HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/HB 639 (CS/SB 1086)	**FINAL HOUSE FLOOR ACTION:**	
SPONSOR(S):	State Affairs Committee; Young and others (Environmental Preservation and Conservation and Garcia)	113 **Y's**	1 **N's**
COMPANION BILLS:	CS/SB 1086	**GOVERNOR'S ACTION:**	Approved

SUMMARY ANALYSIS

CS/HB 639 passed the House on February 23, 2012, and subsequently passed the Senate on March 9, 2012.

Under current Florida law, "water" or "waters in the state" are considered basic public resources benefiting the entire state. As such, the public has a right to use waters in the state but may not assert a legally protected property interest to "own" the waters. The Department of Environmental Protection (DEP) and the Water Management Districts (WMD) regulate use of these waters through issuance of consumptive use permits (CUP) based upon statutory authority in Chapter 373, F.S.

DEP defines reclaimed water by rule as water that has received at least secondary treatment and basic disinfection and is reused after flowing out of a domestic wastewater (i.e., sewage) treatment facility. While the statutory definition of "water" or "waters in the state" broadly encompasses "any and all water on or beneath the surface of the ground," it does not expressly include reclaimed water. Whether reclaimed water is a "water" or "waters in the state," and whether DEP and the WMDs have authority to require a CUP for the use of reclaimed water, are unresolved legal questions.

This bill adds DEP's definition of "reclaimed water" to the statutes, and resolves the debate over the extent of DEP's and the WMDs' authority to regulate the use of reclaimed water through the CUP process by: expressly stating that reclaimed water is not subject to regulation under statutes governing declarations of water shortages or issuance of CUPs until the reclaimed water has been discharged into "waters," including rivers, lakes, streams, springs, impoundments, wetlands, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface, or underground waters; prohibiting a WMD from requiring a permit for the use of reclaimed water; and prohibiting WMDs from specifying, in a CUP, any user to whom a reuse utility must provide reclaimed water or restricting the use of reclaimed water provided to a utility's customers. However, if a proposed use of water includes surface water or groundwater, a CUP for those water sources may include conditions that govern their use in relation to the feasibility or use of reclaimed water. DEP and the WMDs may continue to require the use of reclaimed water in lieu of all or a portion of a proposed use of surface water or groundwater when use of reclaimed water is available; is environmentally, economically, and technically feasible; and is of such quality and reliability as is necessary to the user. The bill also provides that a contract for state or district funding assistance for development of reclaimed water may specify conditions for the project relating to metering of certain uses of reclaimed water, implementation of reclaimed water rate structures, education programs, and location data.

The bill also specifies that it does not limit DEP's authority to regulate water quality or require a reuse feasibility study; limit the WMDs authority to conduct regional water supply planning; affect any requirement applicable to funding of alternative water supply development, including reclaimed water; limit statutory provisions governing rates charged by public and private water utilities; or impair the Governor's powers to issue and enforce emergency rules and orders.

Lastly, the bill requires DEP to initiate rulemaking to adopt criteria for the use of "impact offsets" and "substitution credits" related to using reclaimed water to replace the use of surface or groundwater. "Impact offset" is "the use of reclaimed water to reduce or eliminate a harmful impact that has occurred or would otherwise occur as a result of other surface water or groundwater withdrawals." "Substitution credit" is "the use of reclaimed water to replace all or a portion of an existing permitted use of resource-limited surface water or groundwater, allowing a different user or use to initiate a withdrawal or increase its withdrawal from the same resource-limited surface water or groundwater source."

This bill has a minimal negative fiscal impact on the DEP and WMDs due to anticipated costs of rulemaking, and no direct impact on local governments or the private sector.

The bill was approved by the Governor on April 24, 2012, ch. 2012-150, Laws of Florida. The effective date of the bill is July 1, 2012.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

"Water" or "Waters in the State"

Under current Florida law, "waters in the state" are considered basic public resources benefiting the entire state.[1] The statutes define "water" or "waters in the state" as "all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as coastal waters within the jurisdiction of the state."[2]

In the "Declaration of Policy" for Chapter 373, F.S., the Legislature acknowledges that, in the past, Florida's water resources were not adequately conserved or otherwise realized for their full beneficial use. In response, the Legislature delegated authority to the Department of Environmental Protection (DEP) and the Water Management Districts (WMD) to sustainably manage water resources[3] and allocate these resources throughout the state to meet all reasonable-beneficial uses.[4] Under Florida law, the public has a right to use waters in the state but may not assert a legally protected property interest to "own" the waters.[5,6] That is, Florida presently recognizes only a right to "beneficial use" of water, but not a title to it.[7] DEP and the WMDs regulate use of these waters through issuance of consumptive use permits (CUP) based upon statutory authority contained in Chapter 373, F.S., commonly known as the Florida Water Resources Act of 1972.

DEP defines reclaimed water by rule as water that has received at least secondary treatment and basic disinfection and is reused after flowing out of a domestic wastewater (i.e., sewage) treatment facility.[8] While the statutory definition of "water" or "waters in the state" broadly encompasses "any and all water on or beneath the surface of the ground," it does not expressly include reclaimed water. Whether reclaimed water is a "water" or "waters in the state," and whether DEP and the WMDs have authority to require a CUP for the use of reclaimed water, are legal questions yet to be resolved by the Florida courts.

An attempt by St. Johns River WMD (SJRWMD) in 2008 to adopt rules to regulate reclaimed water through the CUP process illustrates the unresolved question regarding the extent of DEP's and the WMDs' regulatory authority over reclaimed water. SJRWMD proposed rulemaking that, if adopted, would have included reclaimed water among water regulated by the WMD by general permit for purposes of landscape and agricultural irrigation, by address, time of day, and day of the week.[9] The Florida League of Cities contested SJRWMD's delegated legislative authority to promulgate these rules, and, two months after proposing the rulemaking, SJRWMD decided not to pursue adoption of the regulations.[10] Nevertheless, DEP asserts that, although they have not historically done so, the WMDs may require a CUP solely for the use of reclaimed water.[11]

Consumptive Use Permitting

For uses other than private wells for domestic use, DEP or the WMDs may require any person seeking to use "waters in the state" to obtain a CUP. A CUP establishes the duration and type of water use as well as the maximum amount that may be used. Pursuant to § 373.219, F.S., each CUP must be consistent with the objectives of the WMD and not harmful to the water resources of the area. To obtain a CUP, an applicant must establish that the proposed use of water satisfies the statutory test, commonly referred to as "the three-prong test." Specifically, the proposed water use:

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[1] Sections 373.016(1) and (4)(a), F.S. (2011).
[2] Section 373.019(20), F.S. (2011) (emphasis added).
[3] Section 373.016(2), F.S. (2011).
[4] Section 373.016(4)(a), F.S. (2011).
[5] William S. Bilenky, *An Alternative Strategy for Water Supply and Water Resource Development in Florida*, 25 J. Land Use & Envtl. Law 77 (2009).
[6] *See Village of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 667 (Fla. 1979) ("There is a right of use as [the water] passes, but there is no ownership in the absolute sense.").
[7] Section 373.223, F.S. (2011).
[8] Rule 62-610.200(48), F.A.C. (2007).
[9] *See* Letter from Suzanne G. Printy, Chief Staff Attorney, The Florida Legislature Joint Administrative Procedures Committee to Thomas M. Beason, General Counsel, Florida Department of Environmental Protection (Dec. 9, 2008).
[10] Letter from Rebecca A. O'Hara, Legislative Director, Florida League of Cities, Inc. to Suzanne Printy, Chief Staff Attorney, The Florida Legislature Joint Administrative Procedures Committee (Dec. 5, 2009).
[11] DEP Draft Bill Analysis for HB 639 (2012), relating to reclaimed water in the consumptive use permitting (p. 3).

1) must be a "reasonable-beneficial use" as defined in § 373.019, F.S.; 2) must not interfere with any presently existing legal use of water; and 3) must be consistent with the public interest.

1. Reasonable-Beneficial Use

"Reasonable-beneficial use," as defined in statute, is the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner that is both reasonable and consistent with the public interest.[12] In the words of the drafters of *A Model Water Code*, from which the reasonable-use standard was taken, "[w]asteful use of water will not be permitted under the reasonable-beneficial use standard, regardless of whether or not there is sufficient water to meet the needs of other riparian owners."[13] Rather, the reasonable-beneficial use standard requires efficient economic use of water and consideration of the rights of the general public.[14]

To that end, DEP has promulgated the Water Resource Implementation Rule that incorporates interpretive criteria for implementing the reasonable-beneficial use standard based on common law and on water management needs.[15] These criteria include consideration of the quantity of water requested; the need, purpose, and value of the use; and the suitability of the use of the source. The criteria also consider the extent and amount of harm caused, whether that harm extends to other lands, and the practicality of mitigating that harm by adjusting the quantity or method of use. Particular consideration is given to the use or reuse of lower quality water, and the long-term ability of the source to supply water without sustaining harm to the surrounding environment and natural resources through such adverse impacts as salt water intrusion. Notwithstanding DEP's rather broad discretion when interpreting these criteria, the district court in *Florida Water Management District v. Charlotte County*[16] nonetheless upheld DEP's use of these criteria for implementing the reasonable-beneficial use standard.

2. Existing Legal Users

The second criterion of the three-prong test protects the rights of existing legal water users for the duration of their permits.[17] Essentially, new users cannot obtain a CUP to use water if the use conflicts with existing permits. But, when the permit is up for renewal, the competing use that the WMD determines best serves the public interest will be permitted, irrespective of which use was previously permitted.

This criterion only protects water users that actually withdraw water. Illustrative of this point, the court in *Harloff v. Sarasota*[18] held that a municipal wellfield was an existing legal use entitled to protection from interference by a new use. In contrast, a farmer who passively depended on the water table to maintain the soil moisture necessary for nonirrigated crops and the standing surface water bodies for watering cattle was denied protection as an "existing user."[19]

3. Public Interest

The third element of the three-prong test requires water use to be consistent with the "public interest." While the DEP's Water Resource Implementation Rule provides criteria for determining the "public interest",[20] determination of public interest is made on a case-by-case basis during the permitting process. For example, in *Friends of Fort George v. Fairfield Communities*,[21] the Division of Administrative Hearings considered the following factors in finding that water use was in the public interest: water conservation and reuse, total amount of water allocated, lack of salt water intrusion, reduction of estuarine pollution, and development of new water source. In a separate case, *Church of Jesus Christ of Latter Day Saints v. St. John's Water Management District*,[22] the St. John's WMD stated that the determination of whether a water use is in the public interest requires a determination of whether the use is "beneficial or detrimental to the overall collective well-being of the people or to the water resource in the area, the [WMD], and the State."

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[12] Section 373.019(16), F.S. (2011).
[13] Richard Hamann, *Consumptive Use Permitting Criteria*, 14.2-1, 14.2-2 (Fla. Env. & Land Use Law, 2001) (citing Frank E. Maloney, et al., *A Model Water Code*, 86-87 (Univ. of Fla. Press, 1972)).
[14] *Id.*
[15] Chapter 62-40,F.A.C. (2010).
[16] *Florida Water Management District v. Charlotte County,* 774 So. 2d 903, 911 (Fla. 2d DCA 2001).
[17] Section 373.223(1)(b), F.S. (2011).
[18] *Harloff v. Sarasota*, 575 So. 2d 1324 (Fla. 2d DCA 1991).
[19] *West Coast Regional Water Supply Authority v. Southwest Florida Water Management District*, 89 ER F.A.L.R. 166 (Final Order, August 30, 1989).
[20] *See, e.g.*, Rule 62-40.422, F.A.C. (2010) (criteria to determine whether transport of water between districts is consistent with the public interest).
[21] *Friends of Fort George v. Fairfield Communities*, 24 Fla. Supp. 2d 192-223, DOAH Case No. 85-3537, 85-3596 (Final Order dated Oct. 6, 1986).
[22] *Church of Jesus Christ of Latter Day Saints v. St. John's Water Management District*, 92 ER. F.A.L.R. 34 (Final Order, Dec. 13, 1990).

Reclaimed Water

In an effort to conserve the State's potable surface and groundwater resources, the statutes authorize the WMDs to restrict water use to the lowest quality water source appropriate for the specific use and to adopt rules that identify preferred water supply sources for consumptive uses.[23] The WMD may consider all economically and technically feasible alternatives to the proposed water source, including alternative water sources that include desalination, aquifer storage and recovery, and – most notably for the purposes of this proposed legislation – reuse of nonpotable reclaimed water.[24] Of these enumerated alternative water sources, the Legislature expressly encourages the use of reclaimed water as an alternative water source "whenever practicable."[25]

DEP defines reclaimed water as water that has received at least secondary treatment and basic disinfection and is reused after flowing out of a domestic wastewater treatment facility.[26] In essence, water reuse involves taking domestic wastewater (i.e., sewage), giving it a high degree of treatment, and using the resulting high-quality reclaimed water for a new, beneficial purpose. Extensive treatment and disinfection during this process ensure that public health and environmental quality are protected.[27]

Reclaimed water is an important alternative water source in Florida in light of mounting pressures on the State's fresh water resources, principally surface water and groundwater. Among its noteworthy benefits, the use of reclaimed water saves water that would otherwise need to be withdrawn from surface water and groundwater sources to meet non-potable supply needs such as agricultural or residential irrigation,[28] power generation, or recreation (e.g., golf courses or waterparks). Additionally, reclaiming waste water reduces reliance on traditional wastewater disposal methods such as surface water discharges, ocean outfall[29], or deep injection wells.[30] DEP asserts that "Florida is leading the nation – reusing 660 million gallons of reclaimed water each day to conserve freshwater supplies and replenish our rivers, streams, lakes and the aquifer."[31]

Section 373.250(2)(c), F.S., authorizes a WMD to require the use of reclaimed water in lieu of surface water or groundwater when the use of uncommitted reclaimed water is available; is environmentally, economically, and technically feasible; and is of such quality and reliability as is necessary to the user. Reclaimed water is presumed to be available to a CUP applicant when a reclaimed water provider has "uncommitted" reclaimed water capacity, and there are distribution facilities provided by the utility to the site of the proposed use. Uncommitted reclaimed water is defined as the average amount of reclaimed water produced during the lowest-flow months, less the amount of reclaimed water that a reclaimed water provider is contractually obligated to provide a customer or user.[32] However, by its express terms, this provision does not authorize a WMD to require a provider of reclaimed water to redirect reclaimed water from one user to another or to provide uncommitted water to a specific user if such water is anticipated to be used by the provider, or a different user selected by the provider, within a reasonable amount of time.

As required in statute and implemented in DEP's Water Resource Implementation Rule,[33] WMDs must designate water resource caution areas[34] within which CUP permit holders are required to use a "reasonable" amount of reclaimed water, unless using it is not "economically, environmentally or technically feasible." For example, the entire St. Johns River WMD has been designated a water resource conservation area, and WMD rules require reclaimed water to be used throughout the district if it is readily available and feasible.[35] In contrast, the Northwest Florida WMD has designated only two water resource caution areas – the coastal areas of Santa Rosa, Okaloosa, and Walton Counties and the Upper Telogia Creek Drainage Basin of Gadsden County. Applicants in those two areas who

[23] Section 373.2234, F.S. (2011).
[24] Section 373.223(3)(c), F.S. (2011).
[25] Section 373.016(4)(a), F.S. (2011).
[26] Florida DEP website http://www.dep.state.fl.us/legal/rules/wastewater/62-610.pdf (p. 12).
[27] Florida DEP website http://www.dep.state.fl.us/water/reuse/index.htm.
[28] In central Florida, for instance, studies have shown that irrigation accounted for 64% of the residential use volume for all monitored homes. (Florida Section of the American Water Works Association, *Florida's Water Survival Handbook for the Future* 60 (2009) (citing Journal of Irrigation and Drainage Engineering, Vol. 133, Issue 5, pp. 427-94 (2007)).)
[29] "Ocean outfall" means the outlet or structure through which effluent is finally discharged to the marine environment which includes the territorial sea, contiguous zone and the ocean. Rule 62–600.200(55), F.A.C. (2010).
[30] "Injection well" means a well into which fluids are being or will be injected, by gravity flow or under pressure. Rule 62-528.200(39), F.A.C. (2010).
[31] Florida DEP website http://www.dep.state.fl.us/water/reuse/index.htm.
[32] Section 373.250(2)(a)-(b), F.S. (2011).
[33] Chapter 62-40, F.A.C. (2010).
[34] Water resource caution areas are designated where water supply problems currently exist or are expected to exist within the next 20 years. Section 373.0363, F.S. (2011); Rule 62-40.416, F.A.C. (2010).
[35] Rule 40C-23.001, F.A.C. (2010).

propose to withdraw water from the Floridan aquifer are required to use reclaimed water unless its use is not economically, environmentally, or technically feasible as determined by the WMD.[36]

Currently, WMD year-round irrigation restrictions do not apply to irrigation with reclaimed water. In recent years, discussions have been held in some WMDs regarding the possibility of imposing restrictions on the use of reclaimed water for irrigation purposes. However, reclaimed water utilities expressed concerns that such restrictions would create operational problems for the utilities, because wastewater flows do not vary according to weather conditions while the need for irrigation does vary. As a result, irrigation restrictions may cause a reuse utility to increase discharges of reclaimed water to surface waters, possibly in violation of the utility's National Pollutant Discharge Elimination System (NPDES) permit, or require the construction of expensive storage capacity for the utility's reclaimed water supply.[37]

For areas outside of designated water resource caution areas, DEP encourages local governments to implement programs for the use of reclaimed water. Specifically, WMDs are encouraged to establish incentives, such as longer permit duration and cost-sharing, for local governments and other interested parties to implement programs for reclaimed water use.[38] With respect to Florida's "Home Rule Power,"[39] the provisions of the Water Resource Implementation Rule provide that the rule itself may not preempt any local water reuse programs.[40]

Additionally, mandatory reuse zones established by local government ordinance may require a person living within the area to connect when available with any alternative water supply system, including reclaimed water.[41] Mandatory reuse zones have been established in three districts – SFWMD, SRWMD, and SJRWMD – mostly for irrigation. In SJRWMD, the conflict between the WMD's authority and the "Home Rule Power" of the local government was resolved by including language in local ordinances requiring reclaimed water use, unless the WMD required otherwise. This allowed the utility to use the most logical lowest quality source, which sometimes may be another source, such as stormwater.[42]

Alternative Water Supply Funding

Between fiscal years 2005-2006 and 2007-2008, the Legislature authorized the allocation of over $217 million among the five WMDs to develop alternative water supply projects. Reclaimed water development projects made up the bulk of project types that were funded over these four years, comprising 202 of the 324 funded projects. Over this period, the funding waned significantly. In fiscal year 2005-2006, $100 million was allocated among the five WMDs, but by fiscal year 2007-2008, that figure dropped to $5.54 million. The Legislature has not provided any alternative water supply funding at the state level since fiscal year 2008-09.[43]

Environmental Considerations

The adverse environmental impacts of consumptive water use are essential considerations in the permitting process. Indeed, the Legislature expressly provided that the policy of the State Water Resource Plan is "to preserve natural resources, fish, and wildlife."[44] This statute is consistent with Article II, Section 7(a), of the Florida Constitution, which states that "[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and excessive and unnecessary noise and for the conservation and protection of natural resources."

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[36] Rule 40A-2.802, F.A.C. (2010).
[37] DEP Draft Bill Analysis for HB 639 (2012) (p. 2-3).
[38] Rule 62-40.416(2), F.A.C. (2010).
[39] In Florida, "Home Rule Power" language was proposed in the 1968 Constitutional revision and was adopted by the people. After several legal challenges, the Florida Legislature adopted the Home Rule Powers Act in 1973, which ended challenges related to city and county powers. The Florida Constitution states in Art. VIII, § 2(b) for municipalities: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise power for municipal purposes except as otherwise provided by law."
[40] Rule 62-40.416(2), F.A.C. (2010).
[41] Section 125.01(k)1., F.S. (2011), authorizes counties to: "[p]rovide and regulate waste and sewage collection and disposal, water and alternative water supplies, including, but not limited to, reclaimed water and water from aquifer storage and recovery and desalination systems, and conservation programs."; Section 180.02, F.S., provides that cities that may " create a zone or area by ordinance and to prescribe reasonable regulations requiring all persons or corporations living or doing business within said area to connect, when available, with any … alternative water supply system, including, … reclaimed water ...."
[42] "Connecting Reuse and Water Use: A Report of the Reuse Stakeholders Meetings," Florida Department of Environmental Protection (Feb. 23, 2009), pp. D-5,6.
[43] Florida DEP website, http://www.dep.state.fl.us/water/waterprojectfunding/.
[44] Section 373.016(3)(g), F.S. (2011).

1. Water Needs of Natural Systems

Excessive use of ground or surface waters may trigger a cascade of adverse environmental impacts including: salt water intrusion that can degrade water quality; changes in salinity levels in estuaries that can kill off oyster and grass beds; "drying out" of wetlands and lakes that can lead to habitat loss; and reduced spring and river flows that can diminish recreational values like fishing or ecotourism, which rely on a robust and biologically diverse ecology. To avoid adverse environmental impacts, DEP and WMDs are statutorily mandated to establish minimum flow levels (MFLs) for surface and groundwaters which set the threshold at which further withdrawals could significantly harm the water resources or ecology of the area.[45] To date, the five WMDs have collectively adopted over 300 MFLs for water bodies across the state.[46]

A WMD may deny a CUP because the desired uses are "undesirable because of the nature of the activity or the amount of water required."[47] For example, in *Osceola County v. St. Johns River Water Management District*,[48] the WMD denied a wellfield permit because of the potential adverse effects of a drawdown of the aquifer on wetlands. The hearing officer found that the predicted drawdown of 0.14 feet could significantly harm herbaceous wetlands, and the applicant was denied a permit because he failed to sufficiently assess those impacts or propose adequate mitigation efforts.[49]

2. Water Quality Standards

Water quality and pollution is primarily regulated through Florida's implementation of the federal Clean Water Act (CWA).[50] The CWA requires states or the U.S. Environmental Protection Agency (EPA) to establish water quality standards for surface waters and prohibits the discharge of any pollutant into navigable waters from a point source, such as a pipe, man-made ditch, or large animal feeding operation, without a National Pollutant Discharge Elimination System (NPDES) permit. Non-point sources, such as fertilizer and pesticide runoff, are not required to obtain an NPDES permit and are not directly regulated under the CWA. DEP sought and accepted authority from the EPA to implement water quality programs in Florida under state laws. As such, DEP adopts water quality standards subject to EPA approval and administers the federal pollutant discharge NPDES permit program.

Specifically, the CWA requires states to establish water quality standards and review those standards every three years. States must also identify impaired waters that are not meeting established water quality standards and establish total maximum daily loads (TMDLs) of pollutants for those waters. A TMDL is a value of the maximum amount of a pollutant that a body of water can receive and still meet water quality standards. To enforce TMDLs, DEP establishes water quality-based effluent limitations (WQBELs) and incorporates these limitations into NPDES permits.

TMDLs and WQBELs can be established for a broad range of pollutants – in Florida particular attention is paid to nutrient levels, principally the levels of nitrogen and phosphorus. While nitrogen and phosphorus are essential for aquatic organisms to live and grow, excessive levels of these nutrients may result in harmful algal blooms, nuisance aquatic weed proliferation, or an imbalance in the natural community of flora and fauna. Unnatural sources of nitrogen and phosphorus include sewage disposal systems (treatment works or septic systems), overflows of storm and sanitary sewers (untreated sewage), agricultural production and irrigation practices, and runoff from urban and agricultural areas.

In 2008, environmental advocacy groups filed suit against the EPA alleging that excessive nutrient levels were impairing Florida's surface waterbodies and that EPA was failing to comply with the CWA by not requiring Florida to adopt more stringent numeric nutrient criteria in lieu of the State's current EPA-approved narrative criteria. Following a determination by the EPA that numeric nutrient criteria were necessary to protect waters in the state and entry of a court-approved settlement agreement, in November, 2010, EPA issued a final rule adopting numeric nutrient criteria for Florida's lakes, springs, and inland flowing waters with the exception of south Florida canals (mostly south of Lake Okeechobee). These rules are scheduled to take effect in March 2012. In response to EPA's final rule, DEP recently proposed a rule containing numeric nutrient criteria and is proceeding through the rule adoption process. If adopted by DEP, ratified by the Legislature, and approved by the EPA, DEP's adopted numeric nutrient criteria will replace the criteria in the EPA's final rule.

[45] Section 373.042(1)(a)-(b), F.S. (2011).
[46] Since 1992, the five WMDs have adopted 322 minimum flow levels or reservations. (SWFWMD: 167 MFLs; SJRWMD: 135 MFLs; SFWMD: 9 MFLs and 2 Reservations; SRWMD: 7 MFLs; and NWFWMD: 2 Reservations.)
[47] Section 373.036(4), F.S. (2011).
[48] *Osceola County v. St. Johns River Water Management District*, 92 ER F.A.L.R. 109 (Final Order, June 10, 1992).
[49] *See* Richard Hamman, *Consumptive Use Permitting Criteria*, Florida Environmental and Land Use Law. 14.2, 14.2-7 (August 2001).
[50] 33 U.S.C. § 1251 *et seq.*

Unless reclaimed water is extensively treated, it invariably contains nutrients (i.e., nitrogen and phosphorus). When reclaimed water is used for irrigation or discharged into other surface waters, it may eventually flow or seep into an impaired surface waterbody. Therefore, DEP's authority to regulate the effluent and nutrient levels in reclaimed water is an important component in maintaining chemical, physical, and biological integrity of surface waters. In light of this fact, wastewater treatment facilities that produce reclaimed water for land application must obtain wastewater permits and are subject to treatment standards (e.g., effluent limitations and pH standards), monitoring, and reporting requirements.[51] Specifically, DEP may require additional levels of treatment depending on the ultimate use (beyond the minimum) to protect the potential receiving surface waters from exceeding their established TMDLs.[52]

Reuse Feasibility Studies

Pursuant to s. 403.064, F.S., certain applicants for permits to construct or operate a domestic wastewater treatment facility located within, serving a population located within, or discharging within a water resource caution area must prepare a reuse feasibility study as part of their application for the permit. Reuse feasibility studies must be prepared in accordance with DEP rules and must include, but are not limited to:

(a) Evaluation of monetary costs and benefits for several levels and types of reuse.
(b) Evaluation of water savings if reuse is implemented.
(c) Evaluation of rates and fees necessary to implement reuse.
(d) Evaluation of environmental and water resource benefits associated with reuse.
(e) Evaluation of economic, environmental, and technical constraints.
(f) A schedule for implementation of reuse. The schedule shall consider phased implementation.

The permit applicant must prepare a plan of study for the reuse feasibility study consistent with the reuse feasibility study guidelines in DEP's rules, and the plan of study must include detailed descriptions of applicable treatment and water supply alternatives to be evaluated and the methods of analysis to be used. The plan of study must be submitted to DEP for review and approval.

A reuse feasibility study satisfies a WMD requirement to conduct a reuse feasibility study imposed on a local government or utility that has responsibility for wastewater management. The data included in the study and the conclusions of the study must be given significant consideration by the applicant and the appropriate WMD in an analysis of the economic, environmental, and technical feasibility of providing reclaimed water for reuse under part II of chapter 373 and must be presumed relevant to the determination of feasibility. A WMD may not require a separate study when a reuse feasibility study has been completed under this provision.

Regional Water Supply Planning

The WMDs are required to evaluate their water resources to ensure that the reasonable-beneficial needs for water can be met for the next twenty years while the natural resources of the region are protected. If a WMD determines there is not enough water to meet water needs in a sustainable manner, the WMD must develop a regional water supply plan.

Regional water supply planning is a major element of Florida's strategy to sustainably manage the state's water resources. A plan must identify sufficient sources of water to meet the water supply needs for the next twenty years and include at least the following information:

- A water supply and a water resource development component that includes:
  - An estimate of all existing and future needs
  - A list of water supply and water resource development projects
  - An estimate of the water made available by each project
  - The timeframe for implementation
  - An analysis of funding needs and sources
  - The identification of an implementing entity
- A list of water bodies for which minimum flows and levels will be established
- A list of water bodies for which minimum flows and levels have been established
- A list of water bodies for which reservations of water pursuant to s. 373.223(4), F.S. have been established

[51] Rule 62-600.530, F.A.C., Reuse of Reclaimed Water and Land Application.
[52] Rule 62-600.530(3)(b), F.A.C.

- Recovery and prevention strategies for water bodies that are not meeting established minimum flows and levels or are not expected to meet them during the next 20 years.[53]

Regional water supply plans include a technical analysis of the current and future demands and an evaluation of the sources available to meet those demands. The planning process must be conducted in coordination with local governments, regional water supply authorities, utilities, self-suppliers, and other affected or interested parties. Several public meetings are required to ensure public input at appropriate stages of plan development.

The first regional water supply plans were adopted in the year 2000. Plans have been adopted by the Northwest Florida, St. Johns River, South Florida, and Southwest Florida Water Management Districts. The Suwannee River Water Management District is developing a plan for the Upper Santa Fe Basin. Plans are updated at least every five years, although additions or changes to the plans may be made more frequently.

Rates for Water

In general, chapters 153 (county-owned utilities), 180 (city-owned utilities), and 367 (some privately-owned utilities), F.S., govern rates charged by water and wastewater utilities.[54] Rate-setting is performed by either a city commission, county commission, or the Public Service Commission (PSC) depending on the type of utility providing the service. In general, rates must be just, reasonable, and equitable, and may provide a reasonable rate of return to the utility.

Though utility rates must be reasonable and non-discriminatory, a local government utility is entitled to make a reasonable profit from it utility operations and to use the proceeds thus derived for other valid public purposes.[55] A utility rate ordinance, as a legislative act, is presumed valid, and the burden rests on those who attack the rates to clearly demonstrate that they are arbitrary, unreasonable, or discriminatory.[56] In setting utility rates, local governments enjoy a certain latitude: they may charge different rates to different classes of users so long as the classifications are not arbitrary, unreasonable, or unfairly discriminatory.[57]

Governor's Authority to Act in an Emergency

Section 14.022, F.S., authorizes the Governor to, when in her or his opinion the facts warrant, declare by proclamation that an emergency exists due to danger to the person or property of any citizen of the state or due to a threat to the peace and tranquility of the state, any political subdivision, or any area of the state designated by the Governor. When the Governor issues a proclamation, he or she is further authorized to: cope with the danger; order and direct any individual person, corporation, association, or group of persons to do any act which would in the Governor's opinion prevent danger to life, limb, or property; prevent a breach of the peace; order such individual person, corporation, association, or group of persons to refrain from doing any act or thing which would, in the Governor's opinion, endanger life, limb, or property, or cause, or tend to cause, a breach of the peace, or endanger the peace and good order of society. The Governor is also granted full power by appropriate means to enforce such order or proclamation.

Reclaimed Water Working Group

The Reclaimed Water Working Group is a collective of several interested parties[58] that, over the past several years, has convened to discuss the role of reclaimed water in meeting Florida's projected water demands. The working group's express objective was "to optimize the use and continued development of reclaimed water as an alternative water supply to the extent environmentally, technically, and economically feasible in order to meet water supply demands."[59] According to DEP, portions of the bill reflect the recommendations of the working group.[60]

[53] § 373.709, F.S.,
[54] ss. 367.022(2), 367.081, 367.171, 153.11, 180.13, 180.191, F.S.
[55] *City of Pompano Beach v. L.M. Oltman*, 389 So. 2d 283, 286 (Fla. 4th DCA 1980) (review denied Nov. 13, 1980)
[56] *Id.*
[57] *City of Gainesville v. State of Florida*, 863 So. 2d 138, 146-147 (Fla. 2003)
[58] The Reclaimed Water Working Group consisted of: DEP, the WMDs, Florida Water Environment Association- Utility Council, American Water Works Association, League of Cities, Association of Counties, and individual utilities. (DEP presentation by Dr. Ann Shortelle, Director of Office of Water Policy before Florida House Subcommittee on Agriculture and Natural Resources, Nov. 1, 2011.)
[59] *Id.*
[60] DEP Draft Bill Analysis for HB 639 (2012) (p. 3).

Effects of Proposed Changes

Declaration of Policy

The bill amends § 373.250(1), F.S., to add a legislative declaration that "the interest of the state to sustain water resources for the future through the use of reclaimed water must be balanced with the need for reuse utilities to operate and manage reclaimed water systems in accordance with a variety and range of circumstances, including regulatory and financial considerations, which influence the development and operation of reclaimed water systems across the state." The bill also specifies in § 373.250(2), F.S., that the use of reclaimed water may not be excluded from regional water supply planning under § 373.709, F.S.

Consumptive Use Permitting

The bill adds a definition of "reclaimed water" in §373.019(17), F.S., which mirrors the current definition in DEP's rules ("reclaimed water" means water that has received at least secondary treatment and basic disinfection and is reused after flowing out of a domestic wastewater treatment facility). The bill further specifies that reclaimed water is not subject to regulation pursuant to § 373.175, F.S., which governs water shortage emergencies, and part II of chapter 373, F.S., which governs issuance of consumptive use permits, until it has been discharged into "waters" as defined in § 403.031(13), F.S. Under that section, "waters" include, but are not limited to, rivers, lakes, streams, springs, impoundments, wetlands, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface, or underground waters. In effect, after wastewater treatment plants convert wastewater into reclaimed water, use of reclaimed water will not require a consumptive use permit until the reclaimed water has been reused and discharged into certain "waters".

The bill also adds a definition of "reclaimed water distribution system" in § 373.019(18), F.S., which mirrors the current definition in DEP's rules ("reclaimed water distribution system" means "a network of pipes, pumping facilities, storage facilities, and appurtenances designed to convey and distribute reclaimed water from one or more domestic wastewater treatment facilities to one or more users of reclaimed water.") The DEP's definition appears in Rule 62.610, F.A.C., which implements the pollution control provisions in ch. 403, F.S. The new statutory definition does not appear to have any effect on the manner in which Florida Water Resources Act of 1972 in ch. 373, F.S., is implemented. The bill deletes the definition of "uncommitted" reclaimed water capacity[61] and provides that a reuse utility will determine when it has uncommitted reclaimed water capacity.

The bill amends § 373.250(3), F.S., to prohibit WMDs from requiring a CUP for the use of reclaimed water; however, if a CUP application includes at least some use of surface water or groundwater, the WMDs are authorized to include conditions that govern the use of the permitted sources in relation to the feasibility or use of reclaimed water. Additionally, the bill allows WMDs to continue requiring the use of reclaimed water in lieu of all or a portion of a proposed use of surface water or groundwater, provided that the use of reclaimed water is available; is environmentally, economically, and technically feasible; and is of such quality and reliability as is necessary to the user.

However, the bill stipulates that WMDs may neither specify any user to whom the reuse utility must provide reclaimed water nor restrict -- in a permit, water shortage order, or water shortage emergency order -- the use of reclaimed water provided by a reuse utility to a customer unless requested by the reuse facility.

Funding

The bill creates § 373.250(2), F.S., providing that reclaimed water remains a statutorily defined "alternative water supply"[62] eligible for state and district alternative supply funding. This bill provides that a contract for state or WMD funding for the development of reclaimed water as an alternative water supply may include the following conditions:[63]

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[61] The definition of uncommitted in § 373.250(3), F.S., provides that, for purposes of that section, "uncommitted" means the average amount of reclaimed water produced during the three lowest-flow months minus the amount of reclaimed water that a reclaimed water provider is contractually obligated to provide to a customer or user.

[62] Section 373.019(1), F.S. (2011). "Alternative water supplies" mean salt water; brackish surface and groundwater; surface water captured predominately during wet-weather flows; sources mad available through the addition of new storage capacity for surface or groundwater, water that has been reclaimed after one or more public supply, municipal, industrial, commercial, or agricultural uses; the downstream augmentation of water bodies with reclaimed water; stormwater; and any other water supply source that is designated as nontraditional for a water supply planning region in the applicable regional water supply plan.

[63] Section 373.707(9)(a)-(d), F.S. (2011).

- Metering of reclaimed water use for irrigation uses (including residential, agricultural, landscape, irrigation as well as irrigation of golf courses and public access areas), industrial uses, commercial and institutional uses (e.g., toilet flushing), and transfers to other reclaimed water utilities;
- Implementation of reclaimed water rate structures based on actual use of reclaimed water for such irrigation uses, industrial uses, commercial and institutional uses, and transfers;
- Implementation of education programs to inform the public about water issues, water conservation, and the importance and proper use of reclaimed water; or
- Development of location data for key reuse facilities.

Impact Offsets and Substitution Credits

This bill creates § 373.250(5), F.S., requiring DEP to initiate rulemaking no later than October 1, 2012 to adopt revisions to the Water Resource Implementation Rule to include criteria for the use of proposed "impact offsets" and "substitution credits." Additionally, the WMDs must initiate rulemaking to incorporate DEP's revisions to the Water Resource Implementation Rule within 60 days of DEP's final adoption of the revisions. Where the act requires implementation through rulemaking, DEP must draft and formally propose such rules within 180 days after the effective date of the act unless the act provides otherwise.[64] In this case, the act allows both DEP and the WMDs longer than 180 days to initiate rulemaking.

Two WMDs (the South Florida and Southwest Florida WMDs) have already adopted rules similar to "impact offsets" and "substitution credits," and other WMDs have separately evolved other permitting practices in their own regions using similar, but less detailed rules.[65]

1. Impact Offsets

First, the bill requires DEP to initiate rulemaking to adopt "[c]riteria for the use of a proposed impact offset derived from the use of reclaimed water when a water management district evaluates an application for a consumptive use permit." The bill defines "impact offset" as:

> The use of reclaimed water to reduce or eliminate a harmful impact *that has occurred or would otherwise occur* as a result of *other* surface water or groundwater withdrawals."
> (emphasis added)

The bill does not provide further legislative guidance regarding DEP's development of these rules. For example, the bill does not specifically address the manner in which impact offsets may be approved or applied by a WMD or the ultimate benefit a CUP applicant may derive from using an impact offset, nor does the bill provide guidelines or standards to address these issues or otherwise direct DEP's establishment of criteria for the use of impact offsets. For instance, the bill does not indicate whose or which harmful impacts may be offset by the applicant's use of reclaimed water other than to specify an impact "that has occurred or would otherwise occur as a result of other surface water or groundwater withdrawals." In addition, the bill does not require a geographical nexus between the use of reclaimed water and the applicant's withdrawal of surface or ground water. Therefore, it is unclear whether an impact offset will be available if reclaimed water will be used by the applicant to offset a harmful impact outside the hydrological area where the applicant proposes to withdraw surface or groundwater.

Examples of offset projects that may have a beneficial water resource effect include: the use of recharge systems to prevent saltwater intrusion; the use of reclaimed water to reduce or prevent wetland impacts or other surface and groundwater impacts; and the use of reclaimed water to replace surface or groundwater withdrawals, so that those withdrawals may be used to reduce or prevent adverse impacts. [66] According to DEP, the use of reclaimed water to rehydrate wetlands that would otherwise be adversely affected by a water withdrawal has already been allowed in some WMDs.[67]

[64] Section 120.54(1)(b), F.S.
[65] "Purple Paper: Reclaimed Water, Credits, and Offsets," Prepared by: DEP, NWFWMD, SJRWMD, SFWMD, SWFWMD, SRWMD, and the Florida Water Environment Association Utility Council. (undated)
[66] *Id.*at p. 2; "Purple Paper: Reclaimed Water, Credits, and Offsets," Prepared by: DEP, NWFWMD, SJRWMD, SFWMD, SWFWMD, SRWMD, and the Florida Water Environment Association Utility Council (undated).
[67] DEP Draft Bill Analysis for HB 639 (2012) (p. 3).

2. Substitution Credits

Second, DEP must establish criteria for the use of "substitution credits" where a WMD has adopted rules establishing withdrawal limits from a specified water resource within a defined geographic area. The bill defines "substitution credits" as "the use of reclaimed water to replace all or a portion of an existing permitted use of resource-limited surface water or groundwater, allowing a different user or use to initiate a withdrawal or increase its withdrawal from the same resource-limited surface water or groundwater source provided that the withdrawal creates no net adverse impact on the limited water resource or creates a net positive impact if required by water management district rule as part of a strategy to protect or recover a water resource." The bill does not provide other restrictions on the use of credits or further legislative guidance regarding DEP's development of these rules.

Examples of resource-limited areas in which the concept of substitution credits has already been implemented are the Southern Water Use Caution Area in SWFWMD, as well as the Lower East Coast Everglades and Northern Palm Beach/Loxahatchee River Watershed regions, and the Lake Okeechobee Service Area in SFWMD.[68] According to DEP, these WMDs have "formalized mechanisms to allow reclaimed water to be provided as a substitution for groundwater withdrawals, thus allowing another entity to use new or additional groundwater without increasing the overall water withdrawals in a region."[69]

Bill Limitations

Section 3 of the bill specifies that the bill does not:

- Impair or limit the authority of DEP to regulate water quality, including reclaimed water, or require a reuse feasibility study.[70]
- Impair or limit the authority of a WMD to conduct regional water supply planning.
- Affect any requirement that may be applicable to funding of alternative water supply development, including reclaimed water.
- Affect or limit any applicable provisions regarding the rates charged by public and private water utilities pursuant to ch. 153 or ch. 180, F.S., or § 367.081, F.S.
- Affect or impair the powers of the Governor under the State Constitution; general law; and police powers of the state to adopt and enforce emergency rules, regulations, and orders.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None

2. Expenditures: The bill will result in a minimal negative fiscal impact on DEP related to the costs associated with promulgating rules.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None

2. Expenditures: None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None

D. FISCAL COMMENTS: None

[68] *Id.*
[69] DEP Draft Bill Analysis for HB 639 (2012) (pp. 2-3).
[70] According to DEP, this bill does not affect its existing statutory authority to regulate the water quality of reclaimed water as it leaves the reuse facility. Thus, DEP's continued regulation of wastewater treatment facilities will ensure that reclaimed water is in compliance with treatment requirements (i.e., effluent and nutrient limitations) before it is utilized or applied to the landscape. *See generally*, Chapter 403, F.S. (2011), "Environmental Control"; *see also* § 62-600.530, F.A.C., "Reuse of Reclaimed Water and Land Application".