The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Environmental Preservation and Conservation

BILL:	SPB 7062
INTRODUCER:	Environmental Preservation and Conservation Committee
SUBJECT:	Ratification of Department of Environmental Protection Rules
DATE:	March 25, 2015 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hinton	Uchino		**EP Submitted as Committee Bill**

I. Summary:

SPB 7062 ratifies Rule 62-42.300, F.A.C., establishing minimum flows and levels (MFLs) for the Lower Santa Fe and Ichetucknee Rivers, and associated priority springs. It requires the DEP to publish a notice of enactment in the Florida Administrative Register or the Florida Administrative Code, or both, as appropriate.

II. Present Situation:

Minimum Flows and Levels

MFLs are established for water bodies in order to prevent significant harm as a result of permitted water withdrawals. MFLs are typically determined based on evaluations of topography, soils, and vegetation data collected within plant communities, and other pertinent information associated with the water resource. MFLs take into account the ability of wetlands and aquatic communities to adjust to changes in hydrologic conditions and allow for an acceptable level of hydrologic change to occur. When use of water resources shifts the hydrologic conditions below levels defined by MFLs, significant ecological harm can occur.[1]

The consumptive use of water can draw down water levels and reduce pressure in the aquifer.[2] By establishing MFLs for non-consumptive uses,[3] the water management districts (WMDs) can determine how much water is available for consumptive uses.

Section 373.042, F.S., requires the Department of Environmental Protection (DEP) or WMDs to establish MFLs for priority water bodies to prevent significant harm from water withdrawals.

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[1] St. Johns River Water Management District, *Water Supply: An Overview of Minimum Flows and Levels*, http://www.sjrwmd.com/minimumflowsandlevels/ (last visited Mar. 19, 2015).

[2] Department of Community Affairs, *Protecting Florida's Springs: An Implementation Guidebook*, 3-5 (Feb. 2008), *available at* http://www.dep.state.fl.us/springs/reports/files/springsimplementguide.pdf (last visited Mar. 19, 2015).

[3] Examples of consumptive uses include agricultural irrigation, public water supply, golf course irrigation, mining, and power generation. Non-consumptive uses of water include recreational, aesthetic, and navigational uses of water resources.

MFLs are considered rules and are subject to ch. 120, F.S., challenges. MFLs are established by the DEP, in coordination with the applicable WMD, using the best available data and are subject to independent scientific peer review at the request of the WMD, or, if requested, by a third party.[4]

MFLs apply to decisions affecting permit applications, declarations of water shortages, and assessments of water supply sources. Models for surface waters and groundwater are used to evaluate the effects of existing and/or proposed consumptive uses and the likelihood they might cause significant harm.

If the existing flow or water level in a waterbody is below, or is projected to fall within 20 years below, the applicable minimum flow or water level, the DEP or WMD must expeditiously implement a recovery or prevention strategy.[5] Recovery or prevention strategies include phasing or a timetable that allows for the development of sufficient water supplies for all existing and projected reasonable-beneficial uses. The strategy also includes development of additional water supplies and implementation of conservation strategies, the use of impact offsets, and other efficiency measures to accommodate withdrawals.[6]

Consumptive Use Permits

Consumptive use permits (CUPs) establish the duration and type of consumptive water use as well as the maximum amount of water that may be withdrawn daily by a permittee.[7] Each CUP must be consistent with the objectives of the issuing WMD, or the DEP, and may not be harmful to the water resources of the area.[8] To obtain a CUP, an applicant must establish that the proposed use of water satisfies a statutory test, commonly referred to as "the three-prong test." Specifically, the proposed water use must:

- Be a "reasonable-beneficial use;"[9]
- Not interfere with any presently existing legal use of water; and
- Be consistent with the public interest.[10]

Regional Water Supply Planning

WMDs are required to conduct water supply needs assessments. If the assessment determines that existing resources will not be sufficient to meet reasonable-beneficial uses for the planning period for a particular water supply planning region, it must prepare a regional water supply plan.[11] Regional water supply plans must be based on at least a 20-year planning period and must include:

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[4] Section 373.042, F.S.
[5] Section 373.0421, F.S. See also Fla. Admin. Code R. 62-40.473 (2013).
[6] *Id.*
[7] Fla. Admin. Code R. 40C-2 (2014).
[8] Section 373.219, F.S.
[9] Section 373.019(16), F.S. Reasonable-beneficial use is defined as, "the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest." *See also* Fla. Admin. Code R. 62-40.410(2) (2013), for a list of 18 factors to help determine whether a water use is a reasonable-beneficial use.
[10] Section 373.223(1), F.S.
[11] Section 373.709(1), F.S.

- A water supply development component;
- A water resource development component;
- A recovery and prevention strategy;
- A funding strategy;
- Consideration of how water supply development projects serve the public interest or save costs;
- Technical data and information;
- Any MFLs established for the planning region;
- 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.[12]

Mobile Irrigation Labs

Mobile Irrigation Labs (MILs) consist of one or two person teams that provide site-specific evaluation and analysis of irrigation systems. They provide recommendations for the improvement of existing irrigation systems and equipment, as well as education on water conservation, irrigation planning, and irrigation management. MILs operate within all five WMDs and are supported by four of the WMDs, the Department of Agriculture and Consumer Services, the Natural Resources Conservation Service, and certain counties and utilities.[13]

After evaluating a particular agricultural operation, the MIL provides a report that recommends improvements and irrigation schedules. The schedules offer general guidelines to determine when and how much to irrigate based on system efficiency, crop requirements, and soil characteristics. The program provides for follow-up visits to collect more data and install free soil moisture-sensing devices to help growers adapt the schedule to the site. The program also provides training for farmers to calibrate and maintain the equipment.[14]

The North Florida Southeast Georgia Regional Groundwater Flow Model

The North Florida Southeast Georgia (NFSEG) Regional Groundwater Flow Model is currently in development. The general goal of the model is to construct a groundwater flow model that will aid in the assessment of climatic and anthropogenic effects on the groundwater resources of north Florida and southeast Georgia.[15] It will also provide a regional framework for the development and application of models for use in assessments of "critical areas of concern."[16] A "critical area of concern" is an area where there is a particular concern regarding drawdown

[12] Section 373.709(2), F.S.
[13] Department of Agriculture and Consumer Services, *Evaluate Your Irrigation System*, http://www.freshfromflorida.com/Divisions-Offices/Agricultural-Water-Policy/Evaluate-Your-Irrigation-System (last visited Mar. 19, 2015).
[14] DEP, *Statement of Estimated Regulatory Costs*, 24 (Apr. 8, 2015), *available at* http://www.dep.state.fl.us/water/waterpolicy/docs/mflrulemaking/serc_04_08_2014.pdf (last visited Mar. 19, 2015).
[15] North Florida Regional Water Supply Partnership, *North Florida Southeast Georgia (NFSEG) Regional Groundwater Flow Model: Goals and Objectives Technical Memo*, *available at* http://northfloridawater.com/pdfs/NFSEG/NFSEG_goals_objectives_final.pdf (last visited Mar. 19, 2015)).
[16] *Id.*

impacts due to regional and/or local pumping effects. Areas that have been identified as critical areas of concern in the NFSEG Regional Groundwater Flow Model include:

- The Upper Santa Fe Basin;
- The Lower Santa Fe Basin;
- The Upper Suwannee River Basin;
- The Alapaha River Basin; and
- The Upper Etonia Creek Basin.[17]

The flow model must be designed and applied such that it will aid in pinpointing the exact sources of impacts on the basin and determine the relative contributions of the various parties involved. One of the ongoing problems the model will be designed to address more accurately is separating climatic impacts from anthropogenic impacts.[18]

Legislative Ratification of Agency Rules

Pursuant to s. 120.541(3), F.S., the Legislature must ratify a rule that:

- Has an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of $1 million in the aggregate within five years after the implementation of the rule;
- Has an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of $1 million in the aggregate within five years after the implementation of the rule; or
- Increases regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within five years after the implementation of the rule.[19]

If a rule requires ratification by the Legislature, the rule must be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the regular legislative session. The rule may not go into effect until it is ratified by the Legislature.[20]

Statement of Estimated Regulatory Costs

According to the DEP's statement of estimated regulatory costs for the proposed MFL rule for the Suwannee River and St. Johns River WMDs, applicants for new CUPs or CUP renewals may be affected by the rule, if the CUP has the potential to impact the MFL.[21] The DEP anticipates that approximately 28 agricultural water use permit holders will be required to provide offsets under the proposed rule, requiring a total offset of 2.6 million gallons per day (mgd). The DEP also anticipates that, of new permit requests, approximately 40 agricultural users impacted by the rule will have to provide total offsets of 11.2 mgd. The anticipated offset required to accommodate both groups will be 13.8 mgd.[22]

[17] *Id.*
[18] *Id.*
[19] Section 120.541(2)(a)1.-3., F.S.
[20] Section 120.541(3), F.S.
[21] *Supra* note 14, at 1-2.
[22] *Supra* note 14, at 15.

If the entire amount of water is offset by implementing additional agricultural water conservation measures via retrofitting center pivot irrigation systems to make them more efficient, the total cost will approach $3 million over five years.[23] Because the Suwannee River WMD cost-share program typically covers 80 percent of retrofit costs, the actual regulatory burden will likely be significantly less.[24] Other possible methods, such as changing withdrawal locations, farming practices, or crop rotation, are difficult to project expected costs for. The development of alternative water supplies for agricultural use as an option to provide offsets will likely be significantly limited by cost and feasibility.[25]

Proposed Rule 62-42.300, F.A.C.

Proposed Rule 62-42.300, F.A.C., establishes MFLs for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs.[26] The proposed rule limits the duration of renewed CUPs to five years for existing users that do not request additional allocations to five years if the requested allocation has the potential to affect MFLs in the Lower Santa Fe or Ichetucknee Rivers. CUPs may be issued for longer than five years if the permittee demonstrates that the proposed allocations' impacts on the MFLs will be eliminated or offset.

For a CUP holder that applies for additional allocations in its renewal application that may impact the MFLs in the Lower Santa Fe or Ichetucknee Rivers, the applicant must provide reasonable assurance of elimination or offset of that portion of the requested allocation that exceeds the existing allocation and that results in potential impacts to those water bodies. Such CUPs will be issued for five years unless the potential impacts to the MFLs will be eliminated or offset.

For new CUP applications that impact the MFLs, the entity requesting the permit must provide reasonable assurance that any potential impacts will be eliminated or offset. For existing authorized uses, permits are not subject to modification unless provided for in future rule revisions.

The rule provides for two special conditions on certain CUPs. For a CUP that is issued for more than five years, it must contain a provision stating that the CUP is subject to modification during the term of the permit, upon reasonable notice by the WMD, to achieve compliance with any approved MFL recovery or prevention strategy. The second provision provides that for new or renewed agricultural CUPs in Columbia, Suwannee, Union, and Gilchrist Counties, and portions of Baker, Bradford, and Alachua Counties within the boundaries of the Suwanee River WMD, the permittee must participate in an MIL program and allow access to the project site for the purpose of conducting an MIL evaluation at least once every five years.

By the publication date of the final peer review report on the NFSEG Regional Groundwater Flow Model, or by December 31, 2019, whichever is earlier, the DEP must:

[23] *Supra* note 14, at 17.
[24] *Supra* note 14, at 16.
[25] *Supra* note 14, at 23.
[26] Lower Santa Fe priority springs are: Santa Fe Rise, ALA112971, Hornsby, Columbia, Poe, COL 101974, Rum Island, July, Devil's Ear, and GIL.1012973. Ichetucknee River priority springs are: Ichetucknee Head, Blue Hole, Mission, Devil's Eye, Grassy Hole, and Mill Pond.

- Publish a Notice of Proposed Rule to strike Rule 62-42.300(a)-(d), F.A.C., which establishes the MFLs for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs;
- Re-propose MFLs for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs along with any associated recovery or prevention strategies; and
- Adopt the proposed rule in accordance with the timeframes provided in s. 120.54(3), F.S.

In 2014, the Legislature enacted HB 7171, exempting Rule 62-42.300, F.A.C., from ratification. Subsequently, the rule was challenged in the Department of Administrative Hearings (DOAH). The Administrative Law judge issued a ruling on September 11, 2014, finding that the proposed rule setting the MFLs was vague because the period of record for the flow duration curve and the synthetic data used to generate the curve or, alternatively, a reference to the technical report where the information could be found, was not included.[27]

On November 7, 2014, a Notice of Change was published, which added the technical information the DOAH judge found was required. The required change did not change the proposed minimum flows or the recovery strategy included in the proposed rule.[28] A subsequent DOAH challenge was successfully defended by the DEP.[29]

III. Effect of Proposed Changes:

The bill ratifies Rule 62-42.300, F.A.C.. The rule establishes MFLs for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs.

The bill also:

- Ratifies Rule 62-42.300, F.A.C., for the sole and exclusive purpose of satisfying any condition on effectiveness imposed under s. 120.541(3), F.S.;
- Requires the DEP to note its enactment and effective dates in the Florida Administrative Code, the Florida Administrative Register, or both, as appropriate;
- Does not alter rulemaking authority or constitute a legislative preemption of, or exception to, any other provision of law regarding adoption or enforcement of the rule; and
- Does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited.

The bill will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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[27] *Still v. Suwannee River Water Management District*, Case No. 14-1420RU (Fla. DOAH 2004).
[28] DEP, *Florida Department of Environmental Protection Addendum to April 8, 2014 Statement of Estimated Regulatory Costs*, 2 (Dec. 4, 2014), *available at* http://www.dep.state.fl.us/water/waterpolicy/docs/mflrulemaking/SERC_add_040814.pdf (last visited Mar. 19, 2015)
[29] DEP Office of Water Policy, *MFL Rulemaking*, http://www.dep.state.fl.us/water/waterpolicy/mflrulemaking.htm (last visited Mar. 19, 2015).

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

For CUP renewal applications that affect the MFL for the Lower Santa Fe and Ichetucknee Rivers, if permittees are limited to five year permits, there could be an increase in costs for more frequent permit renewals. The DEP estimates that the total amount of additional application fees will be approximately $9,000.

According to the DEP, the rule is estimated to cost approximately $3 million for center-pivot irrigation system retrofits for agricultural permittees affected by the rule. Cost-sharing programs will likely reduce this cost; however, the exact reduction cannot be determined at this time.

CUP restrictions could force agricultural users to diversify their farming practices or implement water conservation measures. The economic impact will be determined by the activities of affected users to accommodate any restrictions placed on operations.

For agricultural operations whose costs increase due to the rule, those costs will likely be passed on to consumers.

C. Government Sector Impact:

Any offsets required under the MFL that are eligible for cost-sharing could result in increased costs, depending on the number of projects that qualify for cost-sharing. This impact is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates an undesignated section of Florida law.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.