

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 157 Water Management Districts

SPONSOR(S): State Affairs Committee, Rulemaking & Regulation Subcommittee, Agriculture & Natural Resources Subcommittee, Porter & Pilon

TIED BILLS: None **IDEN./SIM. BILLS:** SB 560

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	15 Y, 0 N, As CS	Deslatte	Blalock
2) Rulemaking & Regulation Subcommittee	15 Y, 0 N, As CS	Miller	Rubottom
3) State Affairs Committee	15 Y, 0 N, As CS	Deslatte	Hamby

SUMMARY ANALYSIS

Under current law, the state of Florida has regulatory authority over various activities that affect surface waters and wetlands, primarily through the Environmental Resource Permit (ERP) program. The program is implemented jointly by the Department of Environmental Protection (DEP) and the five water management districts (WMDs). Current law also grants the WMDs the authority to implement the water supply and planning policies of the state, and issue permits for the consumptive use of water. Each WMD also is responsible for water resource management and development. Each WMD governing board is required to include in its annual budget the amount needed for the fiscal year to implement water resource development projects, as prioritized in its regional water supply plans. When the geographic area of a project or local government crosses WMD boundaries, the affected WMDs are authorized to enter into an interagency agreement designating one WMD with regulatory responsibilities for the geographic area. However, the WMDs do not have the statutory authority to enter into similar agreements for non-regulatory resource management activities, studies or projects. In addition, a WMD may not fund resource management activities in another WMD even if some benefits inure to it from the activities.

Current law also requires the WMDs to establish minimum flows and levels (MFLs) for priority water bodies to prevent significant harm from water withdrawals. If the existing flow or level of a water body is below or projected in 20 years to fall below established MFLs, then a recovery strategy must be implemented to restore the system to the established MFLs or a prevention strategy implemented to prevent the system from falling below the established MFLs. MFLs are adopted by rule by the WMDs and are subject to challenges under chapter 120, F.S., the Administrative Procedure Act (APA).

The bill provides that each WMD submit a priority list and schedule to the DEP for the establishment of minimum flows and levels for surface watercourses, aquifers, and surface waters within the WMDs that identifies any reservations proposed by the WMD to be established and those listed water bodies that have the potential to be affected by withdrawals in an adjacent WMD for which DEP adoption of a reservation or a minimum flow or level may be appropriate.

The bill provides that a WMD must provide the DEP with technical information and staff support for the development of a reservation, minimum flow or level, or recovery or prevention strategy to be adopted by rule by the DEP. A reservation, minimum flow or level, or recovery or prevention strategy adopted by rule by the DEP must be applied by the WMDs without adoption of such reservation, minimum flow or level, or recovery or prevention strategy by rule.

The bill provides that when the geographic area of a resource management activity, study, or project crosses WMD boundaries, the affected WMDs are authorized to designate a single affected district by interagency agreement to conduct all or part of the applicable resource management responsibilities under this chapter, not including those regulatory responsibilities that are subject to s. 373.046(6), F.S. The bill also provides that if funding assistance is provided to a resource management activity, study, or project, the WMD providing the funding must ensure that some or all the benefits accrue to the funding WMD. This will not impair any interagency agreement in effect on July 1, 2012.

The bill allows the governing board of a WMD to provide group insurance for its employees and the employees of another WMD in the same manner and with the same provisions and limitations authorized for other public employees.

The bill directs all WMDs to jointly develop the water supply development component of a regional water supply plan with the regional water supply authority.

The bill provides that cooperative funding programs are not subject to the rulemaking requirements of chapter 120. However, any portion of an approved program which affects the substantial interests of a party would be subject to the hearing procedures established under section 120.569, F.S.

The bill appears to have a fiscal impact on state government (See Fiscal Analysis Section). The bill has a potentially positive fiscal impact on WMDs who enter into interagency agreements by reducing the duplication of services and promoting streamlining.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0157f.SAC

DATE: 2/10/2012

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Minimum Flows and Levels

Current Situation

DEP and each WMD are required to establish minimum flows for surface watercourses and minimum levels for ground water and surface waters within the district.¹ “Minimum flow” is the limit at which further water withdrawals from a given watercourse would significantly harm the water resources or ecology of the area.² “Minimum level” is the level of groundwater in an aquifer or the level of a surface water body at which further withdrawals will significantly harm the water resources of the area.³ Section 373.042(2), F.S., requires that each WMD submit annually to the DEP for review and approval a priority list and schedule for the establishment of minimum flows and levels for surface watercourses, aquifers, and surface waters within the WMD. The priority list and schedule must identify those water bodies for which the WMD will voluntarily undertake independent scientific review.

A person who will be substantially affected by a proposed minimum flow or minimum level may request that DEP or the governing board of the WMD submit for independent scientific peer review all of the information and data on which the proposed flow or level is based. The request must be made in writing prior to the flow or level being established and prior to the filing of any petition for administrative hearing related to the flow or level.⁴ The statute provides a process for conducting such review and that the final report is admissible in evidence in any subsequent administrative challenge to establishing the minimum flow or level.⁵

DEP has sole authority to review rules of WMDs to ensure consistency with DEP’s water implementation rule.⁶ This review is required to begin within 30 days of the adoption or revision of a rule by a WMD.

Effect of Proposed Changes

The bill amends s. 373.042(2), F.S., to provide that each WMD submit a priority list and schedule to the DEP for the establishment of minimum flows and levels for surface watercourses, aquifers, and surface waters within the WMDs that identifies any reservations proposed by the WMD to be established under s. 373.223(4), F.S.⁷; and those listed water bodies that have the potential to be affected by withdrawals in an adjacent WMD for which DEP adoption of a reservation pursuant to s. 373.223(4), F.S., or a minimum flow or level pursuant to subsection (1) may be appropriate.

The bill also provides that a WMD must provide the DEP with technical information and staff support for the development of a reservation, minimum flow or level, or recovery or prevention strategy to be adopted by rule by the DEP. A reservation, minimum flow or level, or recovery or prevention strategy

¹ Section 373.042(1), F.S.

² Section 373.042(1)(a), F.S.

³ Section 373.042(1)(b), F.S.

⁴ Section 373.042(4)(a), F.S.

⁵ Section 373.042(5), F.S. This subsection also requires the Administrative Law Judge to render the order within 120 days after the petition is filed.

⁶ Section 373.114(2), F.S. The Water Resource Implementation Rule is promulgated as Chapter 62-40, F.A.C.

⁷ Section 373.223(4), F.S., provides that the governing board or the DEP, can reserve from use by permit applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety. These reservations must be subject to periodic review and revision in the light of changed conditions. However, all presently existing legal uses of water must be protected so long as such use is not contrary to the public interest.

adopted by rule by the DEP must be applied by the WMDs without adoption of such reservation, minimum flow or level, or recovery or prevention strategy by rule.

Interagency Agreements

Current Situation

Under chapter 373, F.S., the state has regulatory authority over various activities that affect surface waters and wetlands, primarily through the Environmental Resource Permit (ERP) program. The program is implemented jointly by the Department of Environmental Protection (DEP) and the five water management districts (WMDs)⁸. Operating Agreements between the DEP and the WMDs outline specific responsibilities to each agency for any given application. Under those agreements, the DEP generally reviews and takes actions on applications involving:

- Solid waste, hazardous waste, domestic waste, and industrial waste facilities;
- Mining;
- Power plants, transmission and communication cables and lines, natural gas and petroleum exploration, production, and distribution lines and facilities;
- Docking facilities and attendant structures and dredging that are not part of a larger plan of residential or commercial development;
- Navigational dredging conducted by governmental entities, except when part of a larger project that a District has the responsibility to permit;
- Systems serving only one single-family dwelling unit or residential unit not part of a larger common plan of development;
- Systems located in whole or in part seaward of the coastal construction control line;
- Seaports; and
- Smaller, separate water-related activities not part of a larger plan of development (such as boat ramps, mooring buoys, and artificial reefs).

The WMDs have regulatory authority over reviewing and taking action on all other applications, mostly larger commercial and residential developments. Chapter 373, F.S., also grants the WMDs with the authority to implement the water supply and planning policies of the state, and issue permits for the consumptive use of water. Each WMD is also responsible for water resource management and development. Section 373.705, F.S., provides that it is the intent of the Legislature that WMDs take the lead in identifying and implementing water resource development projects, and be responsible for securing necessary funding for regionally significant water resource development projects. The WMDs are encouraged to implement water resource development as expeditiously as possible in areas subject to regional water supply plans. Each WMD governing board is required to include in its annual budget the amount needed for the fiscal year to implement water resource development projects, as prioritized in its regional water supply plans.

Section 373.046(4), F.S., authorizes the DEP and the WMDs to modify the division of responsibilities and to enter into further interagency agreements by rulemaking, including incorporation by reference, pursuant to chapter 120, F.S., to provide for greater efficiency and to avoid duplication in the administration of part IV of chapter 373, F.S. (management and storage of surface waters), by designating certain activities which will be regulated by either the WMDs or the DEP. In developing the interagency agreements, the WMDs and the DEP must take into consideration the technical and fiscal ability of each WMD to implement all or some of the provisions of part IV of chapter 373, F.S.

Section 373.046(6), F.S., provides that when the geographic area of a project or local government crosses WMD boundaries, the affected WMDs may designate a single affected WMD by interagency agreement to implement in that area, under the rules of the designated WMD, all or part of the applicable regulatory responsibilities under this chapter. Interagency agreements entered into under

⁸ The five water management districts include: Northwest Florida Water Management District, Suwannee River Water Management District, St. John's River Water Management District, Southwest Florida Water Management District, and South Florida Water Management District.

this section, which apply to the geographic area of a local government, must have the concurrence of the affected local government.

WMDs do not have the statutory authority to enter into similar agreements for non-regulatory resource management activities, studies or projects. In addition, a WMD may not fund resource management activities in another WMD even if some benefits inure to it from the activities.

Effect of Proposed Changes

The bill creates s. 373.046(7), F.S., providing that when the geographic area of a resource management activity, study, or project crosses WMD boundaries, the affected WMDs are authorized to designate a single affected district by interagency agreement to conduct all or part of the applicable resource management responsibilities, not including those regulatory responsibilities that are subject to s. 373.046(6), F.S. Under the bill, if funding assistance is provided to a resource management activity, study, or project, the WMD providing the funding must ensure that some or all the benefits accrue to the funding WMD. This will not impair any interagency agreement in effect on July 1, 2012.

Group Insurance

Current Situation

Section 373.605, F.S., authorizes the governing board of a WMD to provide group insurance for their employees, and the employees of another WMD in the same manner. Each health care plan varies among the WMDs.

Effect of Proposed Changes

The bill allows the governing board of a WMD to provide group insurance for its employees and the employees of another WMD in the same manner and with the same provisions and limitations authorized for other public employees.

Regional Water Supply Planning

Current Situation

Section 373.709, F.S., requires WMDs to conduct water supply needs assessments. A WMD that determines existing resources will not be sufficient to meet reasonable-beneficial uses for the planning period must prepare a regional water supply plan. The plans must contain:

- A water supply development component.
- A water resource development component.
- A recovery and prevention strategy.
- A funding strategy.
- The impacts on the public interest, costs, natural resources, etc.
- Technical data and information.
- Any MFLs established for the planning area.
- The water resources for which future MFLs must be developed.
- An analysis of where variances may be used to create water supply development or water resource development projects.

Currently, only the Southwest Florida WMD and a regional water supply authority within the boundary of the Southwest Florida WMD are required to jointly develop the water supply development component of a regional water supply plan.

Effect of Proposed Changes

The bill directs all WMDs to jointly develop the water supply development component of a regional water supply plan with the regional water supply authority.

Rules/Cooperative Funding Programs

Current Situation

WMDs have cost-share cooperative funding programs to foster the development of sustainable water resources, improve water quality, provide flood protection, and enhance conservation measures. It is not considered a regulatory program. Therefore, if a WMD needed to adopt rules for all of the procedures and policies in a cooperative funding program, it would be unable to adapt or modify the program as necessary. Section 373.171, F.S., authorizes WMDs to adopt rules or issue orders affecting the use of water; regulate the use of water; issue orders and adopt rules pursuant to chapter 120, F.S.

If a WMD proposes to take certain agency action within its jurisdiction that will affect the substantial interests of a party, that proposed action is subject to the hearing procedures in the APA.⁹

Effect of Proposed Changes

The bill amends s. 373.171, F.S., to provide that cooperative funding programs are not subject to the rulemaking requirements of chapter 120. However, any portion of an approved program which affects the substantial interests of a party would be made subject to the hearing procedures under section 120.569, F.S. These procedures incorporate the specific procedures available under s. 120.57, F.S.

B. SECTION DIRECTORY:

Section 1. Amending s. 373.042, F.S., requiring WMDs to include certain reservations and water bodies in priority lists and schedules; providing for the adoption of certain reservations and minimum flows and levels by the DEP; requiring WMDs to apply, without adopting by rule, reservations, minimum flows and levels, and recovery and prevention strategies adopted by the DEP.

Section 2. Amending s. 373.046, F.S., authorizing WMDs to enter into interagency agreements for resource management activities under specific conditions; providing applicability.

Section 3. Amending s. 373.605, F.S., authorizing a WMD to provide a group health insurance for its employees and the employees of another WMD; removing obsolete provisions.

Section 4. Amending s. 373.709, F.S., relating to regional water supply planning; removing a reference to the SWFWMD; requiring a regional water supply authority and the applicable WMD to jointly develop the water supply component of the regional water supply plan.

Section 5. Amending s. 373.171, F.S., exempting cooperative funding programs from certain rulemaking requirements but providing that a party whose substantial interests are affected by any portion of an approved program would be entitled to a hearing under the provisions of s. 120.569, F.S.

Section 6. Provides an effective date of July 1, 2012.

⁹ Pursuant to s. 120.52(1), F.S., a WMD comes within the definition of an agency. Section 120.52(2), F.S., provides that the adoption of a rule or entry of a final order is an "agency action". A party whose substantial interests are affected by the proposed agency action of a WMD is entitled to a hearing under the basic procedures set out in s. 120.569, F.S. and the specific hearing procedures provided in s. 120.57, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill requires the priority list and schedule that is submitted to the DEP for establishing minimum flows and levels for certain water bodies to also include those water bodies that have the potential to be affected by withdrawals in an adjacent WMD which results in the DEP having to adopt additional reservations, minimum flows or levels, and recovery and prevention strategies. This provision in the bill could result in an indeterminate fiscal impact on the DEP.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill requires WMDs to provide technical information and staff support to the DEP for the development of a reservation, minimum flow or level, or recovery or prevention strategy for adoption by rule by the DEP. This could result in an indeterminate fiscal impact on the WMDs.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill has a potentially positive fiscal impact on WMDs who enter into interagency agreements by reducing the duplication of services and promoting streamlining.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes the reservations, minimum flows and levels, and recovery or prevention strategies adopted by the DEP to be applied by the WMDs, without having to adopt them by rule. The bill also provides that cooperative funding programs are not subject to the rulemaking requirements of chapter 120. However, a party whose substantial interests are affected by any portion of an approved program would be entitled to seek a hearing under the provisions of s. 120.569, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 8, 2012, the State Affairs Committee amended and adopted CS/CS/HB 157 as a committee substitute (CS). The CS does the following:

- Deletes language relating to conditions for a permit.
- Provides that a priority list and schedule must also identify any reservations proposed by a WMD to be established. The priority list and schedule must identify those listed water bodies that have the potential to be affected by withdrawals in an adjacent WMD, and may be appropriate for DEP adopt of the minimum flow or level or reservation.
- Provides that a WMD must provide the DEP with technical information and staff support for the development of a reservation, minimum flow or level, or recovery or prevention strategy to be adopted by rule by the DEP. A reservation, minimum flow or level, or recovery or prevention strategy adopted by rule by the DEP must be applied by the WMDs without adoption of such reservation, minimum flow or level, or recovery or prevention strategy by rule.

This analysis is drawn to the Committee Substitute for CS/CS/CS/HB 157.

On January 24, 2012, the Rulemaking & Regulation Subcommittee amended and passed CS/HB 157 as a committee substitute for the committee substitute (CS/CS). The two amendments adopted did the following:

- Created a new Section 1 which amended s. 373.042, F.S., to provide a process for a person substantially affected by a minimum flow or level, reservation, or recovery or prevention strategy proposed by the governing board of an adjoining WMD to request DEP to review and comment on the proposal.
- Added language to Section 2 of CS/HB 157 (now renumbered as Section 3 in CS/CS/HB 157) to clarify the elements adopted by an adjoining WMD a governing board must consider when reviewing requested permit modifications which increase permitted quantities or transfer permitted quantities to a new or existing source.

This analysis is drawn to the Committee Substitute for CS/CS/HB 157.

On January 11, 2012, the Agriculture & Natural Resources Subcommittee amended and passed HB 157 as a committee substitute (CS). The CS does the following:

- Interagency agreements-Requires the governing board of a WMD, in determining the effect of a proposed consumptive use of water on the water resources of an adjoining district, to apply, without adopting by rule, the reservations, minimum flows and levels, and recovery or prevention strategies adopted by rule after July 1, 2012, by the adjoining WMD; provides that the governing board cannot authorize a consumptive use of water that violates any reservation adopted pursuant to s. 373.223(4), F.S., or any MFL adopted after July 1, 2012, unless the permit is issued in accordance with the recovery or prevention strategy adopted by rule by the adjoining WMD; provides that the governing board may grant a variance from the recovery or prevention strategy if the applicant identifies an alternative strategy to assist with the recovery of or the prevention of harm to a water body; provides that any rule applied pursuant to this subsection that is challenged under chapter 120, F.S., must be defended by the WMD that adopted the rule; provides that this does not apply to and may not be considered for any permit issued before July 1, 2012, including a review of a compliance report submitted pursuant to s. 373.236, F.S.; provides that a WMD must consider the reservations, minimum flows and levels, and recovery strategies adopted by rule after July 1, 2012, by the adjoining WMD if a modification of a permit issued prior to July 1, 2012, is requested by the

permittee to increase permitted quantities or to transfer of permitted quantities to a new or existing source.

- Conditions for a permit-provides that a consumptive use of water permit may not be considered if issued before July 1, 2012. Notwithstanding, a WMD must consider a reservation, minimum flows and levels, and recovery strategies adopted by rule after July 1, 2012, by the adjoining WMD if a modification of a permit issued prior to July 1, 2012, is requested by the permittee to increase permitted quantities or to transfer of permitted quantities to a new or existing source.
- Group insurance-allows a WMD to offer its employees and the employees of another WMD a group health insurance program.
- Regional water supply planning- directs the WMDs to jointly develop the water supply development component of a regional water supply plan with a regional water supply authority.
- Rules- cooperative funding programs are not subject to the rulemaking requirements of chapter 120, however any portion of an approved program which affects the substantial interests of a party is subject to chapter 120.