

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCB ANR 10-11 Stormwater  
**SPONSOR(S):** Agriculture & Natural Resources Policy Committee  
**TIED BILLS:** **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Agriculture & Natural Resources Policy Committee		Lowrance	Reese
1)				
2)				
3)				
4)				
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**SUMMARY ANALYSIS**

The Federal Clean Water Act (CWA) and the Florida Statutes authorize the Department of Environmental Protection (DEP) to: classify surface waters for current and future use, develop water quality criteria, identify Impaired Waters, develop Total Maximum Daily Loads (TMDLs), develop Basin Management Action Plans (BMAPs), and regulate Point and Non-Point Pollution Sources. Currently, the DEP is engaged in three separate rulemaking processes that address water quality criteria: surface water use classification, numeric criteria for nutrients, and a statewide stormwater rule.

In 1982, to manage urban stormwater and minimize impacts to natural systems, Florida adopted a technology-based rule requiring the treatment of stormwater to a specified level of pollutant load reduction for all new development. In 1990, in response to legislation, the DEP developed and implemented the State Water Resource Implementation Rule. In 1999, the Florida Watershed Restoration Act, was enacted leading to the implementation of Florida’s water body restoration program and the establishment of Total Maximum Daily Loads (TMDLs). Levels of nutrient pollution have not significantly improved since 1980 despite strong efforts to control nutrient pollution.

The bill creates s. 373.4131 F.S. and requires the DEP, in coordination with the Water Management Districts (WMDs), to develop a uniform statewide stormwater quality treatment rule providing for exemptions for specified stormwater management systems and permitted activities. The bill specifies that the rule is to provide requirements for developing, adopting, implementing and amending the rule.

The bill requires the DEP to adopt the rule by July 1, 2011, and provides for an exemption from the rulemaking provisions of ch. 120, F.S., for implementation of the rule by WMDs and delegated local programs.

The bill provides authorization for the DEP and WMDs to adopt, amend, and retain specified rules and provides an exemption from the dispute resolution provisions of ch. 70, F.S., for agency action taken pursuant to the rule. Furthermore, the bill specifies applicability, effect, and repeal of pre-existing rules.

The bill specifies that this act will become effective upon becoming law.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

The federal Clean Water Act (CWA)<sup>1</sup> provides the legal authority for Florida to set water quality standards and regulate its surface waters.<sup>2</sup> Pursuant to the CWA, the federal Environmental Protection Agency (EPA) must authorize and approve all of Florida's water quality standards and is required to impose corrective measures if it believes that Florida's standards are inadequate.<sup>3</sup> Water quality standards are the basis for protecting and regulating the quality of surface waters. The CWA, and Florida Statutes, authorize the DEP to:

- **Classify surface waters for current and future use** – The DEP determines which water bodies will be used for industrial purposes, shellfish harvesting, fishing and swimming, potable water, etc.<sup>4</sup>
- **Develop water quality criteria** – The DEP determines the concentration of pollutants (e.g., lead, arsenic, nutrients, etc.) that threatens a water body's designated use.<sup>5</sup>
- **Identify Impaired Waters** – The DEP identifies water bodies that do not meet applicable water quality standards. These waters are placed on an "impaired waters" list, which is shared with the EPA. Water bodies on the list require development of a Total Maximum Daily Load (TMDL).<sup>6</sup>
- **Develop Total Maximum Daily Loads (TMDLs)** – The DEP determines a "target" amount of a pollutant that a specific surface water body can absorb and still maintain its designated use (e.g. drinking, fishing, swimming, shellfish harvesting, etc); a water quality restoration target. One water body may have several TMDLs, one for each pollutant that exceeds the water body's capacity to absorb it safely.<sup>7</sup>
- **Develop Basin Management Action Plans (BMAPs)** – The DEP, through a water management district (WMD), identifies various pollutant "loaders" to a water body and, with the

<sup>1</sup> The principal body of law currently in effect is based on the Federal Water Pollution Control Amendments of 1972 (Pub.L. 92-500, October 18, 1972). Major amendments were enacted in the Clean Water Act of 1977 enacted by the 95th United States Congress (Pub.L. 95-217, December 27, 1977) and the Water Quality Act of 1987 enacted by the 100th United States Congress (Pub.L. 100-4, February 4, 1987).

<sup>2</sup> CWA §510, 33 U.S.C. 1370.

<sup>3</sup> 48 FR 51405, Nov. 8, 1983, as amended at 56 FR 64894, Dec. 12, 1991; 60 FR 15387, Mar. 23, 1995]

<sup>4</sup> 62-302.400 F.A.C.

<sup>5</sup> 62-302.500 and 62-302.530 F.A.C.

<sup>6</sup> 62-303 F.A.C.

<sup>7</sup> Florida's Water Shed Restoration Act of 1999 (s. 403.067, F.S.).

WMDs cooperation, develops a comprehensive set of strategies to reduce pollutant loading, including permit limits on wastewater facilities, urban and agricultural best management practices, conservation programs, and financial assistance. These activities are designed to achieve the pollutant reductions established by the TMDL.<sup>8</sup>

- **Regulate Point and Non-Point Pollution Sources.** The DEP's approach to regulating water quality, including stormwater runoff, is multi-faceted:<sup>9</sup>
  - National Pollutant Discharge Elimination System (NPDES) - The Florida NPDES program controls water pollution by regulating point sources that discharge pollutants into waters of Florida. Point sources are discrete conveyances such as pipes or man-made ditches.
  - Nonpoint Source Management – Nonpoint Source Management is responsible for the implementation of the State of Florida's nonpoint source management programs. These programs are implemented cooperatively by the DEP, Florida's WMDs, other state agencies (i.e., Department of Agriculture and Consumer Services, Department of Health), local governments, and by the public.<sup>10</sup>
  - Environmental Resource Permit Program (ERP) – The DEP and the WMDs amended their stormwater rules in 1995 to combine wetland resource permitting, stormwater quality permitting, and stormwater quantity permitting into a single permit known as the Environmental Resource Permit (ERP).

Currently, the DEP is engaged in three separate rulemaking processes that address water quality criteria: surface water use classification, numeric criteria for nutrients, and a statewide stormwater rule.

Unmanaged urban stormwater creates a wide variety of effects on Florida's surface and ground waters. Urbanization leads to the compaction of soil; the addition of impervious surfaces such as roads and parking lots; alteration of natural landscape features such as natural depressional areas which hold water, floodplains and wetlands; construction of highly efficient drainage systems; and the addition of pollutants from everyday human activities. These alterations within a watershed decrease the amount of rainwater that can seep into the soil to recharge aquifers, maintain water levels in lakes and wetlands, and maintain spring and stream flows. Consequently, the increased volume, speed, and pollutant loading in stormwater that runs off developed areas is leading to flooding, water quality problems, and loss of habitat.<sup>11</sup>

In 1982, to manage urban stormwater and minimize impacts to our natural systems, Florida adopted a technology-based rule requiring the treatment of stormwater to a specified level of pollutant load reduction for all new development. The rule included a performance standard for the minimum level of treatment; design criteria for best management practices (BMPs) that will achieve the performance standard; and a rebuttable presumption that discharges from a stormwater management system designed in accordance with the BMP design criteria will meet water quality standards. The performance standard was to reduce post-development stormwater pollutant loading of Total Suspended Solids (TSS)<sup>12</sup> by 80%, or by 95% for Outstanding Florida Waters.<sup>13</sup>

In 1990, in response to legislation, the DEP developed and implemented the State Water Resource Implementation Rule (originally known as the State Water Policy rule).<sup>14</sup> This rule sets forth the broad

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<sup>8</sup> 403.067(7) F.S.

<sup>9</sup> Stormwater runoff is generated when precipitation from rain and snowmelt events flows over land or impervious surfaces and does not seep into the ground. As the runoff flows over the land or impervious surfaces (paved streets, parking lots, and building rooftops), it accumulates debris, chemicals, sediment or other pollutants that could adversely affect water quality if the runoff is discharged untreated.

<sup>10</sup> Nonpoint source pollution comes from many diffuse sources rather than from a distinct source. Stormwater runoff (see footnote 9) is a type of nonpoint source pollution.

<sup>11</sup> NRDC 1999 Report "Stormwater Strategies." <http://www.nrdc.org/water/pollution/storm/stoinx.asp>

<sup>12</sup> Total Suspended Solid (TSS) is listed as a conventional pollutant under sec. 304(a)(4) of the Clean Water Act. A conventional pollutant is a water pollutant that is amenable to treatment by a municipal sewage treatment plant.

<sup>13</sup> An Outstanding Florida Water, (OFW), is a water designated worthy of special protection because of its natural attributes. This special designation is applied to certain waters, and is intended to protect existing good water quality.

62-302.700 F.A.C.

guidelines for the implementation of Florida's stormwater program and describes the roles of DEP, the water management districts, and local governments. The rule provides that one of the primary goals of the program is to maintain, to the degree possible, during and after construction and development, the predevelopment stormwater characteristics of a site. The rule also provides a specific minimum performance standard for stormwater treatment systems: to remove 80% of the post-development stormwater pollutant loading of pollutants "that cause or contribute to violations of water quality standards." This performance standard is significantly different than the one used in the DEP and Water Management District (WMP) stormwater treatment rules of the 1980's.

In 1999, the Florida Watershed Restoration Act,<sup>15</sup> was enacted leading to the implementation of Florida's water body restoration program and the establishment of Total Maximum Daily Loads (TMDLs). Since the program began over 2000 impairments have been verified in Florida's surface waters with nutrients identified as the major cause of impairments. An analysis of United States Geological Survey (USGS) monitoring data for nutrients in certain locations in Florida shows that levels of nutrient pollution have not significantly improved since 1980 despite strong efforts to control nutrient pollution.<sup>16</sup>

### Effect of the Bill

#### **General:**

The bill provides definitions for nutrient, redevelopment, and stormwater quality treatment requirements.

The bill requires that the DEP, in conjunction with the WMDs, must develop a rule for stormwater management systems, excluding systems that serve agriculture and silviculture. The bill specifies that the DEP must adopt the rule by July 1, 2011, and the WMDs shall implement the rule without having to adopt it pursuant to s. 120.54 F.S.

The bill provides that this adopted rule does not diminish the jurisdiction or authority granted to the WMDs or the DEP before the effective date of this section. The provisions of this bill are to be supplemental to the existing jurisdiction and authority.

#### **Requirements:**

The bill provides that the rule:

1. Must establish the minimum level of stormwater quality treatment that is necessary to prevent or mitigate water quality violations;
2. Must include for discharges to non-Outstanding Florida Waters, an 85% average annual decrease in postdevelopment nutrient load or treatment so that postdevelopment loads are less than or equal to the estimated nutrient loads from the natural vegetative community type associated with the site's natural soils, whichever is less stringent;
3. Must include treatment for discharges to waters not meeting state water quality standards, including impaired waters and Outstanding Florida Waters so that postdevelopment nutrient loads are less than or equal to the estimated nutrient loads from the natural vegetative community type associated with the site's natural soils;
4. Must include any additional requirements that are necessary to ensure that discharges of pollutants, other than nutrients, from stormwater systems meet the applicable water quality standards in the receiving water body.
5. Must provide design criteria for the construction, operation, and maintenance of stormwater systems necessary to meet the established level of stormwater quality treatment. Compliance with the design criteria creates a presumption that stormwater that is discharged from the system will not cause or contribute to violations in water quality standards in receiving waters.

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<sup>14</sup> 62-40 F.A.C.

<sup>15</sup> Section 403.067, F.S.

<sup>16</sup> USEPA. 2000. STORET Legacy Data Center. <http://www.epa.gov/storet/dbtop.html>

6. May establish requirements that ensure financial responsibility of construction, operation, and long-term management of the system.
7. May establish alternative stormwater quality treatment requirements for the redevelopment of sites totaling 2 acres or less and the retrofitting of existing systems if such treatment results in the net reduction of nutrient discharge and pollutants. The alternative requirements for redevelopment of sites totaling 2 acres or less must be based on a feasibility assessment of stormwater best management practices that consider size, availability of regional stormwater treatment systems, and physical characteristics.

Within 2 years after the adoption of any numeric nutrient water quality criteria pursuant to ch. 403, the DEP and the WMDs must develop and adopt any amendments to the rule that are necessary to ensure that water quality standards are maintained.

**Exceptions:**

The bill exempts agency action taken in accordance with the rule from chapter 70.

The bill provides that the DEP and WMDs may adopt, amend, or retain:

- Rules establishing more stringent requirements in order to address further differences in physical or natural characteristics, including legacy pollutants from past activities;
- Rules designed to implement a basin management action plan for TMDL;
- Rules established pursuant to s. 373.4592, s. 373.4595, s. 373.461, or s. 403.067, F.S.;
- Rules designed to protect Class I, Class II, or shellfish harvesting waters.

Following the adoption of the rule, the following circumstances continue to be governed by the stormwater quality treatment rules adopted by DEP, the WMDs, and any delegated local program in effect before the effective date of the rule adopted, unless the applicant elects to have an application reviewed in accordance with the rule adopted pursuant to this section:

- The operation and maintenance of stormwater management systems legally in existence before the effective date of the rule adopted and the terms and conditions of the permit, exemption, or other authorization for such system continue to be met.
- The activities approved in a permit issued pursuant to this part and the review of activities proposed in applications received and completed before the effective date of the rule adopted. This also applies to any modification of the plans, terms, and conditions of the permit, including new activities, within the geographical area to which the permit applies as well as modifications that lessen or do not increase stormwater quality impacts. This does not apply to a modification that would extend the permitted time limit for construction beyond 2 additional years or to any modification that is reasonably expected to lead to additional or substantially different stormwater quality impacts.

Except as otherwise provided, the rule adopted is to supersede any rule of the DEP, a WMD, or a delegated local program that establishes less stringent stormwater quality treatment requirements. Any existing rule that is superseded by the newly adopted rule may be repealed without further rulemaking pursuant to s. 120.54, F.S., by publication of a notice of repeal in the Florida Administrative Weekly and then filing a list of the repealed rules with the Department of State. Until the new rule is adopted, the bill provides that existing stormwater quality treatment rules are to remain in full force and effect.

**B. SECTION DIRECTORY:**

**Section 1:** Creates 373.4131, F.S., to provide stormwater quality treatment requirements.

**Section 2:** Provides that the bill will take effect upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

According to the DEP, there will be no costs associated with adopting the rule itself. The DEP anticipates that the rulemaking process can be accomplished with existing staff resources; a technical advisory committee and staff have been working on a rule draft since March 2008.<sup>17</sup> Subsequent to rule adoption there will be some indeterminate increased cost to state agencies constructing stormwater management systems. However, the DEP finds that these costs will be more than offset by reducing the need to use funds to retroactively fix water quality problems caused by inadequate stormwater quality treatment.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

Subsequent to rule adoption there will be some indeterminate increased cost to local agencies constructing stormwater management systems. However, the DEP finds that these costs will be more than offset by reducing the need to use funds to retroactively fix water quality problems caused by inadequate stormwater quality treatment.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The DEP states that subsequent to rule adoption there will be some indeterminate cost increase to private entities constructing stormwater management systems. However, those costs will be more than offset by reducing the need to use taxpayer funds to retroactively fix water quality problems caused by inadequate stormwater quality treatment.

### D. FISCAL COMMENTS:

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not appear to require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

#### 2. Other:

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<sup>17</sup> See Statewide Stormwater Rule Development at <http://www.dep.state.fl.us/water/wetlands/erp/rules/stormwater/index.htm> for details on this process.

**B. RULE-MAKING AUTHORITY:**

Extensive rulemaking will be required by the Florida Department of Environmental Protection, working in collaboration with the Water Management Districts, as authorized by section 1, subparagraph 3 of the bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**