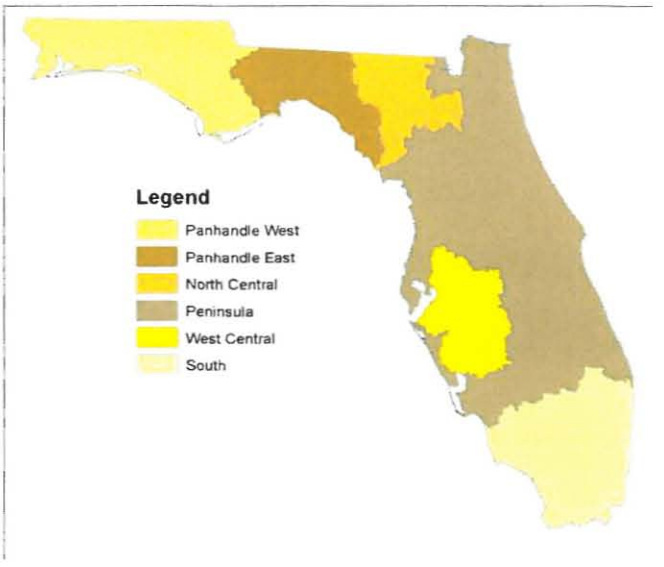
[6] 33 U.S.C. s. 1313(c)(4)(B).
[7] *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir.2002).
[8] *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002).
[9] 33 U.S.C. s. 1329(h).
[10] Section 62-302-530(47)(b), F.A.C.
[11] *Id.*
[12] *See* EPA 303(c)(4) January 2009 Determination Letter.

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.

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[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

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 effect[25] 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 years[27] 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.

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[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 Threshold[2]	Total Nitrogen Nutrient Threshold[2]
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 waterbodies[29]. Costs for septic tanks were based on the number of affected systems and costs associated with their upgrade. The initial estimate[30] 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 ENTRIX[31] 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.

A bill to be entitled

An act relating to rules establishing numeric nutrient criteria; exempting specified rules from the ratification requirement in s. 120.541(3), F.S.; requiring notice of enactment of exemption; requiring ratification of any future amendment to specified rule; requiring submission of rules to the United States Environmental Protection Agency; providing an effective date.

WHEREAS, the Florida Department of Environmental Protection promulgated amendments to Chapters 62-302 and 62-303, F.A.C., addressing nutrient pollution in Florida waters, and

WHEREAS, on December 8, 2011, the Florida Environmental Regulation Commission approved proposed amendments to Chapters 62-302 and 62-303, F.A.C., addressing nutrient pollution in Florida waters in an integrated, comprehensive, and consistent manner, and

WHEREAS, estimates of the cost to implement the department's proposed amendments to Chapters 62-302 and 62-303, F.A.C., are significantly less than estimates of the cost to implement the numeric nutrient criteria rules adopted by the United States Environmental Protection Agency, and

WHEREAS, for purposes of compliance with the federal Clean Water Act, the department's proposed amendments to Chapters 62-302 and 62-303, F.A.C., must be approved by the Environmental Protection Agency in order to replace the Environmental Protection Agency's adopted numeric nutrient criteria rules, which are scheduled to take effect March 6, 2012, unless

extended to June 4, 2012, as proposed by the Environmental Protection Agency, and

WHEREAS, s. 120.541(3), F.S., requires legislative ratification of the department's amendments to Chapters 62-302 and 62-303, F.A.C., after the amendments are adopted by the department, and

WHEREAS, a recently filed rule challenge pending before the Florida Division of Administrative Hearings has delayed adoption, making the rules unavailable for ratification during the 2012 Regular Session, and

WHEREAS, exempting the proposed amendments to Chapters 62-302 and 62-303, F.A.C., from legislative ratification and directing the department to expeditiously submit the proposed amendments to the Environmental Protection Agency will facilitate that agency's review of the proposed state rule amendments under section 303(c) of the Clean Water Act.

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

Section 1. (1) The rules proposed by the Department of Environmental Protection as rules 62-302.200, 62-302.530, 62.302.531, 62.302.532, 62-302.800, 62-303.150, 62-303.200, 62-303.310, 62-303.330, 62-303.350, 62-303.351, 62-303.352, 62-303.353, 62-303.354, 62-303.390, 62-303.420, 62-303.430, 62-303.450, 62-303.710, and 62-303.720, Florida Administrative Code, notices of which were published on November 10, 2011, in the Florida Administrative Weekly, Vol. 37, No. 45, pages 3753-3775, as approved by the Environmental Regulation Commission on December 8, 2011, and the subsequent changes to proposed rules 62-302.200, 62-302.531, 62-302.532, 62-302.800, 62-303.200, 62-

303.330, 62-303.350, 62-303.351, 62-303.352, 62-303.353, 62-303.390, and 62-303.430 which were published on December 22, 2011, in the Florida Administrative Weekly, Vol. 37, No. 51, pages 4444-4450, are exempted from the ratification requirement of s. 120.541(3), Florida Statutes. At the time of filing these rules for adoption, or as soon thereafter as practicable, the Department shall publish in the Florida Administrative Weekly a notice of the enactment of this exemption.

(2) After adoption of proposed Rule 62-302.531(9), Florida Administrative Code, a non-severability and effective date provision approved by the commission on December 8, 2011 in accordance with the commission's legislative authority in s. 403.804, notice of which was published by the Department on December 22, 2011, in the Florida Administrative Weekly, Vol. 37, No. 51, page 4446, any subsequent rule or amendment altering the effect of such rule shall be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and such amendment shall not take effect until ratified by the Legislature.

(3) Within 30 days after the effective date of this act, the proposed rules specified above in subsection 1 shall be submitted by the Florida Department of Environmental Protection to the Regional Administrator of the Environmental Protection Agency for review under section 303(c) of the Clean Water Act.

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