

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	HB 7	FINAL HOUSE FLOOR ACTION:	
SPONSOR(S):	Porter; Pilon and others	117 Y's	0 N's
COMPANION BILLS:	(SB 244)	GOVERNOR'S ACTION:	Approved

SUMMARY ANALYSIS

HB 7 passed the House on May 1, 2013, as SB 244. The bill provides that the priority list and schedule submitted to the Department of Environmental Protection (DEP) by the water management districts (WMDs) also identify any reservations proposed by the WMDs to be established and those listed water bodies that have the potential to be affected by withdrawals in an adjacent WMD for which the DEP's adoption of a reservation or minimum flows and levels (MFL) 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 WMD must apply any reservation, minimum flow or level, or recovery or prevention strategy adopted by the DEP by rule without the WMD's adoption by rule of such reservation, minimum flow or level, or recovery or prevention strategy.

In addition, the bill provides that if 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. 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 provision does not impair any interagency agreement in effect on July 1, 2013.

The bill creates s. 373.171(5), F.S., exempting cooperative funding programs instituted by the several water management district governing boards from the rulemaking requirements of Ch. 120, F.S. 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.

Lastly, the bill requires all WMDs, not just the Southwest Florida Water Management District, to jointly develop, together with the regional water supply authority, the water supply development component of a regional water supply plan, when the plan deals with or affects public utilities and public water supply for those areas served by a regional water supply authority.

The bill appears to have an indeterminate negative 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. The bill also appears to have a negative fiscal impact on WMDs by requiring them 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.

The bill was approved by the Governor on June 28, 2013, ch. 2013-229, L.O.F., and became effective on July 1, 2013.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Minimum Flows and Levels

Current Situation

The Department of Environmental Protection (DEP) and each Water Management District (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 or 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 peer review.

A person who will be substantially affected by a proposed minimum flow or minimum level may request that the 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 states that the final report is admissible in evidence in any subsequent administrative challenge to establishing the minimum flow or level.⁵

The DEP has the sole authority to review rules of WMDs to ensure consistency with the DEP’s water resource implementation rule.⁶ This review must 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 the priority list and schedule submitted to the DEP by the WMDs for the establishment of MFLs and reservations also identify:

- 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 the DEP adoption of a reservation or a minimum flow or level 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

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 unless the time is extended by agreement of all the parties.

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 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. A WMD must apply any reservation, minimum flow or level, or recovery or prevention strategy adopted by the DEP by rule without the WMD's adoption by rule of such reservation, minimum flow or level, or recovery or prevention strategy.

Interagency Agreements

Current Situation

Pursuant to chapter 373, F.S., the state regulates various activities that affect surface waters and wetlands through the Environmental Resource Permit (ERP) program. The program is implemented jointly by the DEP and the five WMDs.⁸ Operating Agreements between 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 WMD 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 to 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 projects 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 their division of responsibilities agreement and to enter into further interagency agreements by rulemaking 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). 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 regulatory activity crosses WMD boundaries, the affected WMDs may designate a single affected WMD by interagency agreement to carry out the WMD's regulatory responsibilities within that geographic area.

⁸ The five water management districts include Northwest Florida WMD, Suwannee River WMD, St. Johns River WMD, Southwest Florida WMD, and South Florida WMD.

WMDs do not have the same 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., discussed above. 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. The provisions in this new subsection will not impair any interagency agreement in effect on July 1, 2013.

Rules/Cooperative Funding Programs

Current Situation

The Boards of the several WMDs are authorized to adopt rules to implement their responsibilities under Chapter 373, F.S.⁹ A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms.¹⁰ To adopt a rule an agency must have an express grant of authority to implement a specific law by rulemaking.¹¹ The particular statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.¹² A delegation of authority to an administrative agency by a law that is vague, uncertain, or so broad as to give no notice of what actions would violate the law, could be ruled unconstitutional because it allows the agency to make the law.¹³ The Legislature may delegate rule-making authority to agencies but not the authority to determine what the law should be.¹⁴

The term “cooperative funding program” is not defined by statute. WMD attorneys have supplied the following informal working definitions:

- “Cooperative funding” or “cooperative funding program” means the expenditure of federal, state, or district funds in support of and in cooperation with other governmental entities or not-for-profit organizations for the purpose of accomplishing specific projects that meet the district’s core mission responsibilities in the areas of water supply, flood protection, water quality protection, and preservation and enhancement of natural systems. Cooperative funding is not a procurement activity. The cooperating entity is responsible for supervision of the cooperative project and contributes funds and/or services in support of the cooperative project.¹⁵

⁹ Section 373.171, F.S.

¹⁰ Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

¹¹ Sections 120.52(8) & 120.536(1), F.S.

¹² *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

¹³ *Conner v. Joe Hatton, Inc.*, 216 So.2d 209 (Fla.1968).

¹⁴ *Sarasota County. v. Barg*, 302 So.2d 737 (Fla. 1974).

¹⁵ Informally suggested by District staff in an email of March 5, 2013, from the St. John’s River WMD Office of Communications and Intergovernmental Affairs to Staff of RO&R Subcommittee (SJRWMD 3/5/2013 email). This was not represented as the official position of the District.

- “A cooperative funding program is a program in which a government agency through the use of legal agreements with other entities (local government, special district, private company, etc.) provides funding for public purposes consistent with the statutory mission of the agency.”¹⁶

All WMDs participate with entities such as local governments or private landowners in cost-sharing for certain projects, including those creating sustainable water resources, providing flood protection, and enhancing conservation efforts. As authority for these arrangements the WMDs rely on their general responsibilities to protect water quality and regulate water supply.¹⁷ Some are directed by proviso in the General Appropriations Act. The nature and fiscal impact of these funding programs is included generally in their annual budgeting process¹⁸ and included in the budget of each WMD, usually denominated “interagency expenditures.”¹⁹ The policies and procedures controlling the application process, consideration, award, and implementation for each program are not ordinarily adopted through the rulemaking process of the Administrative Procedure Act (APA), with exceptions noted below.²⁰

The Southwest Florida WMD (SWFWMD), in conjunction with the Department of Agriculture and Consumer Services, implements the “Facilitating Agricultural Resource Management Systems Program” (FARMS), the one program authorized by statute expressly referencing “cooperative funding programs.”²¹ The District adopted rules to implement this program (Chapter 40D-26, Florida Administrative Code).²² SWFWMD also incorporated a joint funding agreement into the rule adopted as part of its strategy for recovery of minimum water flows and levels and environmental resources recovery plan for the Northern Tampa Bay Water Use Caution Area.²³ SWFWMD separately established a “Cooperative Funding Initiative” providing uniform policies and procedures for the District to cooperate in other projects “with county governments, municipalities, water supply authorities, and other interested entities in water management programs and projects of mutual benefit....”²⁴ These other cooperative funding arrangements are used by the District primarily to assist with water quality, water supply development, and water resource projects.²⁵ SWFWMD budgets funding for cooperative

¹⁶ Informally suggested in an email of March 6, 2013, from staff of the South Florida WMD to staff of the RO & R Subcommittee (SWFWMD 3/6/2013 email). This was not represented as the official position of the District.

¹⁷ Section 373.083, F.S. Specific water quality projects may rely on ss. 373.042, 373.451, 373.536, 373.705, and 373.707, F.S. Water resource development projects are authorized under s. 373.705(3), F.S., and may also reference ss. 259.105, 373.470, 373.536, 373.701(3), and 373.703(2), (6), (9), F.S. Sections 373.701, 373.703, and 373.707 provide additional authority for water supply projects.

¹⁸ WMDs annually submit a preliminary budget to the Speaker of the House and the President of the Senate. Section 373.535, F.S. Public hearings are part of the budgeting process for each District, as is review and approval by the Executive Office of the Governor. Section 373.536, F.S.

¹⁹ See, Northwest Florida WMD “Consolidated Annual Report 2013-01, p. 4-6, at <http://www.nfwmd.state.fl.us/pubs/consolidatedAR/consolAR.html>; Suwannee River WMD “Final Budget and Documents to the Governor” at <http://www.mysuwanneeriver.com/index.aspx?NID=136>; St. John’s River WMD “FY 2012-2013 Adopted Budget Overview” at <http://floridaswater.com/budget/>; Southwest Florida WMD “FY 2012-2013 Budget” at <http://www.swfwmd.state.fl.us/business/budget/>; South Florida WMD “FY 2013 Budget” at http://www.sfwm.gov/portal/page/portal/xweb%20about%20us/agency%20reports#budget_strategic_plan.

²⁰ Chapter 120, F.S. Each WMD meets the definition of an “agency” under s. 120.52(1), F.S., and may not apply a general policy implementing a specific statutory responsibility without first adopting that policy as a rule. Section 120.54, F.S. However, a specific contract between a District and another party, such as an agreement with a local government to for cost-sharing of a water supply project, is not a rule.

²¹ Section 373.0363(3) & (4)(b), F.S. The SWFWMD asserts these are not regulatory programs and thus not subject to rulemaking. The SWFWMD asserts that if it were required to adopt rules for all procedures and policies pertaining to a cooperative funding program, the program could not be modified as necessary or implemented as efficiently.

²² Rule 40D-26.011, F.A.C.

²³ Rule 40D-80.073(8)(a), F.A.C., incorporating the “Joint Funding Agreement Between the Southwest Florida Water Management District and The City of Tampa for Implementation of Recovery Projects to meet Minimum Flows of the Lower Hillsborough River, dated October 19, 2007.”

²⁴ Board Policy Number 130-4. The uniform application process is established in District Procedure Number 13-4.

²⁵ March 6, 2013, email from SWFWMD Office of the General Counsel to staff of RO & R Subcommittee (SWFWMD 3/6/2013 email).

projects as “Interagency Expenditures (Cooperative Funding)” under “Acquisition, Restoration and Public Works,” “Regulation,” and “Outreach.”²⁶

The Suwannee River WMD (SRWMD) relies on written policies and procedures for accepting, evaluating, and granting applications for cost-sharing projects.²⁷ The Board of SRWMD by directive established a separate funding program to encourage improved irrigation efficiency, conservation, and pollution prevention by agricultural producers.²⁸ SRWMD budgets funding for cooperative projects as “Interagency Expenditures” under “Water Resources Planning and Monitoring” and “Acquisition, Restoration and Public Works.”²⁹

The South Florida WMD (SFWMD) implemented a uniform system controlling the filing, evaluation, award, and monitoring of “grants,” which is defined to include cooperative agreements.³⁰ SFWMD currently participates in over 900 funding agreements with local governments, federal, state, and local agencies, and private entities. These projects range from a “Water Savings Incentive Program” in part implementing s. 373.707, F.S., to “Watershed Protection Plan” projects as part of Everglades restoration,³¹ to environmental monitoring.³² SFWMD apparently summarizes cooperative funding in its budget as “Interagency Expenditures.”³³

The St. Johns River WMD (SJRWMD) presently helps fund 22 projects³⁴ and participates in another 4 funded by state or federal funds for a specific purpose.³⁵ SJRWMD also engages in cooperative funding with agricultural landowners through its Tri-County Agricultural Area Water Management Partnership.³⁶ SJRWMD budgets cooperative funding expenditures as “Interagency Expenditures (Cooperative Funding)” only under “Acquisition, Restoration and Public Works.”³⁷

The Northwest Florida WMD (NFWWMD) currently participates in cost-sharing for a number of cooperative projects, most of which pertain to water supply infrastructure.³⁸ NFWWMD budgets cooperative funding as “Interagency Expenditures (Cooperative Funding)” under “Acquisition, Restoration and Public Works” and “Operations and Maintenance of Lands and Works.”³⁹

Each WMD has policies and procedures for the “cooperative funding” process, including submission and consideration of applications and monitoring project progress. These policies appear to meet the

²⁶ <http://www.swfwmd.state.fl.us/business/budget/>

²⁷ “Cooperative Funding Program Policy” and “Cooperative Funding Program Procedure” on file with staff.

²⁸ “Suwannee River Water Management District Governing Board Directive GBD12-0005,” on file with staff.

²⁹ <http://www.mysuwanneeriver.com/index.aspx?NID=136>

³⁰ “South Florida Water Management District Policies and Procedures, Part II, Art. XII, Grants and Cooperative Agreements” at <http://library.municode.com/index.aspx?clientId=70019>.

³¹ Section 373.470(6)(e), F.S.

³² SFWMD 3/6/2013 email.

³³ “South Florida Water Management District Standard Format Tentative FY 2013 Budget Submission” (8/1/2012), p. 30, at http://my.swfwmd.gov/portal/pls/portal/portal_apps.repository_lib_pkg.repository_browse?p_keywords=budgetfy2013&p_thumbnails=no

³⁴ “Four projects related to water resource development in accordance with 373.536, 373.705 and 373.707, F.S.; Twelve projects related to development plans and programs for surface water projects in accordance with 373.451 and 373.707, F.S.; and Six projects related to establishment of MFLs and AWS in accordance with 373.042, 373.536, 373.705, and 373.707, F.S.” SJRWMD 3/5/2013 email.

³⁵ “Water Protection and Sustainability Program; section 373.707(6) – (9), F.S.; Indian River Lagoon License Plate Program; section 320.08058(10), F.S.; Lower St. Johns River Basin Initiative; special legislative appropriations; National Estuaries Program: Federal Clean Water Act, 33 U.S.C. section 466, et seq.,” SJRWMD also provides an online summary of its cooperative funding projects at <http://floridaswater.com/cooperativedfunding/>.

³⁶ Application guidelines, form, eligibility checklist, and application procedure summary at <http://floridaswater.com/agriculture/costshare.html>.

³⁷ “FY 2012-2013 Budget,” p. 11-13, 16, at <http://www.swfwmd.state.fl.us/business/budget/>.

³⁸ “Consolidated Annual Report 2013-01,” Ch. 1, p. 4-6, at <http://www.nfwfmd.state.fl.us/pubs/consolidatedAR/consolAR.html>.

³⁹ “Preliminary Fiscal Year 2013-2014 Budget,” p. 37-46, at <http://www.nfwfmd.state.fl.us/bizfinance.html>.

statutory definition of “rules” provided by Florida’s APA⁴⁰ because they generally apply to all applicants seeking cost-sharing assistance and failure to comply may result in delay or denial of an application or affect the disbursement of funds by the District for approved project. Failing to adopt a statement meeting the definition of a rule exposes a District to an order directing that it immediately cease using the unadopted statement.⁴¹ Agencies generally may not rely on an unadopted rule to determine a party’s substantive rights.⁴²

The APA currently provides that any agency proceeding affecting the substantial rights of a party must be conducted under the statutory hearing procedures unless the parties choose mediation under s. 120.573, F.S., or the summary hearing procedure under s. 120.574, F.S.⁴³

Effect of Proposed Changes

The bill creates s. 373.171(5), F.S., exempting cooperative funding programs from the rulemaking requirements of chapter 120, F.S. The bill does not define “cooperative funding program” and the term could be subject to differing interpretations and applications by the WMDs. Because no rulemaking exemption is necessary at present for WMDs to execute cost-sharing contracts with other entities, the exemption would remove the rulemaking requirement from the adoption of the standard policies and procedures presently guiding this contracting process as administered by the separate WMDs.

The bill also requires that “any portion of an approved program affecting the substantial interests of a party would be subject to the administrative hearing provisions under s. 120.569, F.S.”⁴⁴ This provision appears to restate the requirement of existing law that agency actions affecting such interests are subject to such review.

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.; and
- An analysis of where variances may be used to create water supply development or water resource development projects.

Currently, only the Southwest Florida WMD is required to jointly develop, with the regional water supply authority, the water supply development component of a regional water supply plan where such plan deals with or affects public utilities and public water supply for those areas served by a regional water supply authority.

⁴⁰ Section 120.52(16), F.S.

⁴¹ Section 120.56(4), F.S.

⁴² Section 120.57(1)(e), F.S.

⁴³ Section 120.569(1), F.S.

⁴⁴ 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.

Effect of Proposed Changes

The bill amends s. 373.709(3), F.S., to require all WMDs to jointly develop, together with the regional water supply authority, the water supply development component of a regional water supply plan that deals with or affects public utilities and public water supply for those areas served by a regional water supply authority.

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 may result 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 negative 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 negative fiscal impact on the WMDs.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

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