

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB WST 24-01 Stormwater Rules
SPONSOR(S): Water Quality, Supply & Treatment Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Water Quality, Supply & Treatment Subcommittee	16 Y, 0 N	Guy-Hudson	Curtin

SUMMARY ANALYSIS

In 2020, the Legislature passed the Clean Waterways Act (Act) to address a number of environmental issues relating to water quality improvement. In pertinent part, for stormwater management systems, the Act requires the Department of Environmental Protection (DEP) and the Water Management Districts (WMDs) to initiate rulemaking to update stormwater design and operation regulations and the Environmental Resource Permit Program Applicant's Handbook using the most recent scientific information available.

The Act requires DEP to consider design best management practices (BMPs) and criteria that increase the removal of nutrients from stormwater discharges and address low-impact design BMPs. With respect to adopting new standards for pollutant loading reduction, the Act requires DEP to adopt measures for the consistent application of net improvement performance standards. The rules must increase the removal of nutrients from stormwater discharges in the state and ensure significant reductions of pollutant loadings to waterbodies.

A statement of estimated regulatory costs (SERC) must be prepared if a proposed rule will have an adverse impact on small business or is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate within one year after implementation. If the SERC shows that the adverse impact or regulatory costs of the proposed rule exceeds \$1 million in the aggregate within five years after implementation, then the proposed rule must be submitted to the Legislature for ratification. DEP initiated rulemaking to update rules 62-330.010, 62-330.050, 62-330.055, 62-330.301, 62-330.310, 62-330.311, 62-330.350, and 62-330.405, F.A.C. (collectively, "the stormwater rules") in accordance with the Act. The SERC prepared by DEP for the stormwater rules indicated that the rules would require Legislative ratification in order to become effective. The stormwater rules were timely submitted to the Legislature for ratification.

The bill ratifies rules 62-330.050, 62-330.055, 62-330.301, 62-330.310, 62-330.311, 62-330.350, and 62-330.405, F.A.C. The bill also ratifies, with modifications, rule 62-330.010, F.A.C. Except for the modifications to rule 62-330.010, F.A.C., the bill serves no other purpose and will not be codified in the Florida Statutes. The bill specifies that after becoming law, its enactment and effective dates will be noted in the Florida Administrative Code, the Florida Administrative Register, or both, as appropriate.

The stormwater rules have a fiscal impact on the private sector and local governments. See Fiscal Comments in Section II.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Water Quality and Nutrients

For approximately 15 years the Department of Environmental Protection (DEP) has warned that despite Florida's regulatory standards and the state's long-term focus on water quality protection, "[t]echnical evaluations and water quality monitoring data indicate that many rule-adopted best management practices (BMPs) are not as effective at achieving the intended stormwater treatment performance standards for some critical stormwater pollutants, including nutrients such as nitrogen and phosphorus."¹ DEP determined that "[c]urrently, excess nutrients represent one of the leading causes of impairment in our surface waterbodies. Therefore, it is critically important that stormwater design criteria and operation requirements provide for effective nutrient removal."²

While the correct balance of both nitrogen and phosphorus is necessary for a healthy ecosystem, excessive nitrogen and phosphorus can cause significant water quality problems.³ Human-made nutrient load sources include stormwater runoff, untreated sewage, and agricultural production and irrigation practices.⁴ Excessive nutrient loads may result in harmful algal blooms, nuisance aquatic weeds and the alteration of the natural community of plants and animals.⁵

The Environmental Protection Agency (EPA) periodically conducts nutrient level assessments for rivers, streams, lakes and coastal waters to benchmark water quality and measure water quality stressors⁶ that may lessen water quality.⁷ The National Aquatic Resource Surveys are statistical surveys of the biological health and condition of waterbodies across the United States and allow for estimates to be made about the adverse impact stressors are having on water quality. The most recent surveys found:

- That in lakes nutrient pollution was the most widespread stressor with 45 percent of lakes evaluated as in poor condition with elevated phosphorus and 46 percent evaluated as in poor condition with elevated nitrogen.⁸
- That 42 percent of the nation's rivers and streams were rated in poor condition for phosphorus and 44 percent were rated poor for nitrogen.⁹
- Excess nutrients exist in two-thirds of the nation's estuarine areas.¹⁰

¹ Department of Environmental Protection (DEP), Rulemaking Update, *Stormwater/Chapter 62-330, F.A.C. Environmental Resource Permitting*, p. 1, (on file with the House Water Quality, Supply & Treatment Subcommittee).

² DEP, *Statewide Environmental Resource Permitting Rules for Stormwater Design and Operation Regulations Rule Development Workshop No. 1*, p. 15 (May 18, 2022), [PowerPoint Presentation \(floridadep.gov\)](#) (last visited Jan. 24, 2024).

³ Ch. 2020-150, Laws of Fla.

⁴ Environmental Protection Agency (EPA), *Sources and Solutions* (last updated Nov. 30, 2023), <https://www.epa.gov/nutrientpollution/sources-and-solutions> (last visited Jan. 25, 2024).

⁵ *Id.*

⁶ EPA, National Aquatic Resource Survey, *What is the National Rivers and Streams Assessment?* (last updated Dec. 19, 2023), [What is the National Rivers and Streams Assessment? | US EPA](#) (last visited Jan. 24, 2024). Stressors are the chemical, physical and biological components of the ecosystem that have the potential to degrade biological integrity. Some of these are naturally occurring, some result only from human activities, but most come from both sources.

⁷ Individual statistical survey information is collected for the National Lakes Assessment (NLA); National Rivers and Streams Assessment (NRSA); National Coastal Condition Assessment (NCCA); and, National Wetland Condition Assessment (NWCA). EPA, *National Aquatic Resource Surveys* (last updated Dec. 21, 2023), [National Aquatic Resource Surveys | US EPA](#) (last visited Jan. 24, 2024).

⁸ EPA, National Aquatic Resource Surveys, *National Lakes Assessment 2017 Key Findings* (last updated Aug. 17, 2023), [National Lakes Assessment 2017 Key Findings | US EPA](#) (last visited Jan. 24, 2024).

⁹ EPA, National Aquatic Resource Surveys, *National Rivers and Streams Assessment 2018-19 Key Findings* (last updated Dec. 19, 2023), [National River and Streams Assessment 2018-19 Key Findings | US EPA](#) (last visited Jan. 25, 2024).

¹⁰ EPA, *National Aquatic Resource Surveys National Coastal Condition Assessment 2015 Key Findings* (last updated Aug. 17, 2021), [National Coastal Condition Assessment 2015 Key Findings | US EPA](#) (last visited Jan. 24, 2024).

A 2007 stormwater treatment system design study commissioned by DEP concluded that current stormwater design criteria failed to achieve the standards in place at that time.¹¹ In Florida, 87 percent of counties have nutrient impaired water bodies.¹²

The Florida Clean Waterways Act (Act) addresses a myriad of water quality issues by strengthening regulatory requirements for wastewater treatment and discharge, septic systems, stormwater runoff and fertilizer used in agricultural production.¹³ The Act directed DEP to promulgate rules to implement policies to improve water quality and address stormwater treatment systems design and performance to increase nutrient removal and ensure future stormwater system design that is consistent with Best Management Practices (BMPs).

Stormwater Treatment

Stormwater is the flow of water resulting from, and immediately following, a rainfall event.¹⁴ When stormwater falls on pavement, buildings and other impermeable surfaces, the runoff flows quickly and can pick up sediment, nutrients (such as nitrogen and phosphorous), chemicals and other pollutants.¹⁵ A stormwater management system is a system designed “[t]o control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation, and water pollution. . . .”¹⁶ Most activities that create new impervious surfaces or alter surface water flows involve a stormwater management system.¹⁷

Effective stormwater management reduces nonpoint source pollution and protects surface water resources from stormwater pollution from existing and new land uses.¹⁸ Nonpoint source pollution may come from land runoff or rain or hydrologic modification, among other diffuse sources. These pollutants adversely impact drinking water supplies, recreation, fisheries and wildlife.¹⁹

DEP regulates surface water flows via the Environmental Resource Permit (ERP) Program, a permitting process that addresses and regulates impacts to the landscape including clearing, grading, construction of structures and filling and dredging, whether the work occurs in uplands, wetlands or other surface waters.²⁰ An ERP permit may be issued by DEP, a water management district (WMD) or a local government to which DEP delegated ERP permitting authority.²¹ ERPs are designed to prevent flooding, protect wetlands and other surface waters and protect Florida’s water quality from stormwater pollution.²²

¹¹ Harvey H. Harper, Ph.D., P.E., and David M. Baker, P.E., prepared for DEP by Environmental Research & Design, Inc., *Evaluation of Current Stormwater Design Criteria within the State of Florida*, p. 1-1 (June 2007), [Microsoft Word - SW TREATMENT REPORT-SEC 1-607.doc \(sfwmd.gov\)](#) (last visited Jan. 24, 2024).

¹² DEP, *Modernizing Florida’s Stormwater Rules*, Presentation to the House Water Quality, Supply & Treatment Subcommittee, p. 8 (Jan. 10, 2024),

<https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3251&Session=2024&DocumentType=Meeting+Packets&FileName=wst+1-10-24.pdf> (last visited Jan. 10, 2024).

¹³ Ch. 2020-150, Laws of Fla.

¹⁴ DEP, *Environmental Resource Permit Applicant’s Handbook Volume I (General and Environmental)* p. 2-10 (Dec. 22, 2020)

Modified Document, 1/6/2021, <https://www.flrules.org/gateway/reference.asp?No=Ref-12078> (last visited Jan. 23, 2024).

¹⁵ EPA, Source Water Protection, *Urbanization and Stormwater Runoff* (last updated Feb. 28, 2023),

<https://www.epa.gov/sourcewaterprotection/urbanization-and-stormwater-runoff#:~:text=Stormwater%20runoff%20is%20generated%20from%20rain%20and%20snowmelt,chemicals%2C%20and%20dirt%20Fsediment%20into%20streams%2C%20lakes%2C%20and%20groundwater> (last visited Jan. 24, 2024).

¹⁶ S. 373.403(10), F.S. See s. 403.031(18), F.S., relating to pollution control.

¹⁷ DEP, *Modernizing Florida’s Stormwater Rules*, *supra* note 12, pp. 1-5.

¹⁸ R. 62-40.431(1), F.A.C.

¹⁹ EPA, Polluted Runoff: Nonpoint Source (NPS) Pollution, *Basic Information about Nonpoint Source (NPS) Pollution* (last updated Dec. 4, 2023), [Basic Information about Nonpoint Source \(NPS\) Pollution | US EPA](#) (last visited Jan. 25, 2024).

²⁰ DEP, *Environmental Resource Permitting Online Help* (last updated Feb. 8, 2022), <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/environmental-resource-0> (last visited Jan. 24, 2024).

²¹ *Id.*

²² *Id.*

ERP permitting for stormwater management systems as well as dams, reservoirs and water impoundment is governed by s. 373.4131, F.S. DEP implements this section of law in ch. 62-330, F.A.C., which provides for the permitting rules, application process and standards by which applications are considered and approved or denied. The ERP Applicant's Handbook, which is incorporated by reference into DEP rules, provides guidance on DEP's ERP program, which includes all permitted activities governed by ch. 373, part IV, F.S., relating to management and storage of surface waters, as well as stormwater management systems-specific activities.²³ Applicants for an ERP must adhere to requirements in both the Applicant's Handbook, Volume I, which governs general permitting while WMD-specific permitting requirements are contained in the Applicant's Handbook, Volume II, for which there is one per WMD.²⁴

Regulations to protect water quality typically use standards and BMPs in concert to achieve desired outcomes. Generally, BMPs are measures to prevent water pollution discharge.²⁵ The EPA's National Pollutant Discharge Elimination System (NPDES)²⁶ regulations include a definition of BMPs as applied to water quality protection to mean:

Schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of 'waters of the United States.' BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.²⁷

Florida law includes a BMP definition that is specific to the Northern Everglades and Estuaries Protection Program in ch. 373, pt. IV, F.S.²⁸ DEP as well as the Department of Agriculture & Consumer Services (DACCS) use BMPs in rules, guidance and criteria to protect water quality. BMPs are often used among both environmental and agricultural constituencies to balance agricultural productivity and improvements to water quality.

Currently, Florida's state water quality standards are found in administrative rule and provide the threshold reduction required for stormwater treatment systems. New stormwater management systems design and performance criteria must achieve at least an 80 percent reduction of the "average annual load of pollutants" that would cause or contribute to violations of state water quality standards.²⁹ For systems that discharge to Outstanding Florida Waters (OFW) (*see Stormwater Rules Performance Standards* below for term definition), the system must achieve at least a 95 percent reduction.³⁰ If a WMD or DEP adopts basin-specific design and performance criteria in order to achieve an adopted Total Maximum Daily Load (TMDL)³¹ or the pollutant load reduction goals established in a watershed

²³ R. 62-330.010(4), F.A.C. *See* DEP, *Modernizing Florida's Stormwater Rules*, *supra* note 12.

²⁴ DEP, *ERP Stormwater* (last updated June 7, 2022), [ERP Stormwater | Florida Department of Environmental Protection](#) (last visited Jan. 24, 2024).

²⁵ EPA, *NPDES Permit Writers Manual, Chapter 9, Special Conditions*, p. 9-3 (Sep. 2010),

https://www.epa.gov/sites/default/files/2015-09/documents/pwm_chapt_09.pdf (last visited Jan. 24, 2024).

²⁶ Pursuant to section 402 of the federal Clean Water Act, any discharge of a pollutant from a point source to surface waters (i.e., the navigable waters of the United States or beyond) must obtain a NPDES permit. *See* 33 U.S.C. § 1342. NPDES permit requirements for most wastewater facilities or activities (domestic or industrial) that discharge to surface waters are incorporated into a state-issued permit which gives the permittee a single set of permitting requirements rather than one state and one federal permit. *See* ss. 403.061(32), and 403.087, F.S.

²⁷ 40 C.F.R. § 122.2.

²⁸ S. 373.4595(2)(a), F.S. The term "best management practice" in this section means a practice or combination of practices determined by the coordinating agencies, based on research, field-testing and expert review, to be the most effective and practicable on-location means, including economic and technological considerations, for improving water quality in agricultural and urban discharges.

²⁹ R. 62-40.432(2)(a)1., F.A.C.

³⁰ R. 62-40.432(2)(a)2., F.A.C.

³¹ A TMDL is a scientific determination of the maximum amount of a given pollutant that can be absorbed by a waterbody and still meet water quality standards. DEP, *Watershed Evaluation and Total Maximum Daily Loads (TMDL) Section* (last updated Oct. 12, 2023), [Watershed Evaluation and Total Maximum Daily Loads \(TMDL\) Section | Florida Department of Environmental Protection](#) (last visited Jan. 24, 2024).

management plan, such design and performance criteria shall govern in place of the above-mentioned reduction thresholds.³²

When a stormwater management system complies with rules establishing applicable design and performance criteria, there is a rebuttable presumption that the system's discharge will comply with water quality standards.³³ Thus, compliance with the reduction threshold is presumed achieved and not measured according to outcome calculations.

Rulemaking Authority and Legislative Ratification

A rule is an "agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency . . ." ³⁴ Rulemaking authority is delegated by the Legislature through statute and authorizes an agency to "adopt, develop, establish, or otherwise create" a rule.³⁵ The effect of an agency statement determines whether it meets the statutory definition of a rule, regardless of how the agency characterizes the statement.³⁶ If an agency statement generally requires compliance, creates certain rights while adversely affecting others or otherwise has the direct and consistent effect of law, it is a rule.³⁷

The Administrative Procedure Act (APA) sets forth a uniform set of procedures agencies must follow when exercising delegated rulemaking authority.³⁸ Agencies do not have discretion whether to engage in rulemaking.³⁹ To adopt a rule, an agency must have an express grant of authority to implement a specific law by rulemaking.⁴⁰ The specific statute being interpreted or implemented through rulemaking must provide standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.⁴¹

An agency begins the formal rulemaking process by filing a notice of rule development in the Florida Administrative Register (FAR) and the notice must "indicate the subject area to be addressed by rule development, provide a short, plain explanation of the purpose and effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rules, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft, if available."⁴² Next, an agency must file, upon approval of the agency head, a notice of proposed rule.⁴³ The notice is published by the Department of State in the FAR⁴⁴ and must provide certain information, including: the text of the proposed rule; a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared; and, how a party may request a public hearing on the proposed rule.⁴⁵

³² R. 62-40.432(2)(a)3., F.A.C.

³³ R. 62-40.432(2)(a), F.A.C.

³⁴ S. 120.52(16), F.S.; *see also Fla. Dep't of Fin. Servs. v. Capital Collateral Reg'l Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

³⁵ S. 120.52(17), F.S.

³⁶ *Dep't of Admin. v. Harvey*, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

³⁷ *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977); *see also Balsam v. Dep't of Health & Rehab. Servs.*, 452 So. 2d 976, 977-78 (Fla. 1st DCA 1984); *Dep't of Transp. v. Blackhawk Quarry Co.*, 528 So. 2d 447, 450 (Fla. 5th DCA 1988), *rev. den.* 536 So. 2d 243 (Fla. 1988); *Dep't of Natural Res. v. Wingfield*, 581 So. 2d 193, 196 (Fla. 1st DCA 1991); *Dep't of Revenue v. Vanjaria Enters., Inc.*, 675 So. 2d 252, 255 (Fla. 5th DCA 1996); *Volusia Cnty. Sch. Bd. v. Volusia Homes Builders Ass'n*, 946 So. 2d 1084, 1089 (Fla. 5th DCA 2007); *Fla. Dep't of Fin. Servs. v. Capital Collateral Reg'l Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007); *Coventry First, LLC v. Fla. Office of Ins. Reg.*, 38 So. 3d 200, 203-04 (Fla. 1st DCA 2010).

³⁸ Ch. 120, F.S.

³⁹ S. 120.54(1)(a), F.S.

⁴⁰ Ss. 120.52(8) and 120.536(1), F.S.

⁴¹ *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008).

⁴² S. 120.54(2)(a), F.S.

⁴³ S. 120.54(3)(a)1., F.S.

⁴⁴ S. 120.55(1)(b)1., F.S.

⁴⁵ S. 120.54(3)(a)1., F.S.

Stormwater Rulemaking History

In 1978, DEP attempted to create stormwater discharge exemptions in department rules; however, the first formal stormwater rules were not adopted until 1981.⁴⁶ Subsequent, minor revisions were adopted prior to the adoption of the Statewide ERP program rules in 2013.⁴⁷ Stormwater treatment pursuant to the ERP program is currently based on the presumption that standards are achieved when a system complies with design and performance criteria; actual discharge is not measured for compliance purposes.

To address excessive nutrients in stormwater runoff, from 2007 to 2010, DEP and the WMDs worked together to develop a statewide unified stormwater rule.⁴⁸ After a technical advisory committee's analyses, workshops and public comment, DEP released a draft statewide stormwater quality rule and applicant handbook that increased the level of nutrient treatment in stormwater discharges and provided statewide treatment performance standards and BMP design criteria.⁴⁹ The proposed rule and revised handbook were expected to be adopted in 2011; however, neither were adopted.

Updated Stormwater Rules Required by the Clean Waterways Act of 2020

Florida's Clean Waterways Act⁵⁰ requires DEP and the WMDs to initiate rulemaking by January 1, 2021, to update stormwater design and operation regulations and the ERP Applicant's Handbook using the most recent scientific information available. The Act requires DEP to consider design BMPs and criteria that increase the removal of nutrients from stormwater discharges. With respect to adopting new standards for pollutant loading reduction, the Act requires DEP to adopt measures for the consistent application of net improvement performance standards. As part of rule development, the bill requires DEP to consider and address low-impact design BMPs and design criteria that increase the removal of nutrients from stormwater discharges.

The EPA provides guidance on low-impact design⁵¹ and describes low-impact development as systems and practices that mimic or preserve natural drainage processes to manage stormwater.⁵² Low-impact designs, including green roofs and permeable pavements, can result in stormwater being reused, soaking into vegetation that performs evaporative cooling or infiltrating the soil and replenishing groundwater.⁵³

DEP's current stormwater treatment rulemaking process began in July 2020 and concluded after three years. The process included: two public outreach meetings and the establishment of a Technical Advisory Committee (TAC); 13 TAC meetings and associated recommendations;⁵⁴ four rule development workshops; publication of and a hearing on the draft rule; publication of a Statement of Regulatory Costs (SERC); and, four published rule changes based on receipt of stakeholder-submitted

⁴⁶ DEP, *Modernizing Florida's Stormwater Rules*, *supra* note 12, p. 9.

⁴⁷ See 62-330, F.A.C.

⁴⁸ Chapter 62-347, F.A.C.

⁴⁹ *Id.*

⁵⁰ Ch. 2020-150, Laws of Fla.

⁵¹ EPA, *Nonpoint Source: Urban Areas* (last updated Nov. 30, 2023), [Nonpoint Source: Urban Areas | US EPA](https://www.epa.gov/nonpoint-source/urban-areas) (last visited Jan. 25, 2024).

⁵² *Id.*

⁵³ William F. Hunt, Ph.D., P.E., and Laura L. Szpir, *Urban Waterways, Permeable Pavements, Green Roofs, and Cisterns: Stormwater Treatment Practices for Low-Impact Development* (May 2006), <https://brunswick.ces.ncsu.edu/wp-content/uploads/2013/04/BMPs4LID.pdf?fwd=no> (last visited Jan. 24, 2024).

⁵⁴ DEP, Division of Water Resource Management, *Clean Waterways Act Technical Advisory Committee Summary Report*, (March 2022), [Clean Waterways Act Stormwater technical advisory committee \(floridadep.gov\)](https://www.floridadep.gov/clean-waterways-act-technical-advisory-committee) (last visited Jan. 24, 2024). A technical advisory committee is appointed by a state agency secretary and is composed of experts, practitioners, stakeholders and interest groups to provide research, guidance and recommendations on a particular proposed action by that agency. The stormwater rulemaking TAC's goal "was to develop and provide consensus on stormwater rulemaking recommendations for DEP and the WMDs through public discussion and constructive deliberation. The TAC collaborated during public meetings to produce stormwater recommendations for DEP's consideration during rulemaking." See p. 2. TAC members included representatives from the Florida Home Builders Association, Audubon Florida, Florida League of Cities, Florida Association of Counties, academia, the Florida Stormwater Association, and others. See p. 7. The TAC reached consensus on 33 of 39 recommendations it developed.

Lower Cost Regulatory Alternative (LCRAs) proposals.⁵⁵ DEP submitted the stormwater rules to the Department of State for adoption on April 28, 2023.

The rules increase stormwater treatment design performance standards, provide explanations on how to achieve those standards and update requirements to strengthen operation, maintenance, inspection and reporting requirements. Changes to the draft rules based on the LCRAs include: providing a lower treatment standard for redevelopment sites; authorizing “qualified inspectors” to conduct inspections in addition to “registered professionals;” and, allowing Municipal Separate Storm Sewer System (MS4) permit holders to follow MS4 standard operating procedures.⁵⁶ Lastly, all four LCRAs proposed a 12-month grandfathering period for those outstanding permit applications deemed complete. Section 3.1.2, contains the grandfathering provisions of the adopted ERP Applicant Handbook, Vol. I. It reads:

(e) Stormwater criteria throughout Volume I and Volume II was updated effective [effective date]. The updated requirements are applicable to project applications as indicated in the respective updated sections, and as described below:

1. When public transportation projects have received an individual permit prior to [effective date], such activities will remain subject to the rules in effect at the time of issuance, including any associated modifications necessary to accommodate design changes solely for the purposes of public safety or design changes that do not increase the overall impervious surface area by more than 10 percent.

2. For permit modifications, submitted no later than five years from [effective date], for permitted public transportation projects which include stormwater ponds that were sized and permitted to collect stormwater from future public transportation projects, such projects shall be subject to the rules in existence at the time the stormwater management pond was permitted, so long as the treatment capacity for future public transportation projects was specified in the application materials submitted to the agency at the time of the original permit application.

3. For projects and activities not covered by subparagraphs 1. and 2. above, those projects and activities that were approved by an unexpired conceptual, general, or A.H. Volume I Eff. date 3-5 individual Environmental Resource Permit, Management and Storage of Surface Waters Permit, or Surface Water Management Permit issued prior to [effective date] shall be exempt from the amendments to Chapter 62-330, F.A.C., and Volume I adopted on [effective date], and the corresponding amendments to the applicable Volume II. This exemption shall apply to any modification of such permit that is not a major modification or that does not cause substantially different water resource impacts, and to the subsequent permits to construct and operate the future phases consistent with an unexpired conceptual approval permit. This exemption shall also apply to transfers of such permits, or conversion of such permits to the operation phase, on or after [effective date]; however, such operation phase permits shall be subject to the Inspections and Reporting Requirements of sections 12.5 and 12.6 of this Volume. A modification of a permit qualifying for this exemption shall be reviewed under the rules in effect at the time the permit was originally issued, unless the applicant elects to have such modification reviewed under the rules adopted on [effective date]. Any modification of such permit for the construction of a new dam or major modification of an existing permit for a dam, as defined in paragraph 2.0(a)27 above, shall be subject to the criteria of sections 8.4.5 and Appendix L, if applicable to such permit modification.

4. Projects or activities that are the subject of a general or individual permit application that is deemed complete on or before [effective date + 12 months] shall be

⁵⁵ S. 120.541, F.S., authorizes a “substantially affected person” to, during the rulemaking process, submit a “good faith proposal” which “substantially accomplishes the objectives of the law being implemented.”

⁵⁶ DEP, *Statement of Estimated Regulatory Cost (SERC), Chapter 62-300, F.A.C.*, p. 9-12, [serc-template-updated.pdf \(state.fl.us\)](#) (last visited Jan. 4, 2024).

exempt from the amendments to Chapter 62-330, F.A.C., and Volume I adopted on [effective date], and the corresponding amendments to the applicable Volume II.⁵⁷

The adoption of the LCRAs decreased the total estimated cost by \$231 million, or a decrease of \$500 per acre developed.⁵⁸

Stormwater Rules Performance Standards

The rules increase stormwater treatment design performance standards and provide guidance on how to achieve the standards, both of which are included in the adopted ERP Applicant's Handbook, Volume I. The majority of increased costs associated with the rules are related to increased standards for nutrient removal from stormwater discharges. (See *Statement of Estimated Regulatory Costs (SERC)* below for details relating to the cost.)

The rules shift from a threshold for "average annual load of pollutants" to performance standards for a minimum reduction needed for each of the total nitrogen nutrient level (TN), the phosphorus nutrient level (TP) and the total suspended solids (TSS) for specified waters. The four types of waters include:

- "Outstanding Florida Waters" (OFW) means waters designated by the Environmental Regulation Commission⁵⁹ as worthy of special protection because of their natural attributes.⁶⁰ The designation is intended to protect existing water quality for a designated OFW.⁶¹
- "Impaired Waters" means a waterbody or waterbody segment that does not meet its applicable water quality standards, due in whole or in part to discharges of pollutants from point or nonpoint sources.⁶²
- "Impaired Outstanding Florida Waters" means an OFW for which a TMDL and a Basin Management Action Plan (BMAP) have been adopted by DEP.⁶³
- "Redevelopment" is defined in the adopted ERP Applicant Handbook, Vol. I, to mean construction on existing sites with the same or less intense land uses, that are not used for silviculture or agriculture purposes. Existing sites must also be:
 - where the existing land use has not been previously permitted pursuant to ch. 373, pt. IV, F.S.; and,
 - where all or part of the existing impervious surface is removed and replaced with new impervious surface, which has the same or lesser area as the existing impervious surface.⁶⁴

⁵⁷ DEP, *Environmental Resource Permit Applicant's Handbook Volume I (General and Environmental)* (adopted Apr. 28, 2023), pp. 3-4 – 3-5, [TABLE OF CONTENTS \(state.fl.us\)](#) (last visited Jan. 11, 2024).

⁵⁸ DEP, *Notes on the State[m]ent of Estimated Regulatory Costs (SERC)*, p. 4, (on file with the House Water Quality, Supply & Treatment Subcommittee).

⁵⁹ DEP, *Environmental Regulation Commission* (last updated Dec. 12, 2023), [Environmental Regulation Commission | Florida Department of Environmental Protection](#) (last visited Jan. 24, 2024). The Environmental Regulation Commission (ERC) is a seven-member board housed within DEP that is charged with setting statutorily-specified air and water quality standards by evaluating the standards' scientific and technical validity, economic impacts and risks and benefits to the public and Florida's natural resources. Members represent a broad array of water quality professionals including scientists and engineers, as well as representatives of local governments, developers and environmental advocates. ERC members are selected by the Governor. See s. 408.304, F.S.

⁶⁰ R. 62-302.200(26), F.A.C. For a complete listing of Outstanding Florida Waters, see R. 62-302.700(9), F.A.C.

⁶¹ DEP, *Outstanding Florida Waters* (last updated June 9, 2023), [Outstanding Florida Waters | Florida Department of Environmental Protection](#) (last visited Jan. 24, 2024).

⁶² R. 62-303.200(7), F.A.C.

⁶³ S. 403.067(6), F.S. Adopted by DEP and legally-enforceable as such, a BMAP is a restoration plan for the watersheds and basins connected to an impaired water body which includes standards for restoration outcomes and monitoring requirements using local and state commitments to reduce pollutant loading. BMAPs contain a comprehensive set of solutions, such as permit limits on wastewater facilities, urban and agricultural best management practices and conservation programs designed to achieve pollutant reductions established by a TMDL. Where there is an adopted BMP for a nonpoint source, the BMAP must require the nonpoint source to implement the applicable BMPs. See also DEP, *Water Quality Restoration Programs, Basin Management Action Plans (BMAPs)* (last updated Jan. 17, 2024), [Basin Management Action Plans \(BMAPs\) | Florida Department of Environmental Protection](#) (last visited Jan. 24, 2024).

⁶⁴ DEP, *ERP Applicant's Handbook: Vol. I* (adopted Apr. 28, 2023), *supra* note 57, s. 2.0(a)97, p 2-10.

Redevelopment may be used as a strategy for reducing net nutrient increases in existing impervious surfaces and receiving waters.⁶⁵

The rules set the following standards for nutrient reduction:

Nutrient Load Reduction Criteria in Rule				
All Sites – Not Impaired	OFWs	Impaired Waters	Impaired OFWs	Redevelopment*
TP: 80% TN: 55%	TP: 90% TN: 80%	TP: 80% TN: 80%	TP: 95% TN: 95%	TP: 80% (90% if OFW) TN: 45% (60% if OFW)
TSS (suspended solids): 80%	TSS: 95%	TSS: 80%	TSS: 95%	TSS: 80% (or 95% if OFW)

*See Effect of the Bill, modifications to the ERP Applicant Handbook, Vol. 1, s. 8.3.5, for additional requirements for redevelopment sites that include OFW and Impaired Waters.

The rules provide flexibility to achieve the required nutrient reduction. An applicant may calculate either the post-development nutrient load as less than or equal to the pre-development nutrient load or achieve specific nutrient loads as identified in the rule to be a net improvement. The applicant must use the calculation that achieves the greatest reduction to produce the most environmentally protective outcomes. The rules also provide that design options to achieve the outcome may include BMPs.

Statement of Estimated Regulatory Costs (SERC)

A SERC must be prepared by a state agency “if a proposed rule will have an adverse impact on small business or if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate within one year after the implementation of the rule”⁶⁶ The economic analysis mandated for each SERC must analyze a rule’s potential impact over the five-year period from when the rule goes into effect, including: the rule’s likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment;⁶⁷ the likely adverse impact on business competitiveness, productivity, or innovation;⁶⁸ and, whether the rule is likely to increase regulatory costs, including any transactional costs.⁶⁹

If the SERC analysis demonstrates that the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the five-year period after implementation, the rule must be ratified by the Legislature in order to become effective.⁷⁰ If a rule requires ratification, the rule must be submitted to the President of the Senate and the Speaker of the House of Representatives no later than 30 days prior to the commencement of the regular legislative session in order to be considered for ratification.⁷¹

DEP determined that a SERC was required for the stormwater treatment rules. DEP found that the rules will increase regulatory costs for approximately 14,032 stormwater projects permitted over a five-

⁶⁵ EPA, *NPDES Stormwater Best Management Practices: Redevelopment* (December 2021), [NPDES: Stormwater Best Management Practice, Redevelopment \(epa.gov\)](https://www.epa.gov/npdes/stormwater-best-management-practices-redevelopment) (last visited Jan. 24, 2024). See also DEP, *Clean Waterways Act Technical Advisory Committee Summary Report*, *supra* note 54, Charge Item 2, p. 14-16.

⁶⁶ S. 120.541(1)(b), F.S.

⁶⁷ S. 120.541(2)(a)1., F.S.

⁶⁸ S. 120.541(2)(a)2., F.S. (The analysis of the likelihood of adverse impact on business competitiveness includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.)

⁶⁹ S. 120.541(2)(a)3., F.S.

⁷⁰ S. 120.541(3), F.S.

⁷¹ S. 120.541(3), F.S.

year period. The SERC includes both transactional and treatment costs.⁷² However, DEP estimates “[t]he most significant factor in the anticipated cost increase associated with these rule updates is the higher treatment costs that would be required to achieve the proposed minimum stormwater treatment performance standards in combination with the requirement to maintain post-development loadings that would not exceed pre-development loadings for nutrients, as a result of the development project.”⁷³

DEP estimates the total increase in cost within five years of implementation will be \$1,254,971,174, an approximately 8-10 percent increase over current stormwater treatment costs.⁷⁴ DEP based the estimate on five land use development categories (residential; commercial; industrial; roadway; and, other) across 464,867 acres. The estimate includes transactional costs totaling \$43,802,340 and treatment costs totaling \$1,211,168,834.⁷⁵

Effect of the Bill

The bill ratifies amendments to Rule 62-330.010, F.A.C., *Purpose and Implementation*, which incorporates by reference Volumes I and II of the adopted ERP Applicant’s Handbook. The rule incorporates by reference the *Federal Guidelines for Inundation Mapping of Flood Risks Associated with Dam Incidents and Failures* (FEMA P-946, July 2013), in appendices to Volume I. The bill also modifies the adopted ERP Handbook, Vol. I and:

- Section 3.1.2, Grandfathered Activities:
 - Clarifies that grandfather provisions in existence prior to the effective date of the rule remain in existence.
 - Provides that specific grandfathered projects⁷⁶ will continue using all forms in effect at the time the permit was originally issued, except for those subsequent permits to construct and operate the future phases consistent with an unexpired conceptual approval permit which will use specified forms.
- Section 8.3.4, Minimum Performance Standards for Impaired Waters:
 - Clarifies in s. 8.3.4(a) and (b) that the minimum level of treatment for stormwater treatment systems located within a HUC 12⁷⁷ subwatershed⁷⁸ which contains an impaired water, and is located upstream of that impaired water, must be sufficient to accomplish a reduction that results in “the post-development condition average annual loading, of those pollutants not meeting water quality standards, . . . is less than that of the predevelopment condition.”

⁷² DEP, *Statement of Estimated Regulatory Cost (SERC), Chapter 62-300, F.A.C.*, *supra* note 56.

⁷³ DEP, *Notes on the State[ment] of Estimated Regulatory Costs (SERC)*, *supra* note 58, p. 4.

⁷⁴ *Id.*, p. 2.

⁷⁵ *Id.*, p. 4.

⁷⁶ Section 3.1.2(e)3., identifies these projects as “...projects and activities that were approved by an unexpired conceptual, general, or individual Environmental Resource Permit, Management and Storage of Surface Waters Permit, or Surface Water Management Permit issued prior to [effective date] shall be exempt from the amendments to Chapter 62-330, F.A.C., and Volume I adopted on [effective date], and the corresponding amendments to the applicable Volume II.” DEP, *ERP Applicant’s Handbook: Vol. I (adopted Apr. 28, 2023)*, *supra* note 57, pp. 3-4 – 3-5.

⁷⁷ “Hydrologic Unit Code” or “HUC” means the hydrologic cataloging unit assigned to a geographic area representing a surface watershed drainage basin. Each unit is assigned a two- to 12-digit number that uniquely identifies each of the six levels of classification within six two-digit fields. United States Geological Survey (USGS), *Hydrologic Unit Codes (HUCs) Explained*, <https://nas.er.usgs.gov/hucs.aspx> (last visited Jan. 24, 2024). Eight-digit HUCs are used for large watersheds known as subbasins; 10-digit HUCs divide the large subbasins into watersheds; and, 12-digit HUCs divide watersheds into subwatersheds. EPA, *Hydrologic Unit Codes: HUC 4, HUC 8, and HUC 12*, <https://enviroatlas.epa.gov/enviroatlas/datafactsheets/pdf/Supplemental/HUC.pdf> (last visited Jan. 24, 2024); DEP, *About the Florida National Hydrography Dataset* (last updated Sept. 6, 2022), <https://floridadep.gov/dear/watershed-services-program/content/about-florida-national-hydrography-dataset> (last visited Jan. 24, 2024).

⁷⁸ A watershed, also referred to as a catchment area or drainage basin, is an area of land that contributes to the flow of water into a waterbody. The flow of water from a watershed can negatively impact the receiving body of water as it often carries pollutants such as fertilizers and pesticides and deposits them into the receiving waterbody. S. 403.031(18), F.S. *See also*, S. Shukla, *What is a Watershed?*, University of Florida IFAS Extension, AskIFAS (Dec. 12, 2019), <https://edis.ifas.ufl.edu/publication/AE265> (last visited Jan. 24, 2024). A subwatershed is an HUC classification that divides a watershed and captures the locale tributaries contained within. EPA, *Hydrologic Unit Codes: HUC 4, HUC 8, and HUC 12*, *supra* note 77.

- Section 8.3.5, Alternative Performance Standards for Redevelopment: Provides an alternative⁷⁹ level of treatment sufficient to accomplish:
 - an 80 percent reduction of the post-development average annual loading of TP and a 45 percent reduction of the post-development average annual loading of TN from the project area; and
 - for stormwater systems located within a HUC 12 subwatershed containing an OFW and located upstream of that OFW, a 90 percent reduction of the post-development average annual loading of TP and a 60 percent reduction of the post-development average annual loading of TN from the project area; and
 - for stormwater treatment systems located within a HUC 12 subwatershed which contains an impaired water and located upstream of that impaired water, a level of treatment sufficient to accomplish a post-development condition average annual loading, of those pollutants not meeting water quality standards, that is less than that of the predevelopment condition."
- Section 12.5, Inspections: Provides exceptions to inspection requirements in the ERP Applicant Handbook, Vol. I, for activities and BMPs:
 - Regulated by the South Florida WMD pursuant to r. 40E-63, F.A.C, relating to the Everglades Program; or,
 - Regulated by DACS pursuant to Title 5M, F.A.C., relating to agricultural BMPs, and s. 403.067(7)(c)2., F.S., relating to the establishment and implementation of TMDLs.

The bill ratifies amendments, without further modification, to rules 62-330.050, 62-330.055, 62-330.301, 62-330.310, 62-330.311, 62-330.350, and 62-330.405, F.A.C., relating to stormwater treatment within the ERP program. The rules:

- *Rule 62-330.050, F.A.C., Procedures for Review and Agency Action on Exemption Requests:* The rule incorporates by reference the updated *State of Florida Erosion and Sediment Control Designer and Reviewer Manual*, the *Florida Stormwater Erosion and Sedimentation Control Inspector's Manual Tier I* and the *Florida Stormwater Erosion and Sedimentation Control Inspector's Manual Tier II*.
- *Rule 62-330.055, F.A.C., Conceptual Approval Permits for Urban Infill or Redevelopment:* As a part of a conceptual approval permit request, if a county or municipality submits a stormwater management master plan for an urban infill or redevelopment area that meets certain criteria, the rule exempts the requestor from meeting all of the quality and quantity design and performance criteria of Volume I of the ERP Applicant's Handbook. (Currently, this exemption only applies to the stormwater quality and quantity design and performance criteria of Volume II of the ERP Applicant's Handbook.)
- *Rule 62-330.301, F.A.C., Conditions for Issuance of Individual and Conceptual Approval Permits:*
 - The rule requires applicants who are unable to meet state water quality standards because existing ambient water quality does not meet standards and the stormwater management system will contribute to this existing condition to demonstrate a post-development net improvement in pollutant load discharges. The rule provides how applicants must calculate the discharged pollutant loads.
 - The rule incorporates by reference Forms 62-330.301(26), "Certification of Financial Capability for Perpetual Operations and Maintenance Entities" and Form 62-330.301(25), "Dam System Information." (Submitting information for existing dam systems required by the Dam System Information form is a new requirement under the rules.)

⁷⁹ The bill preserves the current adopted ERP Applicant Handbook nutrient load reduction criteria for redevelopment in ss. 8.3.2 – 8.3.4, as an option for redevelopment activities. See *Nutrient Load Reduction Criteria in Rule Chart in Stormwater Rules Performance Standards* chart above.

- *Rule 62-330.310, F.A.C., Operation and Maintenance:*
 - The rule requires a development-permittee that also serves as the perpetual operation and maintenance entity to demonstrate on-going financial, legal and administrative capability after the project is completed. (Currently, this requirement only applies to a perpetual entity which operates and maintains the project after completion and is different from the development-permittee.)
 - The rule incorporates by reference the updated Form 62-330.310(2), “Request for Transfer of Environmental Resource Permit to the Perpetual Operation and Maintenance Entity.”

- *Rule 62-330.311, F.A.C., Inspections and Reporting:*
 - The rule requires each operation and maintenance entity to conduct and report inspections as described in Volume I of the ERP Applicant’s Handbook. The rule requires that within 30 days of a stormwater management system inspection, a report shall be submitted to the permitting agency using updated Form 62-330.311(1), “Operation and Maintenance Inspection Certification” and the rule incorporates by reference the updated version of the form. (Currently, the form is only required to be submitted within 30 days of any failure of a stormwater management system or deviation from the permit.) The rule requires the inspection report to include Form 62-330.311(3), F.A.C., “Inspection Checklists,” or another form or format that includes information required on the Inspection Checklist.
 - The rule requires information to be provided for existing dam systems in accordance with Volume I of the ERP Applicant’s Handbook on Form 62-330.311(4), “Condition Assessment Report” and incorporates the form by reference.

- *Rule 62-330.350, F.A.C., General Conditions for Individual Permits:*
 - The rule requires performance-based erosion and sediment control BMPs to be installed and maintained in accordance with the updated *State of Florida Erosion and Sediment Control Designer and Reviewer Manual*, the *Florida Stormwater Erosion and Sedimentation Control Inspector’s Manual Tier I* and the *Florida Stormwater Erosion and Sedimentation Control Inspector’s Manual Tier II*.
 - The rule requires each permittee to provide routine operation of all components of the stormwater management system to remove trapped sediments and debris and to ensure that the system continues to function as designed and permitted. (Currently, permittees are not responsible for ensuring future function according to the design and permit.)

- *Rule 62-330.405, F.A.C., General Conditions for All General Permits:* The rule requires erosion and sediment control measures for general permits to be installed and maintained in accordance with the updated *State of Florida Erosion and Sediment Control Designer and Reviewer Manual*, the *Florida Stormwater Erosion and Sedimentation Control Inspector’s Manual Tier I* and the *Florida Stormwater Erosion and Sedimentation Control Inspector’s Manual Tier II*.

Except for the modifications to rule 62-330.010, F.A.C., the bill ratifies the DEP rules solely to meet the condition for effectiveness by s. 120.541(3), F.S., and expressly limits ratification to the effectiveness of the rules.

The bill requires any future amendments to those portions of rule 62-330.010(4)(a), F.A.C., incorporated in the adopted ERP Applicant’s Handbook, Vol. I., be submitted in bill form to the Speaker of the House of Representatives and to the President of the Senate for their consideration and referral to the appropriate committees. Such amendments shall become effective only upon approval by act of the Legislature.

B. SECTION DIRECTORY:

Section 1. Ratifies rules 62-330.010, 62-330.050, 62-330.055, 62-330.301, 62-330.310, 62-330.311, 62-330.350, and 62-330.405, F.A.C.

Section 2: Amends s. 373.4131, F.S., relating to statewide environmental resource permitting rules.

Section 3. Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

There is a fiscal impact to local governments that own and/or operate stormwater treatment facilities; however, such impact is indeterminate, separate and apart from the total increased costs to private and public entities estimated in DEP's SERC. See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The amendments to ch. 62-330, F.A.C., will increase costs to private entities for residential, commercial and industrial construction projects for stormwater treatment to achieve higher minimum stormwater treatment performance standards.

D. FISCAL COMMENTS:

The amendments to ch. 62-330, F.A.C., will increase regulatory costs for private and public entities⁸⁰ developing stormwater treatment infrastructure and providing increased levels of stormwater treatment. DEP estimates within a five-year period that costs will increase by \$1,254,971,174, for five land use development categories (residential; commercial; industrial; roadway; and, other) across 464,867 acres.⁸¹

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

⁸⁰ It is difficult to estimate the number of public entities impacted by the bill. The Office of Economic and Demographic Research (EDR), in response to surveys for the stormwater services 20-year needs analysis required by Ch. 2021-194, Laws of Fla., received information from 832 counties, municipalities and independent special districts. However, EDR does not query systems owned or operated by the federal government, state government, WMDs, school districts, state universities or colleges for this needs analysis. See EDR, *Annual Assessment of Florida's Water Resources: Infrastructure Investments for Stormwater and Wastewater, 2023 Edition, Chapter 5*, p. 14, [2023_AnnualAssessment_InfrastructureInvestments_Chapter5\(state.fl.us\)](https://www.dep.state.fl.us/water/infrastructure/2023_AnnualAssessment_InfrastructureInvestments_Chapter5(state.fl.us)) (last visited Jan. 24, 2024).

⁸¹ DEP, *Notes on the State[ment] of Estimated Regulatory Costs (SERC)*, *supra* note 58, p. 2-4.

None.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

Not applicable.