

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: SB 364

INTRODUCER: Senator Hays

SUBJECT: Consumptive Use Permits for Development of Alternative Water Supplies

DATE: February 5, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hinton	Uchino	EP	Favorable
2.	_____	_____	CA	_____
3.	_____	_____	AGG	_____
4.	_____	_____	AP	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

SB 364 directs that alternative water supply (AWS) development projects are eligible for consumptive use permits (CUPs) of at least 30 years. The permits are subject to compliance reports and water management district (WMD) water shortage orders. The bill provides that AWS permits may be reduced to prevent unanticipated harm to water resources or existing legal uses. The bill also specifies an AWS CUP may not be issued for nonbrackish groundwater supplies or nonalternative water supplies. Lastly, the bill clarifies that entities have the option to apply for either at least 20-year permits or at least 30-year permits.

This bill substantially amends s. 373.236, of the Florida Statutes.

II. Present Situation:

Consumptive Use Permitting

Section 373.236(5), F.S., authorizes CUPs for the development of AWS projects. A CUP establishes the duration and type of water use as well as the maximum amount that may be withdrawn. A WMD or the DEP may impose reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of the issuing WMD or the DEP and is not harmful to the water resources of the area.¹

¹ Section 373.219, F.S.

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 must:

- be a “reasonable-beneficial use” as defined in s. 373.019(16), F.S.;
- not interfere with any presently existing legal use of water; and
- be consistent with the public interest.²

The Three-Prong Test

“Reasonable-beneficial use,” the first prong of the test, 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.”³ The Legislature has declared water a public resource. Therefore, wasteful uses of water are not allowed even if there are sufficient resources to meet all other demands.

To that end, the DEP has promulgated the Water Resource Implementation Rule that incorporates interpretive criteria for implementing the reasonable-beneficial use standard based on common law and water management needs.⁴ These criteria include consideration of the quantity of water requested; the need, purpose, and value of the use; and the suitability 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.⁵

The second element of the three-prong test protects the rights of existing legal uses of water for the duration of their permits.⁶ New CUPs cannot be issued if they would conflict with an existing legal use. This criterion is only protective of water users that actually withdraw water, not passive users of water resources.⁷

The final 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,” determination of a public interest is made on a case-by-case basis during the permitting process.⁸ However, the WMDs and the DEP have broad authority to determine which uses best serve the public interest if there are not sufficient resources to fulfill all applicants’ CUPs. In the event that two or more competing applications are deemed to be

² Section 373.223(1)(a-c), F.S.

³ Section 373.019(16), F.S.

⁴ See Rule 62-40, F.A.C.

⁵ *Southwest Florida Water Management District v. Charlotte County*, 774 So. 2d 903, 911 (Fla. 2d DCA 2001) (upholding the WMD’s use of criteria for implementing the reasonable-beneficial use standard).

⁶ Section 373.223(1)(b), F.S.

⁷ See *Harloff v. City of Sarasota*, 575 So. 2d 1324 (Fla. 2d DCA 1991) (holding a municipal wellfield was an existing legal user and should be afforded protection). In contrast, see *West Coast Regional Water Supply Authority v. Southwest Florida Water Management District*, 89 ER F.A.L.R. 166 (Final Order, Aug. 30, 1989) (holding a farmer who passively relied on a higher water table to grow nonirrigated crops and standing surface water bodies to water cattle was not an existing legal user).

⁸ *Supra* note 4.

equally in the public interest, the particular WMD or the DEP gives preference to renewal applications.⁹

Duration of Permits and Compliance Reviews

Pursuant to s. 373.236(1), F.S., CUPs must be granted for 20 years if requested by the applicant and there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit. If either of these requirements is not met, a CUP with a shorter duration may be issued to reflect the period for which reasonable assurances can be provided. The WMDs and the DEP may determine the duration of permits based upon a reasonable system of classification according to the water source, the type of use, or both.

Pursuant to s. 373.236(4), F.S., when necessary to maintain “reasonable assurance” that initial conditions for issuance of a 20-year CUP can continue to be met, a WMD or the DEP may require a permittee to produce a compliance report every 10 years.¹⁰ A compliance report must contain sufficient data to maintain reasonable assurance that the initial permit conditions are met, including original demand projections. After reviewing a compliance report, a WMD or the DEP may modify the permit, including reductions or changes in the initial allocations of water to ensure the water use comports with initial conditions for issuance of the CUP. Permit modifications made by a WMD or the DEP during a compliance review cannot be subject to competing applications for water use if the permittee is not seeking additional water allocations or changes in water sources.

Consumptive Use Permits for the Development of Alternative Water Supplies

Section 373.019(1), F.S., defines “alternative water supplies” as:

[S]alt water; brackish surface and groundwater; surface water captured predominately during wet-weather flows; sources made 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.

CUPs issued pursuant to s. 373.236(5), F.S., for the development of AWS must be issued for at least 20 years. If the permittee issues bonds to finance construction of the AWS project, the permit must be extended to expire upon retirement of the bonds if the permittee requests an extension during the term of the permit and the issuing WMD’s governing board determines the use will continue to meet the CUP’s conditions. Compliance reports may also be required every 10 years for CUPs issued for AWS projects. WMDs generally issue CUPS with a maximum term of 20 years for the development of AWS, although some 30-year CUPs for AWS projects have been issued.

⁹ See s. 373.233, F.S.

¹⁰ In limited instances, the statute authorizes more frequent “look backs”. For example, the Suwannee River WMD may require a compliance report every 5 years through July 1, 2015, after which the “look-back” period returns to 10 years.

III. Effect of Proposed Changes:

Section 1 amends s. 373.236, F.S., clarifying that AWS permits issued for at least 20 years are subject to the reasonable assurance provisions currently required by the DEP and WMDs.

It directs the DEP or the WMDs to issue permits for the development of AWS projects for at least 30 years for permits issued on or after July 1, 2013, if the proper reasonable assurance is provided. If, within 7 years from the issuance of the permit, the permittee issues bonds to finance the project, completes the project, and requests an extension of the CUP duration, the CUP must be extended for a maximum of seven years. This will allow the entity that develops the AWS project to operate the AWS project for 30 years after construction in order to repay 30-year bonds.

CUPs issued pursuant to this bill are subject to compliance reports; however, the quantity of alternative water allocated under the permit cannot be reduced during the compliance review if bonds that financed the project are outstanding. This provision does not apply to adopted districtwide water shortage orders or when an AWS permit results in unanticipated harm to water resources or existing legal uses.

The bill clarifies that CUPs cannot be issued for AWS projects for nonbrackish groundwater supplies (i.e., fresh water) or nonalternative water supplies. It also clarifies that entities may apply for an AWS permit under either s. 373.236(5)(a) or (b), F.S.

Section 2 provides an effective date of July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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:

Most bonds issued to fund the capital construction costs of an AWS project are 30-year bonds; however, most AWS CUPs are only issued for 20 years. This discrepancy may

affect the interest rate the AWS developer has to pay to launch the bonds. The impact of this is indeterminate but may be significant if the uncertainty in renewing a 20-year CUP for a 30-year bond has significant weight in the rating agencies' models. For example, an A-rated \$100 million bond may cost \$7-10 million more over the life of the bond as compared to an AAA-rated bond. Also, by allowing an up to seven-year extension under certain circumstances, AWS developers will be able to operate the AWS project without having to reapply for a CUP at the end of the initial 30-year duration. This will ensure operation of the AWS project for a full 30-year term.

C. Government Sector Impact:

SB 364 may have a negative but indeterminate effect on permit revenues for the DEP or the WMDs; however, any impacts are expected to be met by existing staff and resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

By the Legislature's amending this section to explicitly require reasonable assurance for both the 20-year and 30-year AWS CUP, a court may find the Legislature implicitly excluded the necessity to provide reasonable assurance for a 50-year permit for certain public or government works. It would be the only permit category excluded from statutorily required reasonable assurance requirements of s. 373.236, F.S. Currently, the requirement is implicit and the WMDs require reasonable assurance for the up to 50-year permit.

VIII. Additional Information:

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

None.

B. Amendments:

None.