RULEMAKING OVERSIGHT & REPEAL SUBCOMMITTEE MEETING

Wednesday, March 11, 2015
10:00 a.m. – 12:00 p.m.

306 House Office Building

MEETING PACKET

Steve Crisafulli
Speaker

Lake Ray
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Rulemaking Oversight & Repeal Subcommittee

Start Date and Time: Wednesday, March 11, 2015 10:00 am

End Date and Time: Wednesday, March 11, 2015 12:00 pm

Location: 306 HOB

Duration: 2.00 hrs

Consideration of the following bill(s):

HB 985 Maintenance of Agency Final Orders by Eisnaugle
HB 1013 Legislative Ratification/Workers' Compensation Law by Hager

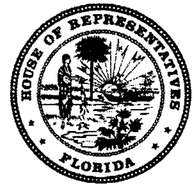
Consideration of the following proposed committee bill(s):

PCB RORS 15-03 -- Ratification of Department of Environmental Protection Rules (establishing minimum water flows and levels for water bodies)
PCB RORS 15-04 -- Ratification of Department of Environmental Protection Rules (relating to liners and leachate collection systems for construction and demolition debris disposal facilities)

Consideration of the following proposed committee substitute(s):

PCS for HB 435 -- Administrative Procedures

NOTICE FINALIZED on 03/09/2015 16:22 by Powell-Battles.Sonja



FLORIDA HOUSE OF REPRESENTATIVES

Rules, Calendar & Ethics Committee
Rulemaking Oversight & Repeal Subcommittee

Steve Crisafulli
Speaker

Lake Ray
Chair

AGENDA
Wednesday, March 11, 2015
10:00 a.m. – 12:00 p.m.
306 House Office Building

- **Opening Remarks by Chair Ray**
- **Roll Call by Sonja Powell-Battles, CAA**
- **Announcements**
- **Consideration of the following proposed committee substitute(s):**
    - PCS for HB 435 -- Administrative Procedures
- **Consideration of the following bill(s):**
    - HB 985 Maintenance of Agency Final Orders by Eisnaugle
    - HB 1013 Legislative Ratification/Workers' Compensation Law by Hager
- **Consideration of the following proposed committee bill(s):**
    - PCB RORS 15-03 -- Ratification of Department of Environmental Protection Rules (establishing minimum water flows and levels for water bodies)

402 South Monroe Street, 400 House Office Building, Tallahassee, Florida 32399-1300
Telephone: 850–717-4881

  - PCB RORS 15-04 -- Ratification of Department of Environmental Protection Rules (relating to liners and leachate collection systems for construction and demolition debris disposal facilities)

- **Closing Remarks**

- **Meeting Adjourned**

PCS for HB 435

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 435 Administrative Procedures
SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:** SB 718

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee		Stranburg	Rubottom

SUMMARY ANALYSIS

The Administrative Procedure Act (APA) provides uniform procedures for the exercise of specified administrative authority. The bill amends 8 provisions of the APA to enhance the opportunities for substantially affected parties to challenge rules, and be awarded attorney fees in certain successful administrative matters. Specifically, the bill makes the following changes to the APA, including, but not limited to:

- Revising rulemaking procedures based on petitions to initiate rulemaking alleging an unadopted rule;
- Expanding the listing of information that must be published on the Florida Administrative Register to include rules filed for adoption in the previous seven days and a listing of all rules filed for adoption but awaiting legislative ratification;
- Revising the pleading requirements and burden of going forward with evidence in challenges to proposed and unadopted rules;
- Removing a defense to an award of fees and costs that an agency did not know or should not have known that an agency statement or policy was an unadopted rule in cases where notice is actually provided;
- Extending the time to appeal certain final orders when notice to the party was delayed;
- Authorizing rule challenges in challenges to agency actions on similar terms as petitions challenging rules and unadopted rules, including the award of reasonable attorney fees to prevailing challengers;
- Requiring agencies to identify and certify all of the rules the violation of which would be a minor violation.

The bill also provides conditions for when an agency action is not substantially justified for purposes of an award of attorney fees under the Florida Equal Access to Justice Act.

The bill may have an indeterminate minimal fiscal impact to the state. *See* Fiscal Comments section for further discussion.

The bill has an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current situation

Rulemaking

The Administrative Procedure Act (APA)[1] sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. 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.[2] Rulemaking authority is delegated by the Legislature through statute and authorizes an agency to "adopt, develop, establish, or otherwise create" a rule.[3] Agencies do not have discretion whether or not to engage in rulemaking.[4] To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.[5] The grant of rulemaking authority itself need not be detailed. The specific statute being implemented or interpreted through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.

Petitions to Initiate Rulemaking

The APA authorizes a substantially interested party to file a petition to adopt, amend or repeal a rule.[6] The agency must initiate rulemaking or provide a written explanation why the petition is denied. If the petition is directed to an unadopted rule, the agency must hold a workshop before it may deny the petition.[7] If, after the workshop, the agency does not initiate rulemaking, the agency is required to publish in the Florida Administrative Register (F.A.R.) a notice explaining why the agency is denying the petition and explaining any changes it will make in the scope or application of the statement asserted in the petition to be an unadopted rule.[8] However, the APA does not require rulemaking before an agency has had sufficient time to acquire the knowledge and experience reasonably necessary, or otherwise resolved matters sufficiently to address a statement by rulemaking.[9] The clear implication is that an agency may apply law and establish procedures by statements of general applicability without adopting the statement as a rule until adoption is feasible and practicable.[10]

Small Business

The APA provides certain accommodations for small businesses[11] but does not provide a definition of "small business". In rulemaking, an agency must consider the impact on small businesses defined for that purpose as employing less than 200 employees and having a net worth less than $5 million,[12] but agencies are authorized to define "small business" to include businesses having more than 200 employees. By contrast, Florida's Equal Access to Justice Act provides for attorney fees to be awarded in administrative proceedings to prevailing parties who are small businesses, defined as having not more than 25 employees with a net worth of no more than $2 million.[13]

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[1] Chapter 120, F.S.
[2] 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).
[3] Section 120.52(17), F.S.
[4] Section 120.54(1)(a), F.S.
[5] Section 120.52(8) and 120.536(1), F.S.
[6] Section 120.54(7)(a), F.S.
[7] Section 120.54(7)(b), F.S.
[8] Section 120.54(7)(c), F.S.
[9] Section 120.54(1)(a)1., F.S.
[10] *See* s. 120.52(16), F.S.
[11] Sections 120.54, 120.541, and 120.74, F.S.
[12] Section 120.54(3)(b), F.S., incorporates by reference the definition of "small business" in s. 288.703(6), F.S.
[13] Section 57.111, F.S.

Notice of Rules
Presently, the only notice of adopted rules is the filing with the Department of State (DOS). DOS publishes such rules in the Florida Administrative Code (F.A.C.). A rule requiring ratification as a condition of effectiveness[14] is not published in the F.A.C. until ratified. However, as a courtesy, DOS, once each week, lists newly adopted rules in the F. A. R., and includes a cumulative list of rules filed for adoption pending legislative ratification.

Attorney Fees
In addition to the special attorney fee provisions in the Equal Access to Justice Act, the APA provides for the recovery of attorney fees when a non-prevailing party, when an agency's actions are not substantially justified, when an agency relies upon an unadopted rule and is successfully challenged after 30 days' notice of the need to adopt rules, and when an agency loses an appeal in a proceeding challenging an unadopted rule.[15] These attorney fee provisions supplement the attorney fee provisions provided by other laws.[16]

In addition, the APA authorizes attorney fees awards when the non-prevailing party challenged an agency action for an "improper purpose".[17] It establishes a rebuttable presumption of improper purposes in certain circumstances involving 3 or more, unfounded, administrative challenges.[18] "Improper purpose" means participation primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of administrative action.[19]

For purposes of the Equal Access to Justice Act, awarding attorney fees to small businesses, an agency action is reasonably justified if it has a reasonable basis in law and fact at the time the agency acted. In such cases, no fees are allowable.

Attorney fees are also awardable in administrative proceedings for baseless or frivolous litigation on the same grounds as in civil court cases.[20]

Burden of Proof
In general, laws carry a presumption of validity; and as such, those challenging the validity of a law carry the burden of proving invalidity. The APA retains this presumption of validity by requiring those challenging adopted rules to carry the burden of proving that a rule constitutes an invalid exercise of delegated authority.[21] However, in the case of proposed rules, the APA places the burden on the agency to demonstrate the validity of the rule as proposed, once the challenger has raised specific objections to the rule's validity.[22] In addition, a proposed rule may not be filed for adoption until any pending challenge is resolved.[23]

In the case of a statement or policy in force that was not adopted as a rule, a challenger must prove that the statement or policy meets the definition of a rule under the APA. If so, and if the statement or policy has not been validly adopted, the agency must prove that rulemaking is not feasible or practicable.[24]

Proceedings Involving Rule Challenges

[14] *See* s. 120.541(3), F.S. (requiring ratification of rules having an economic impact beyond a particular threshold).
[15] Section 120.595, F.S.
[16] See, for example, ss. 57.105 and 57.111, F.S. These sections are specifically preserved in s. 120.595(6), F.S.
[17] Section 120.595(1), F.S.
[18] Section 120.595(1)(c), F.S.
[19] Section 120.595(1)(e)1., F.S.
[20] Section 57.105(5), F.S.
[21] Section 120.56(3), F.S. Section 120.52(8), F.S., defines "invalid exercise of delegated legislative authority."
[22] Section 120.56(2), F.S.
[23] Section 120.54(3)(e)2., F.S.
[24] Section 120.56(4), F.S.

The APA presently applies different procedures when proposed rules, existing rules and statements defined as rules ("unadopted rules") are challenged by petition, as compared to a challenge to the validity of an existing rule or an unadopted rule when raised defensively in a proceeding initiated as a result of agency action. In addition to the attorney fees awardable to small businesses under the Equal Access to Justice Act, the APA provides attorney fee awards when a party petitions for invalidation of a rule, proposed rule or unadopted rule, but not when the same successful legal case is made in defense of an enforcement action or challenging a grant or denial of a permit or license.

The APA does provide that a Division of Administrative Hearings (DOAH) judge may determine that an agency has attempted to rely on an unadopted rule in proceedings initiated by agency action. However, this is qualified by a provision that an agency may overrule the DOAH determination if clearly erroneous, and if the agency rejects the DOAH determination and is later reversed on appeal, the challenger is awarded attorney fees for the entire proceeding.[25] Additionally, in proceedings initiated by agency action, when a DOAH judge determines that a rule constitutes an invalid exercise of delegated legislative authority, the agency has full de novo authority to reject or modify such conclusions of law, provided the final order states with particularity the reasons for rejecting or modifying such determination.[26]

In proceedings initiated by a party challenging a rule or unadopted rule, the DOAH judge enters a final order that cannot be overturned by the agency. The only appeal is to the District Court of Appeals.

Final Orders

An agency has 90 days to render a final order in any proceeding after the hearing if the agency conducts the hearing, or after the recommended order is submitted to the agency if DOAH conducts the hearing (excepting the rule challenge proceedings described above in which the DOAH judge enters the final order).

Declaratory Statements

The APA provides for the opportunity to request, for notice and opportunity for public input, and for the issuance of a "declaratory statement" of an agency's opinion on the applicability of a law or rule over which the agency has authority to a particular set of facts set forth in the petition.[27] When issued, a declaratory statement is the agency's legal opinion that binds the agency under principles of estoppel. An agency has the option to deny the petition, and will typically do so if a live enforcement action is pending with respect to similar facts.

Anecdotal evidence indicates that the declaratory statement process in the APA has not proven productive in Florida in some agency situations. By contrast, the Internal Revenue Service and the Florida Department of Revenue each frequently issue binding opinions upon request of taxpayers. Profession and trade licensing boards, for example, the Construction Industry Licensing Board and Board of Architecture, have shown a willingness to issue declaratory statements to clarify matters relating to compliance with the rules and laws enforced by those Boards.[28]

Declaratory statements are considered final agency action, subject to judicial review. Declaratory statements have the effect of stare decisis.

Judicial Review

A notice of appeal of an appealable order under the APA must be filed within 30 days of the rendering of the order.[29] An order, however, is rendered when filed with the agency clerk.[30] On occasion, a party

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[25] Section 120.57(1)(e)3., F.S.

[26] Section 120.57(1)(k-*l*), F.S.

[27] Section 120.565, F.S.

[28] See, e.g., Notice of Declaratory Statement, Department of Business and Professional Regulation, Board of Architecture, vol. 40, no. 3, F.A.R. (Feb. 13, 2014), Notice of Declaratory Statement, Department of Business and Professional Regulation, Construction Industry Licensing Board, vol. 40, no. 27 (Feb. 10, 2014).

[29] Section 120.68(2)(a), F.S.

may not receive notice of the order in time to meet the 30 day appeal deadline. Under the current statute, a party may not seek judicial review of the validity of a rule by appealing its adoption but authorizes an appeal from a final order in a rule challenge.[31]

Minor Violations

The APA directs agencies to issue a "notice of noncompliance" as the first response when the agency encounters a first minor violation of a rule.[32] The law provides that a violation is a minor violation if it "does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm." Agencies are authorized to designate those rules for which a violation would be a minor violation. An agency's designation of rules under the provision is excluded from challenge under the APA but may be subject to review and revision by the Governor or Governor and Cabinet.[33] An agency under the direction of a cabinet officer has the discretion not to use the "notice of noncompliance" once each licensee is provided a copy of all rules upon issuance of a license, and annually thereafter.

Rules Ombudsman

Section 288.7015, F.S., requires the Governor to appoint a rules ombudsman in the Executive Office of the Governor, for considering the impact of agency rules on the state's citizens and businesses. The rules ombudsman must carry out the duties related to rule adoption procedures with respect to small businesses; review state agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses; and make recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to business. Each state agency must cooperate fully with the rules ombudsman in identifying such rules, and take the necessary steps to waive, modify, or otherwise minimize such adverse effects of any such rules.

Effect of the Bill

Agency Action

Section 1 amends s. 57.111(3), F.S., which awards attorney fees and costs to small businesses that prevail in an administrative proceeding when the agency was not substantially justified. The bill provides particular circumstances when an agency proceeding is not substantially justified. The bill provides that an agency may not establish that its action is substantially justified if it acts in contradiction to its own declaratory statement or the agency denies a petition for declaratory statement and thereafter pursues enforcement on facts submitted in the petition. This will only apply when the agency is wrong on the application of the law. While agencies do not like to issue declaratory statements on facts that have already occurred, the change should motivate an agency to review its legal position carefully before denying the petition and thereafter attempting to punish the circumstances raised by the petition.

Petition to Initiate Rulemaking

Section 2 amends s. 120.54(7) to add new rulemaking requirements when an agency initiates rulemaking after a workshop on a petition to initiate rulemaking that alleges an unadopted rule. The provision will require the agency to file its Notice of Rule Development within 30 days of a mandatory hearing on the petition. Unless the agency publishes a notice explaining the reasons it cannot do so, the Notice of Proposed Rule must be filed within 180 days after the Notice of Rule Development. Lastly, unless the agency publishes a statement explaining why rulemaking is not feasible or practicable under s. 120.54(1), the bill prohibits the agency from relying on the unadopted rule until rulemaking is

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[30] Sections 120.52(7), 120.68(2)(a), F.S.

[31] Section 120.68(9), F.S.

[32] Section 120.695, F.S. The statute contains the following legislative intent: "It is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response to a minor violation of a rule in any instance in which it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it."

[33] Section 120.695(2)(c), (d), F.S. The statute provides for final review and revision of these agency designations to be at the discretion of elected constitutional officers.

complete. This limitation mirrors that applicable when an agency loses a formal challenge to an unadopted rule.[34]

Rulemaking Publication and Notification Requirements

Section 3 amends s. 120.55, F.S., to expand the list of information that must be published on the Florida Administrative Register. The bill requires DOS to publish in the Florida Administrative Register a listing of rules filed for adoption in the previous seven days and a listing of all rules filed for adoption but pending legislative ratification.

The bill also requires those agencies with e-mail alert services that provide regulatory information to interested parties to use such services to notify recipients of each notice required under s. 120.54(2) and (3)(a), F.S., including, but not limited to, notice of rule development, notice of proposed rules, and notice of adoption of rules. The notices must provide Internet links to either the rule page on the Secretary of State's website or an agency website that contains the proposed rule or final rule.

Challenges to Rules

Section 4 amends s. 120.56(1), (2) and (4), F.S., relating to petitions challenging the validity of rules, proposed rules and statements defined as rules ("unadopted rules"). The changes clarify the pleading requirements for the petitions. It also clarifies the parties' respective burdens of proof in challenges to proposed rules and unadopted rules.

The Committee Substitute preserves the presumption of validity in challenges to existing adopted rules. (The original bill proposed to change the burden of proof in such cases to the agency.)

Final Orders

Section 5 amends s. 120.569(2)(l)2., F.S., to extend the 90 day time for entry of final orders in proceedings relating to agency actions to allow, at the agency's discretion, for the completion of any appeal of an order on a rule challenge which may be concurrent with the enforcement action. An agency will have 10 days after the determination of the appeal to enter the final order on the related matter. The provisions of Section 6 make this extension of time beneficial to a clear final resolution of certain matters.

Disputes

Section 6 amends s. 120.57, F.S., relating to DOAH hearings of agency-initiated actions involving disputed issues of material fact. The bill incorporates many of the rule challenge provisions of s. 120.56, F.S., allowing the administrative law judge to enter a final order on a challenge to the validity of a rule or to an unadopted rule in all contests before DOAH. This would treat a challenge to a rule in defending against or attacking an agency action much as a challenge in an action initiated solely to challenge the rule. Notably, the decision on the rule challenge in the DOAH proceeding would be binding on the agency.

The bill allows the agency, within 15 days of notice of the rule challenge in such matters, to waive its reliance on an unadopted rule or a rule alleged to be invalid, and thereby eliminate that aspect of the litigation, without prejudice to the agency reasserting its position in another matter or rule challenge. This will help an agency advance a proceeding beyond a weak legal position on the rule issue, particularly in matters initiated by field investigators who often do not enjoy the benefit of legal deliberation by counsel prior to initiation of the action.

The bill also revises the procedures for raising challenges to the validity of rules and unadopted rules in many proceedings where there is no dispute of material fact, staying the agency's non-DOAH proceeding during a related DOAH challenge to a rule.

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[34] *See*, s. 120.56(4)(c) and (e), F.S.

Attorney Fees
Section 7 amends s. 120.595, F.S., relating to attorney fees in APA proceedings, to clarify the statute respecting participating in a proceeding for improper purposes. The bill amends s. 120.595(1)(c) to increase the clarity of the paragraph. The bill adds a new paragraph (d) to s. 120.595(1), F.S., extending the capped attorney fee awards available for successful rule challenges under s. 120.56, F.S., to rule challenges in other cases when the agency does not waive its reliance on the challenged rule or unadopted rule. This provision would obviate any necessity to file separate rule challenge petitions to gain an attorney fee award while challenging an agency action that relies on an invalid or unadopted rule. It also reinforces the changes to s. 120.57 in Section 6 of the CS authorizing rule challenges in particular proceedings.

The bill also recodifies the right to fees for improper purposes when an agency prevails in a rule challenge by deleting 3 duplicative sentences[35] and adding the affected cases to the scope of the improper purposes provision. The revision does not change the substance of the law.

The bill eliminates the defense that an agency's action can be "substantially justified" when a rule or unadopted rule is successfully challenged. It also eliminates a defense that the agency "did not know or should not have known" that it was relying on an unadopted rule. The bill retains an equitable defense against an attorney fee award in those rule challenges in case of "special circumstances."

The bill adds a new subsection (6) to s. 120.595, F.S., revising the provisions for pre-petition notice of an invalid rule or proposed rule, or of an unadopted rule for rule challenges under s. 120.56, F.S. The bill requires notice 30 days prior to filing of a petition challenging a rule or unadopted rule, and five days prior to filing the petition challenging a proposed rule. Reasonable costs and attorney fees may be awarded only for the period beginning after notice. The agency may avoid an award of attorney fees and costs if, within the notice period provided, the agency provides notice that it will not adopt the proposed rule or will not rely upon the adopted rule or statement challenged as an unadopted rule until after the agency has complied with the rulemaking procedures of the APA to ensure its rules conform to the law. The bill also provides that taking such steps to cure its faults would constitute "special circumstances" protecting the agency from an attorney fees judgment on the rule challenge.

The bill does not impose pre-petition notice provisions to rule challenges included in other challenges to agency actions, those challenges authorized in Section 6 of the CS.

The bill adds a new subsection (7) to s. 120.595 providing that reasonable costs and reasonable attorney fees incurred in proving and prosecuting a claim for attorney fees under the statute are not subject to the fee cap applicable to costs and fees awardable in an underlying action. Agencies are excluded from such supplemental awards. This provision may deter some agencies from aggressively litigating attorney fees due to increased risk of incurring additional fees when the fee cap has otherwise been exceeded.

Appeals
Section 8 alters the appellate provisions to clarify that a final order on a rule challenge litigated with other challenges to agency action under s. 120.57(1)(e), F.S. will be directly appealable in the same manner as a final order in a petition challenging a rule under s. 120.56, F.S.. The section also allows 10 additional days to file an appeal if the appellant did not receive notice of the rendering of the final order within 25 days. The section also makes conforming technical changes.

Minor Violations
Section 9 amends s. 120.695, F.S., to direct each agency to timely review its rules and certify to the President of the Senate, the Speaker of the House of Representatives, the Administrative Procedures Committee, and the rules ombudsman those rules that have been designated as rules the violation of

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[35] *See* s. 120.595(2) (next to last sentence), s. 120.595(3) (next to last sentence), and s. 120.595(4)(d) (final sentence)(this sentence also contains a provision that is unnecessarily duplicative of s. 57.105(5), F.S.).

which would be a minor violation no later than June 30, 2014. Each agency that fails to timely complete the review and file the certification will be reported by the rules ombudsman to the Governor, the President of the Senate, the Speaker of the House of Representatives and the Administrative Procedures Committee.

Beginning July 1, 2015, each agency will be required to publish all rules of that agency designated as rules the violation of which would be a minor violation either as a complete list on the agency's Internet webpage or by incorporation of the designations in the agency's disciplinary guidelines adopted as a rule. Each agency must ensure that all investigative and enforcement personnel are knowledgeable of the agencies designations of these rules. The agency head must certify for each rule filed for adoption whether any part of the rule is designated as one the violation of which would be a minor violation and update the listing on the webpage or disciplinary guidelines.

Effective Date
The bill provides an effective date of July 1, 2015.

B. SECTION DIRECTORY:

Section 1 amends s. 57.111(3)(e), F.S.

Section 2 amends s. 120.54(7)(c), F.S., and creates paragraph (7)(d) of that section.

Section 3 amends s. 120.55, F.S.

Section 4 amends s. 120.56(1), (2) and (4), F.S.

Section 5 amends s. 120.569(2)(l), F.S.

Section 6 amends s. 120.57(1)(e) and (h), F.S. and subsection (2) of that section.

Section 7 amends s. 120.595, F.S.

Section 8 amends s. 120.68(1), (2) and (9), F.S.

Section 9 amends s. 120.695, F.S.

Section 10 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See Fiscal Comments.

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The private sector may benefit slightly by the increased incentives for agencies to conform their rules to the law, thereby increasing clarity and certainty in the application of the law.

D. FISCAL COMMENTS:

The bill allows for the recovery of reasonable attorney fees and reasonable costs incurred in litigating entitlement to, and the determination or quantification of, attorney fees and costs. This could potentially have a negative fiscal impact to the state when a state agency is the non-prevailing party. However, the appellate courts have already upheld awards of fees and costs incurred in litigating fees and costs, so the bill conforms the APA to existing case law. The fiscal impact to the state would be limited to those few cases in which the fees and costs are capped by the authorizing law but litigating fees and costs result in supplemental awards above those caps.

The bill also allows attorney fees for successfully challenging invalid rules or unadopted rules in cases that arise outside s. 120.56, F.S. Those fees, however, are only awardable when the agency has notice of the challenge and persists in relying on the invalid rule to support an agency action. Thus, the costs are generally avoidable by taking heed to diligent legal counsel and diligence in maintaining the validity of rules. Note also that the same exposure to fee awards would be incurred under current law by the challenger filing a separate challenge under s. 120.56, F.S.

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:

B. RULE-MAKING AUTHORITY:

The bill enhances the procedures provided by the APA for challenging rules, particularly in the defense against agency actions that are not based on valid rules. As such, it provides incentives and opportunities for private parties to keep agency rulemaking accountable under the law. The bill also increases requirements relating to identifying rules the violation of which should be classified as minor violations.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

The Rulemaking Oversight & Repeal Subcommittee adopted a strike-all amendment, as amended by one technical amendment, deleting two sections of the original bill relating to declaratory statements and mediation. The amendment also altered four other sections of the bill. The substance of the strike-all is explained in the full analysis above.

1 A bill to be entitled
2 An act relating to administrative procedures; amending
3 s. 57.111, F.S.; providing conditions under which a
4 proceeding is not substantially justified for purposes
5 of an award under the Florida Equal Access to Justice
6 Act; amending s. 120.54, F.S.; providing procedures
7 for agencies to follow when initiating rulemaking
8 following public hearings; limiting reliance upon an
9 unadopted rule in certain circumstances; amending s.
10 120.55, F.S.; providing for publication of notices of
11 rule development and of rules filed for adoption;
12 providing additional notice of rule development,
13 proposals, and adoptions; amending s. 120.56, F.S.;
14 providing that a petitioner challenging a proposed
15 rule or unadopted agency statement has the burden of
16 going forward with evidence sufficient to support the
17 petition; amending s. 120.569, F.S.; granting agencies
18 additional time to render final orders in certain
19 circumstances; amending s. 120.57, F.S.; conforming
20 proceedings that oppose agency action based on an
21 invalid or unadopted rule to proceedings used for
22 challenging rules; requiring the agency to issue a
23 notice stating whether the agency will rely on the
24 challenged rule or alleged unadopted rule; authorizing
25 the administrative law judge to make certain findings
26 on the validity of certain alleged unadopted rules;

27 authorizing the administrative law judge to issue a
28 separate final order on certain rules and alleged
29 unadopted rules; prohibiting agencies from rejecting
30 specific conclusions of law; providing for stay of
31 proceedings not involving disputed issues of fact upon
32 timely filing of a rule challenge; providing that the
33 final order terminates the stay; amending s. 120.595,
34 F.S.; requiring a final order in specified
35 administrative proceedings to award all reasonable
36 costs and all reasonable attorney fees to a prevailing
37 party under certain circumstances; revising the
38 criteria used by an administrative law judge to
39 determine whether a party participated in a proceeding
40 for an improper purpose; removing certain exceptions
41 from requirements that attorney fees and costs be
42 rendered against the agency in proceedings in which
43 the petitioner prevails in a rule challenge; requiring
44 service of notice of invalidity to an agency before
45 bringing a rule challenge as a condition precedent to
46 the award of attorney fees and costs; authorizing the
47 recovery of reasonable attorney fees and costs
48 incurred by a prevailing party in litigating
49 entitlement to or quantification of underlying
50 attorney fees and costs; removing certain limitations
51 on such attorney fees and costs; correcting a cross-
52 reference; amending s. 120.68, F.S.; providing for

53 appellate review of orders rendered in challenges to
54 specified rules or unadopted rules; authorizing
55 extensions for filing certain appeals or petitions for
56 review under certain circumstances; amending s.
57 120.695, F.S.; removing obsolete provisions with
58 respect to required agency review and designation of
59 minor violations; requiring agency review and
60 certification of minor violation rules by a specified
61 date; requiring the reporting of agency failure to
62 complete the review and file certification of such
63 rules; requiring minor violation certification for all
64 rules adopted after a specified date; requiring public
65 notice; providing nonapplicability; conforming
66 provisions; providing an effective date.
67
68 Be It Enacted by the Legislature of the State of Florida:
69
70 Section 1. Paragraph (e) of subsection (3) of section
71 57.111, Florida Statutes, is amended to read:
72 57.111 Civil actions and administrative proceedings
73 initiated by state agencies; attorney ~~attorneys'~~ fees and
74 costs.—
75 (3) As used in this section:
76 (e) A proceeding is "substantially justified" if it had a
77 reasonable basis in law and fact at the time it was initiated by
78 a state agency. A proceeding is not substantially justified if

79 the specified law, rule, or order at issue in the current agency
80 action is the subject upon which the prevailing small business
81 party previously petitioned the agency for a declaratory
82 statement under s. 120.565; the current agency action involves
83 identical or substantially similar facts and circumstances as
84 those raised in the previous petition; and:
85 1. The agency action contradicts the declaratory statement
86 issued by the agency upon the previous petition; or
87 2. The agency denied the previous petition under s.
88 120.565 before initiating the current agency action against the
89 prevailing small business party.
90 Section 2. Paragraph (c) of subsection (7) of section
91 120.54, Florida Statutes, is amended, and paragraph (d) is added
92 to that subsection, to read:
93 120.54 Rulemaking.—
94 (7) PETITION TO INITIATE RULEMAKING.—
95 (c) If the agency does not initiate rulemaking or
96 otherwise comply with the requested action within 30 days after
97 following the public hearing provided for in by paragraph (b),
98 if the agency does not initiate rulemaking or otherwise comply
99 with the requested action, the agency shall publish in the
100 Florida Administrative Register a statement of its reasons for
101 not initiating rulemaking or otherwise complying with the
102 requested action, and of any changes it will make in the scope
103 or application of the unadopted rule. The agency shall file the
104 statement with the committee. The committee shall forward a copy

105 of the statement to the substantive committee with primary
106 oversight jurisdiction of the agency in each house of the
107 Legislature. The committee or the committee with primary
108 oversight jurisdiction may hold a hearing directed to the
109 statement of the agency. The committee holding the hearing may
110 recommend to the Legislature the introduction of legislation
111 making the rule a statutory standard or limiting or otherwise
112 modifying the authority of the agency.
113 (d) If the agency initiates rulemaking following a public
114 hearing under paragraph (b), the agency shall publish its notice
115 of rule development within 30 days after the hearing and file
116 its notice of proposed rule within 180 days after the notice of
117 rule development unless, before the 180th day, the agency
118 publishes in the Florida Administrative Register a statement
119 explaining its reasons why a proposed rule has not been filed.
120 If rulemaking is initiated under this paragraph, the agency may
121 not rely on the unadopted rule unless the agency publishes in
122 the Florida Administrative Register a statement explaining why
123 rulemaking under paragraph (1)(a) is not feasible or practicable
124 until conclusion of the rulemaking proceeding.
125 Section 3. Section 120.55, Florida Statutes, is amended to
126 read:
127 120.55 Publication.—
128 (1) The Department of State shall:
129 (a)1. Through a continuous revision and publication
130 system, compile and publish electronically, on an Internet

131 website managed by the department, the "Florida Administrative
132 Code." The Florida Administrative Code shall contain all rules
133 adopted by each agency, citing the grant of rulemaking authority
134 and the specific law implemented pursuant to which each rule was
135 adopted, all history notes as authorized in s. 120.545(7),
136 complete indexes to all rules contained in the code, and any
137 other material required or authorized by law or deemed useful by
138 the department. The electronic code shall display each rule
139 chapter currently in effect in browse mode and allow full text
140 search of the code and each rule chapter. The department may
141 contract with a publishing firm for a printed publication;
142 however, the department shall retain responsibility for the code
143 as provided in this section. The electronic publication shall be
144 the official compilation of the administrative rules of this
145 state. The Department of State shall retain the copyright over
146 the Florida Administrative Code.
147 2. Rules general in form but applicable to only one school
148 district, community college district, or county, or a part
149 thereof, or state university rules relating to internal
150 personnel or business and finance shall not be published in the
151 Florida Administrative Code. Exclusion from publication in the
152 Florida Administrative Code shall not affect the validity or
153 effectiveness of such rules.
154 3. At the beginning of the section of the code dealing
155 with an agency that files copies of its rules with the
156 department, the department shall publish the address and

157 telephone number of the executive offices of each agency, the
158 manner by which the agency indexes its rules, a listing of all
159 rules of that agency excluded from publication in the code, and
160 a statement as to where those rules may be inspected.
161 4. Forms shall not be published in the Florida
162 Administrative Code; but any form which an agency uses in its
163 dealings with the public, along with any accompanying
164 instructions, shall be filed with the committee before it is
165 used. Any form or instruction which meets the definition of
166 "rule" provided in s. 120.52 shall be incorporated by reference
167 into the appropriate rule. The reference shall specifically
168 state that the form is being incorporated by reference and shall
169 include the number, title, and effective date of the form and an
170 explanation of how the form may be obtained. Each form created
171 by an agency which is incorporated by reference in a rule notice
172 of which is given under s. 120.54(3)(a) after December 31, 2007,
173 must clearly display the number, title, and effective date of
174 the form and the number of the rule in which the form is
175 incorporated.
176 5. The department shall allow adopted rules and material
177 incorporated by reference to be filed in electronic form as
178 prescribed by department rule. When a rule is filed for adoption
179 with incorporated material in electronic form, the department's
180 publication of the Florida Administrative Code on its Internet
181 website must contain a hyperlink from the incorporating
182 reference in the rule directly to that material. The department

183 may not allow hyperlinks from rules in the Florida
184 Administrative Code to any material other than that filed with
185 and maintained by the department, but may allow hyperlinks to
186 incorporated material maintained by the department from the
187 adopting agency's website or other sites.
188 (b) Electronically publish on an Internet website managed
189 by the department a continuous revision and publication entitled
190 the "Florida Administrative Register," which shall serve as the
191 official publication and must contain:
192 1. All notices required by s. 120.54(2) and (3)(a) ~~s.~~
193 ~~120.54(3)(a)~~, showing the text of all rules proposed for
194 consideration.
195 2. All notices of public meetings, hearings, and workshops
196 conducted in accordance with s. 120.525, including a statement
197 of the manner in which a copy of the agenda may be obtained.
198 3. A notice of each request for authorization to amend or
199 repeal an existing uniform rule or for the adoption of new
200 uniform rules.
201 4. Notice of petitions for declaratory statements or
202 administrative determinations.
203 5. A summary of each objection to any rule filed by the
204 Administrative Procedures Committee.
205 6. A listing of rules filed for adoption in the previous 7
206 days.

207 7. A listing of all rules filed for adoption pending
208 legislative ratification under s. 120.541(3) until notice of
209 ratification or withdrawal of such rule is received.
210 8.~~6.~~ Any other material required or authorized by law or
211 deemed useful by the department.
212
213 The department may contract with a publishing firm for a printed
214 publication of the Florida Administrative Register and make
215 copies available on an annual subscription basis.
216 (c) Prescribe by rule the style and form required for
217 rules, notices, and other materials submitted for filing.
218 (d) Charge each agency using the Florida Administrative
219 Register a space rate to cover the costs related to the Florida
220 Administrative Register and the Florida Administrative Code.
221 (e) Maintain a permanent record of all notices published
222 in the Florida Administrative Register.
223 (2) The Florida Administrative Register Internet website
224 must allow users to:
225 (a) Search for notices by type, publication date, rule
226 number, word, subject, and agency.
227 (b) Search a database that makes available all notices
228 published on the website for a period of at least 5 years.
229 (c) Subscribe to an automated e-mail notification of
230 selected notices to be sent out before or concurrently with
231 publication of the electronic Florida Administrative Register.

232 Such notification must include in the text of the e-mail a
233 summary of the content of each notice.
234 (d) View agency forms and other materials submitted to the
235 department in electronic form and incorporated by reference in
236 proposed rules.
237 (e) Comment on proposed rules.
238 (3) Publication of material required by paragraph (1)(b)
239 on the Florida Administrative Register Internet website does not
240 preclude publication of such material on an agency's website or
241 by other means.
242 (4) Each agency shall provide copies of its rules upon
243 request, with citations to the grant of rulemaking authority and
244 the specific law implemented for each rule.
245 (5) Each agency that provides an e-mail notification
246 service to inform licensees or other registered recipients of
247 notices shall use such service to notify recipients of each
248 notice required under s. 120.54(2) and (3), and provide Internet
249 links to the appropriate rule page on the Secretary of State's
250 website or Internet links to an agency website that contains the
251 proposed rule or final rule.
252 (6) ~~(5)~~ Any publication of a proposed rule promulgated by
253 an agency, whether published in the Florida Administrative
254 Register or elsewhere, shall include, along with the rule, the
255 name of the person or persons originating such rule, the name of
256 the agency head who approved the rule, and the date upon which
257 the rule was approved.

258 (7) ~~(6)~~ Access to the Florida Administrative Register
259 Internet website and its contents, including the e-mail
260 notification service, shall be free for the public.
261 (8) ~~(7)~~(a) All fees and moneys collected by the Department
262 of State under this chapter shall be deposited in the Records
263 Management Trust Fund for the purpose of paying for costs
264 incurred by the department in carrying out this chapter.
265 (b) The unencumbered balance in the Records Management
266 Trust Fund for fees collected pursuant to this chapter may not
267 exceed $300,000 at the beginning of each fiscal year, and any
268 excess shall be transferred to the General Revenue Fund.
269 Section 4. Subsection (1), paragraph (a) of subsection
270 (2), and subsection (4) of section 120.56, Florida Statutes, are
271 amended to read:
272 120.56 Challenges to rules.—
273 (1) GENERAL PROCEDURES ~~FOR CHALLENGING THE VALIDITY OF A~~
274 ~~RULE OR A PROPOSED RULE~~.—
275 (a) Any person substantially affected by a rule or a
276 proposed rule may seek an administrative determination of the
277 invalidity of the rule on the ground that the rule is an invalid
278 exercise of delegated legislative authority.
279 (b) The petition challenging the validity of a proposed or
280 adopted rule under this section ~~seeking an administrative~~
281 ~~determination~~ must state: ~~with particularity~~
282 1. The particular provisions alleged to be invalid and a
283 statement ~~with sufficient explanation~~ of the facts or grounds

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

284 for the alleged invalidity. ~~and~~
285 2. Facts sufficient to show that the petitioner ~~person~~
286 ~~challenging a rule~~ is substantially affected by the challenged
287 adopted rule or ~~it, or that the person challenging a proposed~~
288 ~~rule~~ would be substantially affected by the proposed rule ~~it~~.
289 (c) The petition shall be filed by electronic means with
290 the division which shall, immediately upon filing, forward by
291 electronic means copies to the agency whose rule is challenged,
292 the Department of State, and the committee. Within 10 days after
293 receiving the petition, the division director shall, if the
294 petition complies with the requirements of paragraph (b), assign
295 an administrative law judge who shall conduct a hearing within
296 30 days thereafter, unless the petition is withdrawn or a
297 continuance is granted by agreement of the parties or for good
298 cause shown. Evidence of good cause includes, but is not limited
299 to, written notice of an agency's decision to modify or withdraw
300 the proposed rule or a written notice from the chair of the
301 committee stating that the committee will consider an objection
302 to the rule at its next scheduled meeting. The failure of an
303 agency to follow the applicable rulemaking procedures or
304 requirements set forth in this chapter shall be presumed to be
305 material; however, the agency may rebut this presumption by
306 showing that the substantial interests of the petitioner and the
307 fairness of the proceedings have not been impaired.
308 (d) Within 30 days after the hearing, the administrative
309 law judge shall render a decision and state the reasons therefor

310 in writing. The division shall forthwith transmit by electronic
311 means copies of the administrative law judge's decision to the
312 agency, the Department of State, and the committee.
313 (e) Hearings held under this section shall be de novo in
314 nature. The standard of proof shall be the preponderance of the
315 evidence. Hearings shall be conducted in the same manner as
316 provided by ss. 120.569 and 120.57, except that the
317 administrative law judge's order shall be final agency action.
318 The petitioner and the agency whose rule is challenged shall be
319 adverse parties. Other substantially affected persons may join
320 the proceedings as intervenors on appropriate terms which shall
321 not unduly delay the proceedings. Failure to proceed under this
322 section shall not constitute failure to exhaust administrative
323 remedies.
324 (2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—
325 (a) A substantially affected person may seek an
326 administrative determination of the invalidity of a proposed
327 rule by filing a petition seeking such a determination with the
328 division within 21 days after the date of publication of the
329 notice required by s. 120.54(3)(a); within 10 days after the
330 final public hearing is held on the proposed rule as provided by
331 s. 120.54(3)(e)2.; within 20 days after the statement of
332 estimated regulatory costs or revised statement of estimated
333 regulatory costs, if applicable, has been prepared and made
334 available as provided in s. 120.541(1)(d); or within 20 days
335 after the date of publication of the notice required by s.

336 120.54(3)(d). The petition must state with particularity the
337 objections to the proposed rule and the reasons that the
338 proposed rule is an invalid exercise of delegated legislative
339 authority. The petitioner has the burden of going forward with
340 evidence sufficient to support the petition. The agency then has
341 the burden to prove by a preponderance of the evidence that the
342 proposed rule is not an invalid exercise of delegated
343 legislative authority as to the objections raised. ~~A person who~~
344 ~~is substantially affected by a change in the proposed rule may~~
345 ~~seek a determination of the validity of such change.~~ A person
346 who is not substantially affected by the proposed rule as
347 initially noticed, but who is substantially affected by the rule
348 as a result of a change, may challenge any provision of the
349 resulting proposed rule ~~and is not limited to challenging the~~
350 ~~change to the proposed rule~~.
351 (4) CHALLENGING AGENCY STATEMENTS DEFINED AS UNADOPTED
352 RULES; SPECIAL PROVISIONS.—
353 (a) Any person substantially affected by an agency
354 statement that is an unadopted rule may seek an administrative
355 determination that the statement violates s. 120.54(1)(a). The
356 petition shall include the text of the statement or a
357 description of the statement and shall state ~~with particularity~~
358 facts sufficient to show that the statement constitutes an
359 unadopted ~~a~~ rule ~~under s. 120.52 and that the agency has not~~
360 ~~adopted the statement by the rulemaking procedure provided by s.~~
361 ~~120.54~~.

362 (b) The administrative law judge may extend the hearing
363 date beyond 30 days after assignment of the case for good cause.
364 Upon notification to the administrative law judge provided
365 before the final hearing that the agency has published a notice
366 of rulemaking under s. 120.54(3), such notice shall
367 automatically operate as a stay of proceedings pending adoption
368 of the statement as a rule. The administrative law judge may
369 vacate the stay for good cause shown. A stay of proceedings
370 pending rulemaking shall remain in effect so long as the agency
371 is proceeding expeditiously and in good faith to adopt the
372 statement as a rule. ~~If a hearing is held and the petitioner~~
373 ~~proves the allegations of the petition, the agency shall have~~
374 ~~the burden of proving~~
375 (c) The petitioner has the burden of going forward with
376 evidence sufficient to support the petition. The agency then has
377 the burden to prove by a preponderance of the evidence that the
378 statement does not meet the definition of an unadopted rule, the
379 statement was adopted as a rule in compliance with s. 120.54, or
380 that rulemaking is not feasible or not practicable under s.
381 120.54(1)(a).
382 (d)~~(c)~~ The administrative law judge may determine whether
383 all or part of a statement violates s. 120.54(1)(a). The
384 decision of the administrative law judge shall constitute a
385 final order. The division shall transmit a copy of the final
386 order to the Department of State and the committee. The
387 Department of State shall publish notice of the final order in

388 the first available issue of the Florida Administrative
389 Register.
390 (e) ~~(d)~~ If an administrative law judge enters a final order
391 that all or part of an unadopted rule ~~agency statement~~ violates
392 s. 120.54(1)(a), the agency must immediately discontinue all
393 reliance upon the unadopted rule ~~statement~~ or any substantially
394 similar statement as a basis for agency action.
395 (f) ~~(e)~~ If proposed rules addressing the challenged
396 unadopted rule ~~statement~~ are determined to be an invalid
397 exercise of delegated legislative authority as defined in s.
398 120.52(8)(b)-(f), the agency must immediately discontinue
399 reliance upon ~~on~~ the unadopted rule ~~statement~~ and any
400 substantially similar statement until rules addressing the
401 subject are properly adopted, and the administrative law judge
402 shall enter a final order to that effect.
403 (g) ~~(f)~~ All proceedings to determine a violation of s.
404 120.54(1)(a) shall be brought pursuant to this subsection. A
405 proceeding pursuant to this subsection may be consolidated with
406 a proceeding under subsection (3) or under any other section of
407 this chapter. This paragraph does not prevent a party whose
408 substantial interests have been determined by an agency action
409 from bringing a proceeding pursuant to s. 120.57(1)(e).
410 Section 5. Paragraph (l) of subsection (2) of section
411 120.569, Florida Statutes, is amended to read:
412 120.569 Decisions which affect substantial interests.—
413 (2)

414 (1) Unless the time period is waived or extended with the
415 consent of all parties, the final order in a proceeding which
416 affects substantial interests must be in writing and include
417 findings of fact, if any, and conclusions of law separately
418 stated, and it must be rendered within 90 days:
419 1. After the hearing is concluded, if conducted by the
420 agency;
421 2. After a recommended order is submitted to the agency
422 and mailed to all parties, if the hearing is conducted by an
423 administrative law judge, except that, at the election of the
424 agency, the time for rendering the final order may be extended
425 up to 10 days after entry of a mandate on any appeal from a
426 final order under s. 120.57(1)(e)4.; or
427 3. After the agency has received the written and oral
428 material it has authorized to be submitted, if there has been no
429 hearing.
430 Section 6. Paragraphs (e) and (h) of subsection (1) and
431 subsection (2) of section 120.57, Florida Statutes, are amended
432 to read:
433 120.57 Additional procedures for particular cases.—
434 (1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING
435 DISPUTED ISSUES OF MATERIAL FACT.—
436 (e)1. An agency or an administrative law judge may not
437 base agency action that determines the substantial interests of
438 a party on an unadopted rule or a rule that is an invalid
439 exercise of delegated legislative authority. ~~The administrative~~

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

440 ~~law judge shall determine whether an agency statement~~
441 ~~constitutes an unadopted rule.~~ This subparagraph does not
442 preclude application of valid adopted rules and applicable
443 provisions of law to the facts.
444 2. In a matter initiated as a result of agency action
445 proposing to determine the substantial interests of a party, the
446 party's timely petition for hearing may challenge the proposed
447 agency action based on a rule that is an invalid exercise of
448 delegated legislative authority or based on an alleged unadopted
449 rule. For challenges brought under this subparagraph:
450 a. The challenge shall be pled as a defense using the
451 procedures set forth in s. 120.56(1)(b).
452 b. Section 120.56(3)(a) applies to a challenge alleging
453 that a rule is an invalid exercise of delegated legislative
454 authority.
455 c. Section 120.56(4)(c) applies to a challenge alleging an
456 unadopted rule.
457 d. The agency has 15 days from the date of receipt of a
458 challenge under this subparagraph to serve the challenging party
459 with a notice whether the agency will continue to rely upon the
460 rule or the alleged unadopted rule as a basis for the action
461 determining the party's substantive interests. Failure to timely
462 serve the notice constitutes a binding stipulation that the
463 agency shall not rely upon the rule or unadopted rule further in
464 the proceeding. The agency shall include a copy of this notice
465 with the referral of the matter to the division under s.

466 120.569(2)(a).
467 e. This subparagraph does not preclude the consolidation
468 of any proceeding under s. 120.56 with any proceeding under this
469 paragraph.
470 3.~~2.~~ Notwithstanding subparagraph 1., if an agency
471 demonstrates that the statute being implemented directs it to
472 adopt rules, that the agency has not had time to adopt those
473 rules because the requirement was so recently enacted, and that
474 the agency has initiated rulemaking and is proceeding
475 expeditiously and in good faith to adopt the required rules,
476 then the agency's action may be based upon those unadopted rules
477 if~~, subject to de novo review by~~ the administrative law judge
478 determines that rulemaking is neither feasible nor practicable
479 and the unadopted rules would not constitute an invalid exercise
480 of delegated legislative authority if adopted as rules. An
481 unadopted rule ~~The agency action~~ shall not be presumed valid ~~or~~
482 ~~invalid~~. The agency must demonstrate that the unadopted rule:
483 a. Is within the powers, functions, and duties delegated
484 by the Legislature or, if the agency is operating pursuant to
485 authority vested in the agency by ~~derived from~~ the State
486 Constitution, is within that authority;
487 b. Does not enlarge, modify, or contravene the specific
488 provisions of law implemented;
489 c. Is not vague, establishes adequate standards for agency
490 decisions, or does not vest unbridled discretion in the agency;
491 d. Is not arbitrary or capricious. A rule is arbitrary if

492 it is not supported by logic or the necessary facts; a rule is
493 capricious if it is adopted without thought or reason or is
494 irrational;
495 e. Is not being applied to the substantially affected
496 party without due notice; and
497 f. Does not impose excessive regulatory costs on the
498 regulated person, county, or city.
499 4. If the agency timely serves notice of continued
500 reliance upon a challenged rule or an alleged unadopted rule
501 under sub-subparagraph 2.d., the administrative law judge shall
502 determine whether the challenged rule is an invalid exercise of
503 delegated legislative authority or whether the challenged agency
504 statement constitutes an unadopted rule and if that unadopted
505 rule meets the requirements of subparagraph 3. The determination
506 shall be rendered as a separate final order no earlier than the
507 date on which the administrative law judge serves the
508 recommended order.
509 5.~~3.~~ The recommended and final orders in any proceeding
510 shall be governed by the provisions of paragraphs (k) and (l),
511 except that the administrative law judge's determination
512 ~~regarding an unadopted rule~~ under subparagraph 4. ~~1. or~~
513 ~~subparagraph 2.~~ shall be included as a conclusion of law that
514 the agency may not reject ~~not be rejected by the agency unless~~
515 ~~the agency first determines from a review of the complete~~
516 ~~record, and states with particularity in the order, that such~~
517 ~~determination is clearly erroneous or does not comply with~~

518 ~~essential requirements of law. In any proceeding for review~~
519 ~~under s. 120.68, if the court finds that the agency's rejection~~
520 ~~of the determination regarding the unadopted rule does not~~
521 ~~comport with the provisions of this subparagraph, the agency~~
522 ~~action shall be set aside and the court shall award to the~~
523 ~~prevailing party the reasonable costs and a reasonable~~
524 ~~attorney's fee for the initial proceeding and the proceeding for~~
525 ~~review~~.
526 (h) Any party to a proceeding in which an administrative
527 law judge of the Division of Administrative Hearings has final
528 order authority may move for a summary final order when there is
529 no genuine issue as to any material fact. A summary final order
530 shall be rendered if the administrative law judge determines
531 from the pleadings, depositions, answers to interrogatories, and
532 admissions on file, together with affidavits, if any, that no
533 genuine issue as to any material fact exists and that the moving
534 party is entitled as a matter of law to the entry of a final
535 order. A summary final order shall consist of findings of fact,
536 if any, conclusions of law, a disposition or penalty, if
537 applicable, and any other information required by law to be
538 contained in the final order. This paragraph does not apply to
539 proceedings authorized by paragraph (e).
540 (2) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT
541 INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—In any case to which
542 subsection (1) does not apply:
543 (a) The agency shall:

544 1. Give reasonable notice to affected persons of the
545 action of the agency, whether proposed or already taken, or of
546 its decision to refuse action, together with a summary of the
547 factual, legal, and policy grounds therefor.
548 2. Give parties or their counsel the option, at a
549 convenient time and place, to present to the agency or hearing
550 officer written or oral evidence in opposition to the action of
551 the agency or to its refusal to act, or a written statement
552 challenging the grounds upon which the agency has chosen to
553 justify its action or inaction.
554 3. If the objections of the parties are overruled, provide
555 a written explanation within 7 days.
556 (b) An agency may not base agency action that determines
557 the substantial interests of a party on an unadopted rule or a
558 rule that is an invalid exercise of delegated legislative
559 authority. No later than the date provided by the agency under
560 subparagraph (a)2. for presenting material in opposition to the
561 agency's proposed action or refusal to act, the party may file a
562 petition under s. 120.56 challenging the rule, portion of rule,
563 or unadopted rule upon which the agency bases its proposed
564 action or refusal to act. The filing of a challenge under s.
565 120.56 pursuant to this paragraph shall stay all proceedings on
566 the agency's proposed action or refusal to act until entry of
567 the final order by the administrative law judge, which shall
568 provide additional notice that the stay of the pending agency
569 action is terminated and any further stay pending appeal of the

570 final order must be sought from the appellate court.
571 (c) ~~(b)~~ The record shall only consist of:
572 1. The notice and summary of grounds.
573 2. Evidence received.
574 3. All written statements submitted.
575 4. Any decision overruling objections.
576 5. All matters placed on the record after an ex parte
577 communication.
578 6. The official transcript.
579 7. Any decision, opinion, order, or report by the
580 presiding officer.
581 Section 7. Section 120.595, Florida Statutes, is amended
582 to read:
583 120.595 Attorney ~~Attorney's~~ fees and costs.—
584 (1) CHALLENGES PURSUANT TO SECTION 120.56 OR ~~TO AGENCY~~
585 ~~ACTION PURSUANT TO~~ SECTION 120.57(1).—
586 (a) This ~~The provisions of this~~ subsection is ~~are~~
587 supplemental to, and does ~~do~~ not abrogate, other provisions
588 allowing the award of fees or costs in administrative
589 proceedings.
590 (b) The final order in a proceeding conducted pursuant to
591 s. 120.56 or s. 120.57(1) shall award all reasonable costs and
592 all ~~a~~ reasonable attorney fees ~~attorney's fee~~ to the prevailing
593 party only if the administrative law judge determines ~~only where~~
594 that the nonprevailing adverse party ~~has been determined by the~~
595 ~~administrative law judge to have~~ participated in the proceeding

596 for an improper purpose.
597 (c) In proceedings conducted pursuant to s. 120.57(1), it
598 shall be rebuttably presumed that a nonprevailing adverse party
599 participated in the current proceeding for an improper purpose
600 if the administrative law judge determines that:
601 1. The nonprevailing adverse party participated in two or
602 more other such proceedings involving the same prevailing party
603 and project as an adverse party and in which the nonprevailing
604 adverse party did not establish either the factual or legal
605 merits of its position.
606 2. The factual or legal position asserted in the current
607 proceeding would have been cognizable in the previous proceeding
608 and upon motion, the administrative law judge shall determine
609 whether any party participated in the proceeding for an improper
610 purpose as defined by this subsection. In making such
611 determination, the administrative law judge shall consider
612 whether the nonprevailing adverse party has participated in two
613 or more other such proceedings involving the same prevailing
614 party and the same project as an adverse party and in which such
615 two or more proceedings the nonprevailing adverse party did not
616 establish either the factual or legal merits of its position,
617 and shall consider whether the factual or legal position
618 asserted in the instant proceeding would have been cognizable in
619 the previous proceedings. In such event, it shall be rebuttably
620 presumed that the nonprevailing adverse party participated in
621 the pending proceeding for an improper purpose.

622 (d) In a ~~any~~ proceeding in which the administrative law
623 judge determines that a party participated in the proceeding for
624 an improper purpose, the recommended order shall ~~so~~ designate
625 that party and shall determine the award of costs and attorney
626 ~~attorney's~~ fees.
627 (e) For purposes ~~the purpose~~ of this subsection, the term:
628 1. "Improper purpose" means participation in a proceeding
629 pursuant to s. 120.57(1) primarily to harass or to cause
630 unnecessary delay or for frivolous purpose or to needlessly
631 increase the cost of litigation, licensing, or securing the
632 approval of an activity.
633 2. "Costs" has the same meaning as the costs allowed in
634 civil actions in this state as provided in chapter 57.
635 3. "Nonprevailing adverse party" means a party that has
636 failed to have substantially changed the outcome of the proposed
637 or final agency action which is the subject of a proceeding. If
638 ~~In the event that~~ a proceeding results in any substantial
639 modification or condition intended to resolve the matters raised
640 in a party's petition, it shall be determined that the party
641 having raised the issue addressed is not a nonprevailing adverse
642 party. The recommended order shall state whether the change is
643 substantial for purposes of this subsection. ~~In no event shall~~
644 The term "nonprevailing party" or "prevailing party" does not ~~be~~
645 ~~deemed to~~ include a ~~any~~ party that has intervened in a
646 previously existing proceeding to support the position of an
647 agency.

648 (f) For challenges brought under s. 120.57(1)(e), when the
649 agency relies on a challenged rule or an alleged unadopted rule
650 pursuant to s. 120.57(1)(e)2.d., if the appellate court or the
651 administrative law judge declares the rule or portion of the
652 rule to be invalid or that the agency statement is an unadopted
653 rule which does not meet the requirements of s. 120.57(1)(e)4.,
654 a judgment or order shall be rendered against the agency for
655 reasonable costs and reasonable attorney fees, unless the agency
656 demonstrates that special circumstances exist that make the
657 award unjust. An award of attorney fees as provided by this
658 paragraph may not exceed $50,000.
659 (2) CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO
660 SECTION 120.56(2).—If the appellate court or administrative law
661 judge declares a proposed rule or portion of a proposed rule
662 invalid pursuant to s. 120.56(2), a judgment or order shall be
663 rendered against the agency for reasonable costs and reasonable
664 attorney ~~attorney's~~ fees, unless the agency demonstrates that
665 ~~its actions were substantially justified or~~ special
666 circumstances exist which would make the award unjust. An
667 ~~agency's actions are "substantially justified" if there was a~~
668 ~~reasonable basis in law and fact at the time the actions were~~
669 ~~taken by the agency. If the agency prevails in the proceedings,~~
670 ~~the appellate court or administrative law judge shall award~~
671 ~~reasonable costs and reasonable attorney's fees against a party~~
672 ~~if the appellate court or administrative law judge determines~~
673 ~~that a party participated in the proceedings for an improper~~

674 ~~purpose as defined by paragraph (1)(e). No~~ award of <u>attorney</u>
675 ~~attorney's~~ fees as provided by this subsection <u>may not</u> ~~shall~~
676 exceed $50,000.
677 (3) CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO
678 SECTION 120.56(3) AND (5).—If the appellate court or
679 administrative law judge declares a rule or portion of a rule
680 invalid pursuant to s. 120.56(3) or (5), a judgment or order
681 shall be rendered against the agency for reasonable costs and
682 reasonable <u>attorney</u> ~~attorney's~~ fees, unless the agency
683 demonstrates that ~~its actions were substantially justified or~~
684 special circumstances exist which would make the award unjust.
685 An ~~agency's actions are "substantially justified" if there was a~~
686 ~~reasonable basis in law and fact at the time the actions were~~
687 ~~taken by the agency. If the agency prevails in the proceedings,~~
688 ~~the appellate court or administrative law judge shall award~~
689 ~~reasonable costs and reasonable attorney's fees against a party~~
690 ~~if the appellate court or administrative law judge determines~~
691 ~~that a party participated in the proceedings for an improper~~
692 ~~purpose as defined by paragraph (1)(e). No~~ award of <u>attorney</u>
693 ~~attorney's~~ fees as provided by this subsection <u>may not</u> ~~shall~~
694 exceed $50,000.
695 (4) CHALLENGES TO <u>UNADOPTED RULES</u> ~~AGENCY ACTION~~ PURSUANT
696 TO SECTION 120.56(4).—
697 (a) If the appellate court or administrative law judge
698 determines that all or part of an <u>unadopted rule</u> ~~agency~~
699 ~~statement~~ violates s. 120.54(1)(a), or that the agency must

700 immediately discontinue reliance upon ~~on~~ the unadopted rule
701 ~~statement~~ and any substantially similar statement pursuant to s.
702 120.56(4)(f) ~~120.56(4)(e)~~, a judgment or order shall be entered
703 against the agency for reasonable costs and reasonable attorney
704 ~~attorney's~~ fees, unless the agency demonstrates that the
705 statement is required by the Federal Government to implement or
706 retain a delegated or approved program or to meet a condition to
707 receipt of federal funds.
708 (b) Upon notification to the administrative law judge
709 provided before the final hearing that the agency has published
710 a notice of rulemaking under s. 120.54(3)(a), such notice shall
711 automatically operate as a stay of proceedings pending
712 rulemaking. The administrative law judge may vacate the stay for
713 good cause shown. A stay of proceedings under this paragraph
714 remains in effect so long as the agency is proceeding
715 expeditiously and in good faith to adopt the statement as a
716 rule. The administrative law judge shall award reasonable costs
717 and reasonable attorney ~~attorney's~~ fees incurred ~~accrued~~ by the
718 petitioner before ~~prior to~~ the date the notice was published~~,~~
719 ~~unless the agency proves to the administrative law judge that it~~
720 ~~did not know and should not have known that the statement was an~~
721 ~~unadopted rule. Attorneys' fees and costs under this paragraph~~
722 ~~and paragraph (a) shall be awarded only upon a finding that the~~
723 ~~agency received notice that the statement may constitute an~~
724 ~~unadopted rule at least 30 days before a petition under s.~~
725 ~~120.56(4) was filed and that the agency failed to publish the~~

726 ~~required notice of rulemaking pursuant to s. 120.54(3) that~~
727 ~~addresses the statement within that 30-day period. Notice to the~~
728 ~~agency may be satisfied by its receipt of a copy of the s.~~
729 ~~120.56(4) petition, a notice or other paper containing~~
730 ~~substantially the same information, or a petition filed pursuant~~
731 ~~to s. 120.54(7)~~. An award of <u>attorney</u> ~~attorney's~~ fees as
732 provided by this paragraph may not exceed $50,000.
733 (c) Notwithstanding the provisions of chapter 284, an
734 award shall be paid from the budget entity of the secretary,
735 executive director, or equivalent administrative officer of the
736 agency, and the agency <u>is</u> ~~shall~~ not ~~be~~ entitled to payment of an
737 award or reimbursement for payment of an award under any
738 provision of law.
739 ~~(d) If the agency prevails in the proceedings, the~~
740 ~~appellate court or administrative law judge shall award~~
741 ~~reasonable costs and attorney's fees against a party if the~~
742 ~~appellate court or administrative law judge determines that the~~
743 ~~party participated in the proceedings for an improper purpose as~~
744 ~~defined in paragraph (1)(e) or that the party or the party's~~
745 ~~attorney knew or should have known that a claim was not~~
746 ~~supported by the material facts necessary to establish the claim~~
747 ~~or would not be supported by the application of then-existing~~
748 ~~law to those material facts.~~
749 (5) APPEALS.—When there is an appeal, the court in its
750 discretion may award reasonable <u>attorney</u> ~~attorney's~~ fees and
751 reasonable costs to the prevailing party if the court finds that

752 the appeal was frivolous, meritless, or an abuse of the
753 appellate process, or that the agency action which precipitated
754 the appeal was a gross abuse of the agency's discretion. Upon
755 review of agency action that precipitates an appeal, if the
756 court finds that the agency improperly rejected or modified
757 findings of fact in a recommended order, the court shall award
758 reasonable attorney ~~attorney's~~ fees and reasonable costs to a
759 prevailing appellant for the administrative proceeding and the
760 appellate proceeding.
761 (6) NOTICE OF INVALIDITY.—A party failing to serve a
762 notice of proposed challenge under this subsection is not
763 entitled to an award of reasonable costs and reasonable attorney
764 fees under this section.
765 (a) Before filing a petition challenging the validity of a
766 proposed rule under s. 120.56(2), an adopted rule under s.
767 120.56(3), or an agency statement defined as an unadopted rule
768 under s. 120.56(4), a substantially affected person shall serve
769 the agency head with notice of the proposed challenge. The
770 notice shall identify the proposed or adopted rule or the
771 unadopted rule that the person proposes to challenge and a brief
772 explanation of the basis for that challenge. The notice must be
773 received by the agency head at least 5 days before the filing of
774 a petition under s. 120.56(2), and at least 30 days before the
775 filing of a petition under s. 120.56(3) or s. 120.56(4).
776 (b) This subsection does not apply to defenses raised and
777 challenges authorized by s. 120.57(1)(e) or s. 120.57(2)(b).

778 (7) DETERMINATION OF RECOVERABLE FEES AND COSTS.—For
779 purposes of this chapter, s. 57.105(5), and s. 57.111, in
780 addition to an award of reasonable attorney fees and costs, the
781 prevailing party, if the prevailing party is not a state agency,
782 shall also recover reasonable attorney fees and costs incurred
783 in litigating entitlement to, and the determination or
784 quantification of, reasonable attorney fees and costs for the
785 underlying matter. Reasonable attorney fees and costs awarded
786 for litigating entitlement to, and the determination or
787 quantification of, reasonable attorney fees and costs for the
788 underlying matter are not subject to the limitations on amounts
789 provided in this chapter or s. 57.111.
790 (8) ~~(6)~~ OTHER SECTIONS NOT AFFECTED.—Other provisions,
791 including ss. 57.105 and 57.111, authorize the award of attorney
792 ~~attorney's~~ fees and costs in administrative proceedings. Nothing
793 in this section shall affect the availability of attorney
794 ~~attorney's~~ fees and costs as provided in those sections.
795 Section 8. Subsections (1), (2), and (9) of section
796 120.68, Florida Statutes, are amended to read:
797 120.68 Judicial review.—
798 (1)(a) A party who is adversely affected by final agency
799 action is entitled to judicial review.
800 (b) A preliminary, procedural, or intermediate order of
801 the agency or of an administrative law judge of the Division of
802 Administrative Hearings, or a final order under s.
803 120.57(1)(e)4., is immediately reviewable if review of the final

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

V

804 agency decision would not provide an adequate remedy.
805 (2)(a) Judicial review shall be sought in the appellate
806 district where the agency maintains its headquarters or where a
807 party resides or as otherwise provided by law.
808 (b) All proceedings shall be instituted by filing a notice
809 of appeal or petition for review in accordance with the Florida
810 Rules of Appellate Procedure within 30 days after the date that
811 ~~rendition of~~ the order being appealed was filed with the agency
812 clerk. If a party receives notice of the filing of the order
813 later than the 25th day after the filing of the order with the
814 agency clerk, the time by which the party must file a notice of
815 appeal or petition for review is extended until 10 days after
816 the date that the party received the notice of the filing of the
817 order. If the appeal is of an order rendered in a proceeding
818 initiated under s. 120.56, or a final order under s.
819 120.57(1)(e)4., the agency whose rule is being challenged shall
820 transmit a copy of the notice of appeal to the committee.
821 (c) ~~(b)~~ When proceedings under this chapter are
822 consolidated for final hearing and the parties to the
823 consolidated proceeding seek review of final or interlocutory
824 orders in more than one district court of appeal, the courts of
825 appeal are authorized to transfer and consolidate the review
826 proceedings. The court may transfer such appellate proceedings
827 on its own motion, upon motion of a party to one of the
828 appellate proceedings, or by stipulation of the parties to the
829 appellate proceedings. In determining whether to transfer a

830 proceeding, the court may consider such factors as the
831 interrelationship of the parties and the proceedings, the
832 desirability of avoiding inconsistent results in related
833 matters, judicial economy, and the burden on the parties of
834 reproducing the record for use in multiple appellate courts.
835 (9) No petition challenging an agency rule as an invalid
836 exercise of delegated legislative authority shall be instituted
837 pursuant to this section, except to review an order entered
838 pursuant to a proceeding under s. 120.56, under s.
839 120.57(1)(e)5., or under s. 120.57(2)(b), or an agency's
840 findings of immediate danger, necessity, and procedural fairness
841 prerequisite to the adoption of an emergency rule pursuant to s.
842 120.54(4), unless the sole issue presented by the petition is
843 the constitutionality of a rule and there are no disputed issues
844 of fact.
845 Section 9. Section 120.695, Florida Statutes, is amended
846 to read:
847 120.695 Notice of noncompliance; designation of minor
848 violation rules.—
849 (1) It is the policy of the state that the purpose of
850 regulation is to protect the public by attaining compliance with
851 the policies established by the Legislature. Fines and other
852 penalties may be provided in order to assure compliance;
853 however, the collection of fines and the imposition of penalties
854 are intended to be secondary to the primary goal of attaining
855 compliance with an agency's rules. It is the intent of the

856 Legislature that an agency charged with enforcing rules shall
857 issue a notice of noncompliance as its first response to a minor
858 violation of a rule in any instance in which it is reasonable to
859 assume that the violator was unaware of the rule or unclear as
860 to how to comply with it.
861 (2)(a) Each agency shall issue a notice of noncompliance
862 as a first response to a minor violation of a rule. A "notice of
863 noncompliance" is a notification by the agency charged with
864 enforcing the rule issued to the person or business subject to
865 the rule. A notice of noncompliance may not be accompanied with
866 a fine or other disciplinary penalty. It must identify the
867 specific rule that is being violated, provide information on how
868 to comply with the rule, and specify a reasonable time for the
869 violator to comply with the rule. A rule is agency action that
870 regulates a business, occupation, or profession, or regulates a
871 person operating a business, occupation, or profession, and
872 that, if not complied with, may result in a disciplinary
873 penalty.
874 (b) Each agency shall review all of its rules and
875 designate those for which a violation would be a minor violation
876 and for which a notice of noncompliance must be the first
877 enforcement action taken against a person or business subject to
878 regulation. A violation of a rule is a minor violation if it
879 does not result in economic or physical harm to a person or
880 adversely affect the public health, safety, or welfare or create
881 a significant threat of such harm. ~~If an agency under the~~

882 ~~direction of a cabinet officer mails to each licensee a notice~~
883 ~~of the designated rules at the time of licensure and at least~~
884 ~~annually thereafter, the provisions of paragraph (a) may be~~
885 ~~exercised at the discretion of the agency. Such notice shall~~
886 ~~include a subject-matter index of the rules and information on~~
887 ~~how the rules may be obtained.~~
888 (c)<u>1. No later than June 30, 2016, and after such date</u>
889 <u>within 3 months after any request of the rules ombudsman in the</u>
890 <u>Executive Office of the Governor,</u> ~~The agency's review and~~
891 ~~designation must be completed by December 1, 1995;~~ each agency
892 <u>shall review</u> ~~under the direction of the Governor shall make a~~
893 ~~report to the Governor, and each agency under the joint~~
894 ~~direction of the Governor and Cabinet shall report to the~~
895 ~~Governor and Cabinet by January 1, 1996, on which of~~ its rules
896 <u>and certify to the President of the Senate, the Speaker of the</u>
897 <u>House of Representatives, the committee, and the rules ombudsman</u>
898 <u>those rules that</u> have been designated as rules the violation of
899 which would be a minor violation <u>under paragraph (b), consistent</u>
900 <u>with the legislative intent stated in subsection (1). For each</u>
901 <u>agency failing to timely complete the review and file the</u>
902 <u>certification as required by this section, the rules ombudsman</u>
903 <u>shall promptly report such failure to the Governor, the</u>
904 <u>President of the Senate, the Speaker of the House of</u>
905 <u>Representatives, and the committee</u>.
906 <u>2. Beginning on July 1, 2016, each agency shall:</u>

907 a. Publish all rules that the agency has designated as
908 rules the violation of which would be a minor violation, either
909 as a complete list on the agency's Internet website or by
910 incorporation of the designations in the agency's disciplinary
911 guidelines adopted as a rule.
912 b. Ensure that all investigative and enforcement personnel
913 are knowledgeable of the agency's designations under this
914 section.
915 3. For each rule filed for adoption, the agency head shall
916 certify whether any part of the rule is designated as a rule the
917 violation of which would be a minor violation and shall update
918 the listing required by sub-subparagraph 2.a.
919 (d) The Governor or the Governor and Cabinet, as
920 appropriate ~~pursuant to paragraph (c)~~, may evaluate the review
921 and designation effects of each agency subject to the direction
922 and supervision of such authority and may direct ~~apply~~ a
923 different designation than that applied by such ~~the~~ agency.
924 (e) Notwithstanding s. 120.52(1)(a), this section does not
925 apply to:
926 1. The Department of Corrections;
927 2. Educational units;
928 3. The regulation of law enforcement personnel; or
929 4. The regulation of teachers.
930 (f) Designation pursuant to this section is not subject to
931 challenge under this chapter.
932 Section 10. This act shall take effect July 1, 2015.

HB 985

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 985 Maintenance of Agency Final Orders
SPONSOR(S): Eisnaugle
TIED BILLS: **IDEN./SIM. BILLS:** SB 1284

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom
2) Government Operations Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

All agencies covered by Florida's Administrative Procedures Act (APA) must maintain most final agency orders and a subject matter index thereof, allowing orders to be publically accessed for research or copying, or else maintain an electronic database of final orders allowing public users to research and retrieve full texts using common logical search terms.[1] If an electronic database is not used, an agency may satisfy its public access requirement by designating an official reporter to index and publish its final orders.[2] Thus, agency final orders in Florida may be indexed and maintained for retrieval on microfilm in agency offices or published by a reporter or else available online in a searchable electronic database.

Such orders must be maintained as permanent agency records.[3] Implicitly, public access is required indefinitely.

Since 2008, agencies have been permitted to satisfy the requirement for public access by electronically transmitting a copy of its final orders to the Division of Administrative Hearings (DOAH) for access through DOAH's website. A number of large agencies have used the DOAH alternative with satisfaction. DOAH has no legal obligation to maintain its website.

HB 985 requires all agencies to use the DOAH website for publication of the future orders that must be maintained for public access. Other methods of maintaining and accessing pre-existing orders will continue indefinitely.

The bill will ensure that, all final agency orders entered after implementation of the bill will be available online in an easily searchable database.

The bill is expected to have an insignificant fiscal impact, although there may be a transitional impact on agencies that do not presently create a searchable electronic copy of orders.

The bill has an effective date of July 1, 2015.

[1] S. 120.53(1)(a), F.S.
[2] S. 120.53(2)(a), F.S.
[3] S. 119.021(3), F.S.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present situation

Agency Final Orders

The APA regulates administrative rulemaking, administrative enforcement and administrative resolution of disputes arising out of administrative actions of most state agencies and some subdivisions of state government. Administrative actions authorized by law and regulated by the APA include adoption of a rule, granting or denying a permit or license, an order enforcing a law or rule that assesses a fine or other discipline and final decisions in administrative disputes or other matters resulting in an agency decision. Such disputes include challenges to the validity of a rule or proposed rule or challenges to agency reliance on unadopted rules,[4] as well as challenges to other proposed agency actions which affect substantial interests of any party.[5] In addition to disputes, agency action occurs when the agency acts on a petition for a declaratory statement,[6] or settles a dispute through mediation.[7] A final order is the written final decision of an agency or, in particular matters, an administrative law judge, resulting from any such dispute, declaratory statement petition or mediation. In other words, a final order is the written form of any agency action other than adoption of a rule[8] or an agency policy exempted from the definition of a rule under the APA.[9]

The 1974 Administrative Procedures Act (APA) required agencies to "maintain" all final orders (with certain exceptions) and a subject matter index thereof, allowing orders to be located and publicly accessed for research or copying. One purpose of the requirement was to enhance public notice of agency policy expressed in precedents.[10] In 1979, the law was amended to allow agencies to satisfy the requirement to maintain all agency orders by designating an official reporter to index and publish its orders. Under this provision, agencies may use a third party such as the Florida Administrative Law Reports to index final orders. In practice, the commercial reporters published only select orders.[11] In 1992, amendments authorized agencies to satisfy the requirement by maintaining an electronic database of final orders allowing public users to research and retrieve the full text of final orders using common logical search terms.[12]

Today, agency final orders in Florida may be maintained in hard copy in agency files, published by a reporter or made available online in an electronic database. These varied methods make finding agency orders difficult at times. The Ad Hoc Orders Access Committee of the Florida Bar's Administrative Law Section recently surveyed state agencies to gather information on how agencies index final orders and where final orders may be accessed.[13] The survey revealed that some agencies still require a public records request to access their index and copies of final orders, or they simply identify a particular agency employee to contact for access. Such methods are not always in keeping with the information age. Because such orders must be maintained as permanent agency records, public access of final orders is required indefinitely.

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[4] S. 120.56, F.S.
[5] S. 120.569, F.S.
[6] S. 120.565, F.S.
[7] S.120.573, F.S.
[8] Rule is defined in s. 120.52(16), F.S., and includes most policies apart from statutes that purport to be legally binding. The definition lists a number of express exclusions.
[9] S. 120.52(8), F.S.
[10] See, *McDonald v. Department of Banking and Finance*, 346 So. 2d 569, 582 (1st DCA 1977).
[11] F. Scott Boyd, "From the Chair: 'Order, Order!'", Admin. Law Sec. Newsletter, Vol. XXXIV, No. 2, p. 2 (Jan. 2013).
[12] S. 120.53(1)(a), F.S.
[13] A copy of the survey results is available in the Rulemaking Oversight & Repeal Subcommittee offices.

Preservation of records

In addition to the maintenance, indexing and access requirements in the APA, Florida's public records laws require agencies to permanently maintain records of agency final orders.[14]

Coordination by Department of State

In addition to its supervisory role in the archiving of state records, beginning in 1991, the Department of State (DOS) has exercised power to coordinate the indexing, management, preservation, and accessibility of agency final orders that must be indexed. The Department has rulemaking authority over the system of indexing that agencies may use, and the storage and retrieval systems used to provide access. Authorized storage and retrieval systems include reporters, microfilm, automated systems or any other system considered appropriate by the Department. The Department also has authority to regulate which final orders agencies must index.[15]

DOAH

The Division of Administrative Hearings (DOAH) is a state agency providing ALJs to preside over many disputes under the APA and other state laws. DOAH is placed administratively under the Department of Management Services. However, DOAH is not subject to any control, supervision, or direction by that Department. The director of DOAH, who also serves as chief administrative law judge, has effective administrative control over DOAH, its resources and operations.[16]

Since 2008, agencies have been permitted to satisfy the final order index and maintenance requirement by electronically transmitting a copy of its final orders to DOAH for posting on DOAH's website.[17] A number of large agencies use the DOAH alternative.[18] There does not appear to be any law requiring DOAH to maintain a database accessible for searching orders or other records. However, DOS has adopted a rule governing the use of a database for maintaining final orders.[19] The rule provides:

> If an electronic database is used by an agency, it shall allow users to research and retrieve agency orders by searching the text of the order and descriptive information about the order, which shall contain, at a minimum, major subject headings. To promote consistent, reliable indexing, the indexing system for an electronic database shall have fixed fields to ensure common usage of search terms by anyone that uses the system.

Presently, it appears that an agency may not lawfully use DOAH's system unless it can be assured that these requirements are satisfied.

The quoted rule, however, does not appear to directly regulate DOAH. DOAH does not enter final orders on its own behalf, so DOAH is not governed by the requirement to maintain final orders or implementing rules. Final orders entered by Administrative Law Judges (ALJs) are, as a matter of law, rendered by the agency on whose behalf the ALJ adjudicates a matter.

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[14] S. 119.021(3), F.S.
[15] S. 120.533, F.S. The rules adopted under this section are found in ch. 1B-32, Florida Administrative Code.
[16] S. 120.65, F.S.
[17] S. 120.53(2)(a), F.S. (The relevant DOAH website address, accessed 3/7/15, is: https://www.doah.state.fl.us/FLAIO/.)
[18] The DOAH website lists the following agencies having orders accessible through DOAH: Department of Agriculture and Consumer Services, Agency for Persons with Disabilities, Department of Children and Family Services, Department of Corrections, Department of Community Affairs, Department of Economic Opportunity, Department of Environmental Protection, Department of Health, Department of Education, Department of State, Department of Business and Professional Regulation, Florida Housing Finance Corporation, Office of the Governor, Agency for Health Care Administration, Department of Highway Safety and Motor Vehicles
[19] Rule 1B-32.002(2)(e), F.A.C.

Effect of Proposed Changes

HB 985 requires all agencies to transmit electronic copies of future final orders to DOAH for compilation in its searchable database. Agencies must transmit copies within 90 days of the order's rendering.

The bill also deletes language that will be obsolete if orders are all maintained by DOAH, and other language that may be outdated or duplicative of other law or rules governing such records.

The changes in accessibility only affect agency final orders rendered on or after July 1, 2015. Orders indexed and listed through other means prior to that date will have to be continuously preserved and indexes and lists made available through the prior means of access.

The bill creates the expectation that, after implementation, all final agency orders rendered will be available online in an easily searchable database.

B. SECTION DIRECTORY:

SECTION 1. amends s. 119.021(3) to conform the public records custodial requirements relating to agency final orders to the other changes in the bill.

SECTION 2. amends s. 120.53, F.S., to require all agencies to transmit electronic copies of final orders to DOAH for publication online in an electronic database.

SECTION 3. amends s. 120.533, F.S., to conform to changes in Section 2.

SECTION 4. amends s. 213.22, F.S., to correct a cross-reference to conform to changes in Section 2.

SECTION 5. provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The agency does not appear to impact state revenues.

2. Expenditures:

   The bill should reduce some agency costs associated with reporting or indexing and maintaining final orders for public access.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   Not applicable.

2. Expenditures:

   Not applicable.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could have a slight positive economic impact on the private sector by offering easy internet access to agency orders that may only be accessible in person under current law.

D. FISCAL COMMENTS:

DOAH indicates that it can maintain all agency final orders on its website and host full public access with current resources, personnel and equipment.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not affect local mandates.

2. Other:

B. RULE-MAKING AUTHORITY:

The bill implicates the rulemaking authority of the Department of State respecting the coordination of maintenance and public access to agency final orders. Given the administrative independence of DOAH, the authority of DOS rules over the non-mandatory maintenance of records by DOAH may prove problematic. If the maintenance of final orders function is seen as administering public access under the APA, the Administration Commission, presently authorized to adopt rules implementing many APA provisions, might be better suited to exercise the authority. If the function is seen more as a record keeping requirement, it might be advisable to add a statutory requirement for DOAH to abide by DOS rules in operating its electronic database.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not appear to impose any legal responsibility on DOAH to maintain the information that agencies will be required to transmit for public access. This could prove problematic if budgetary constraints on DOAH forces the director to choose between requirements of law and functions such as the maintenance of the database that have been performed for agencies voluntarily.

The bill may inadvertently repeal some provisions that impose continuing duties on agencies to maintain records, indexes and lists of orders rendered prior to the effective date of the bill. In addition, due to the accumulation of provisions over the years, some provisions retained appear to be redundant or unnecessary and might be revised accordingly. See also comments under RULE-MAKING AUTHORITY above.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
2 An act relating to the maintenance of agency final
3 orders; amending s. 119.021, F.S.; conforming a
4 provision to changes made by the act; amending s.
5 120.53, F.S.; requiring agencies to electronically
6 transmit certain agency final orders to a centralized
7 electronic database maintained by the Division of
8 Administrative Hearings; providing the methods by
9 which such final orders can be searched; requiring
10 each agency to maintain a list of final orders that
11 are not required to be electronically transmitted to
12 the database; providing a timeframe for electronically
13 transmitting or listing the final orders; authorizing
14 agencies to maintain subject matter indexes of final
15 orders issued before a specified date or to
16 electronically transmit such orders to the database;
17 providing that the centralized electronic database is
18 the official compilation of administrative final
19 orders issued on or after a specified date for each
20 agency; deleting obsolete provisions regarding filing,
21 indexing, and publishing final orders; amending ss.
22 120.533 and 213.22, F.S.; conforming cross-references;
23 providing an effective date.
24
25 Be It Enacted by the Legislature of the State of Florida:
26

27 Section 1. Subsection (3) of section 119.021, Florida
28 Statutes, is amended to read:
29 119.021 Custodial requirements; maintenance, preservation,
30 and retention of public records.—
31 (3) Agency orders that comprise final agency action and
32 that were ~~must be~~ indexed or listed before July 1, 2015, or must
33 be listed pursuant to s. 120.53 have continuing legal
34 significance; therefore, notwithstanding any other provision of
35 this chapter or any provision of chapter 257, each agency shall
36 permanently maintain records of such orders pursuant to the
37 applicable rules of the Department of State.
38 Section 2. Section 120.53, Florida Statutes, is amended to
39 read:
40 120.53 Maintenance of agency final orders~~; indexing;~~
41 ~~listing; organizational information~~.—
42 (1) In addition to the requirements for maintaining
43 records contained in s. 119.021(3), each agency shall also
44 electronically transmit a text-searchable copy of each final
45 agency order listed in subsection (2) rendered on or after July
46 1, 2015, to a centralized electronic database of agency final
47 orders maintained by the division. The database must allow users
48 to research and retrieve the full texts of agency final orders
49 by:
50 (a) The name of the agency that issued the final order.
51 (b) The date the final order was issued.
52 (c) The type of final order.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

53 (d) The subject of the final order.
54 (e) Terms contained in the text of the final order.
55 ~~(a) Each agency shall maintain:~~
56 ~~1. All agency final orders.~~
57 ~~2.a. A current hierarchical subject-matter index,~~
58 ~~identifying for the public any rule or order as specified in~~
59 ~~this subparagraph.~~
60 ~~b. In lieu of the requirement for making available for~~
61 ~~public inspection and copying a hierarchical subject-matter~~
62 ~~index of its orders, an agency may maintain and make available~~
63 ~~for public use an electronic database of its orders that allows~~
64 ~~users to research and retrieve the full texts of agency orders~~
65 ~~by devising an ad hoc indexing system employing any logical~~
66 ~~search terms in common usage which are composed by the user and~~
67 ~~which are contained in the orders of the agency or by~~
68 ~~descriptive information about the order which may not be~~
69 ~~specifically contained in the order.~~
70 (2)~~c.~~ The agency final orders that must be electronically
71 transmitted to the centralized electronic database ~~indexed,~~
72 ~~unless excluded under paragraph (c) or paragraph (d),~~ include:
73 (a)~~(I)~~ Each final agency order resulting from a proceeding
74 under s. 120.57 or s. 120.573.
75 (b)~~(II)~~ Each final agency order rendered pursuant to s.
76 120.57(4) which contains a statement of agency policy that may
77 be the basis of future agency decisions or that may otherwise
78 contain a statement of precedential value.

79 (c)~~(III)~~ Each declaratory statement issued by an agency.
80 (d)~~(IV)~~ Each final order resulting from a proceeding under
81 s. 120.56 or s. 120.574.
82 (3)~~3.~~ Each agency shall maintain a list of all final
83 orders rendered pursuant to s. 120.57(4) that are not required
84 to be electronically transmitted to the centralized electronic
85 database ~~which have been excluded from the indexing requirement~~
86 ~~of this section, with the approval of the Department of State,~~
87 because they do not contain statements of agency policy or
88 statements of precedential value. The list must include the name
89 of the parties to the proceeding and the number assigned to the
90 final order.
91 ~~4. All final orders listed pursuant to subparagraph 3.~~
92 (4)~~(b)~~ Each ~~An agency~~ final order, whether rendered by the
93 agency or the division, that must be electronically transmitted
94 to the centralized electronic database or maintained on a list
95 pursuant to subsection (3) must be electronically transmitted to
96 the database or added to the list within 90 days after the final
97 ~~indexed or listed pursuant to paragraph (a) must be indexed or~~
98 ~~listed within 120 days after the~~ order is rendered. Each final
99 order that must be electronically transmitted to the database or
100 added to the list ~~indexed or listed pursuant to paragraph (a)~~
101 must have attached a copy of the complete text of any materials
102 incorporated by reference; however, if the quantity of the
103 materials incorporated makes attachment of the complete text of
104 the materials impractical, the final order may contain a

105 statement of the location of such materials and the manner in
106 which the public may inspect or obtain copies of the materials
107 incorporated by reference. ~~The Department of State shall~~
108 ~~establish by rule procedures for indexing final orders, and~~
109 ~~procedures of agencies for indexing orders must be approved by~~
110 ~~the department.~~
111 (5) Nothing in this section relieves an agency from its
112 responsibility for maintaining a subject matter index of final
113 orders rendered before July 1, 2015, and identifying the
114 location of the subject matter index on the agency's website. In
115 addition, an agency may electronically transmit to the
116 centralized electronic database all of the final orders that
117 were rendered before July 1, 2015, which were required to be in
118 the subject matter index. The centralized electronic database
119 constitutes the official compilation of administrative final
120 orders rendered on or after July 1, 2015, for each agency.
121 ~~(c) Each agency must receive approval in writing from the~~
122 ~~Department of State for:~~
123 ~~1. The specific types and categories of agency final~~
124 ~~orders that may be excluded from the indexing and public~~
125 ~~inspection requirements, as determined by the department~~
126 ~~pursuant to paragraph (d).~~
127 ~~2. The method for maintaining indexes, lists, and final~~
128 ~~orders that must be indexed or listed and made available to the~~
129 ~~public.~~
130 ~~3. The method by which the public may inspect or obtain~~

131 ~~copies of indexes, lists, and final orders.~~
132 ~~4. A sequential numbering system which numbers all final~~
133 ~~orders required to be indexed or listed pursuant to paragraph~~
134 ~~(a), in the order rendered.~~
135 ~~5. Proposed rules for implementing the requirements of~~
136 ~~this section for indexing and making final orders available for~~
137 ~~public inspection.~~
138 ~~(d) In determining which final orders may be excluded from~~
139 ~~the indexing and public inspection requirements, the Department~~
140 ~~of State may consider all factors specified by an agency,~~
141 ~~including precedential value, legal significance, and purpose.~~
142 ~~Only agency final orders that are of limited or no precedential~~
143 ~~value, that are of limited or no legal significance, or that are~~
144 ~~ministerial in nature may be excluded.~~
145 ~~(e) Each agency shall specify the specific types or~~
146 ~~categories of agency final orders that are excluded from the~~
147 ~~indexing and public inspection requirements.~~
148 ~~(f) Each agency shall specify the location or locations~~
149 ~~where agency indexes, lists, and final orders that are required~~
150 ~~to be indexed or listed are maintained and shall specify the~~
151 ~~method or procedure by which the public may inspect or obtain~~
152 ~~copies of indexes, lists, and final orders.~~
153 ~~(g) Each agency shall specify all systems in use by the~~
154 ~~agency to search and locate agency final orders that are~~
155 ~~required to be indexed or listed, including, but not limited to,~~
156 ~~any automated system. An agency shall make the search~~

157 ~~capabilities employed by the agency available to the public~~
158 ~~subject to reasonable terms and conditions, including a~~
159 ~~reasonable charge, as provided by s. 119.07. The agency shall~~
160 ~~specify how assistance and information pertaining to final~~
161 ~~orders may be obtained.~~
162 ~~(h) Each agency shall specify the numbering system used to~~
163 ~~identify agency final orders.~~
164 ~~(2)(a) An agency may comply with subparagraphs (1)(a)1.~~
165 ~~and 2. by designating an official reporter to publish and index~~
166 ~~by subject matter each agency order that must be indexed and~~
167 ~~made available to the public, or by electronically transmitting~~
168 ~~to the division a copy of such orders for posting on the~~
169 ~~division's website. An agency is in compliance with subparagraph~~
170 ~~(1)(a)3. if it publishes in its designated reporter a list of~~
171 ~~each agency final order that must be listed and preserves each~~
172 ~~listed order and makes it available for public inspection and~~
173 ~~copying.~~
174 ~~(b) An agency may publish its official reporter or may~~
175 ~~contract with a publishing firm to publish its official~~
176 ~~reporter; however, if an agency contracts with a publishing firm~~
177 ~~to publish its reporter, the agency is responsible for the~~
178 ~~quality, timeliness, and usefulness of the reporter. The~~
179 ~~Department of State may publish an official reporter for an~~
180 ~~agency or may contract with a publishing firm to publish the~~
181 ~~reporter for the agency; however, if the department contracts~~
182 ~~for publication of the reporter, the department is responsible~~

183 ~~for the quality, timeliness, and usefulness of the reporter. A~~
184 ~~reporter that is designated by an agency as its official~~
185 ~~reporter and approved by the Department of State constitutes the~~
186 ~~official compilation of the administrative final orders for that~~
187 ~~agency.~~
188 ~~(c) A reporter that is published by the Department of~~
189 ~~State may be made available by annual subscription, and each~~
190 ~~agency that designates an official reporter published by the~~
191 ~~department may be charged a space rate payable to the~~
192 ~~department. The subscription rate and the space rate must be~~
193 ~~equitably apportioned to cover the costs of publishing the~~
194 ~~reporter.~~
195 ~~(d) An agency that designates an official reporter need~~
196 ~~not publish the full text of an agency final order that is~~
197 ~~rendered pursuant to s. 120.57(4) and that must be indexed~~
198 ~~pursuant to paragraph (1)(a), if the final order is preserved by~~
199 ~~the agency and made available for public inspection and copying~~
200 ~~and the official reporter indexes the final order and includes a~~
201 ~~synopsis of the order. A synopsis must include the names of the~~
202 ~~parties to the order; any rule, statute, or constitutional~~
203 ~~provision pertinent to the order; a summary of the facts, if~~
204 ~~included in the order, which are pertinent to the final~~
205 ~~disposition; and a summary of the final disposition.~~
206 ~~(3) Agency orders that must be indexed or listed are~~
207 ~~documents of continuing legal value and must be permanently~~
208 ~~preserved and made available to the public. Each agency to which~~

209 ~~this chapter applies shall provide, under the direction of the~~
210 ~~Department of State, for the preservation of orders as required~~
211 ~~by this chapter and for maintaining an index to those orders.~~
212 ~~(4) Each agency must provide any person who makes a~~
213 ~~request with a written description of its organization and the~~
214 ~~general course of its operations.~~
215 Section 3. Subsection (1) of section 120.533, Florida
216 Statutes, is amended to read:
217 120.533 Coordination of <u>listing of final orders</u> ~~indexing~~
218 by Department of State.—The Department of State shall:
219 (1) Administer the coordination of the ~~indexing,~~
220 management, preservation, and availability of agency orders that
221 must be ~~indexed or~~ listed pursuant to <u>s. 120.53</u> ~~s. 120.53(1)~~.
222 Section 4. Subsection (1) of section 213.22, Florida
223 Statutes, is amended to read:
224 213.22 Technical assistance advisements.—
225 (1) The department may issue informal technical assistance
226 advisements to persons, upon written request, as to the position
227 of the department on the tax consequences of a stated
228 transaction or event, under existing statutes, rules, or
229 policies. After the issuance of an assessment, a technical
230 assistance advisement may not be issued to a taxpayer who
231 requests an advisement relating to the tax or liability for tax
232 in respect to which the assessment has been made, except that a
233 technical assistance advisement may be issued to a taxpayer who
234 requests an advisement relating to the exemptions in s.

235 212.08(1) or (2) at any time. Technical assistance advisements
236 shall have no precedential value except to the taxpayer who
237 requests the advisement and then only for the specific
238 transaction addressed in the technical assistance advisement,
239 unless specifically stated otherwise in the advisement. Any
240 modification of an advisement shall be prospective only. A
241 technical assistance advisement is not an order issued pursuant
242 to s. 120.565 or s. 120.569 or a rule or policy of general
243 applicability under s. 120.54. The provisions of s. 120.53 ~~s.~~
244 ~~120.53(1)~~ are not applicable to technical assistance
245 advisements.
246 Section 5. This act shall take effect July 1, 2015.

HB 1013

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1013 Legislative Ratification/Workers' Compensation Law
SPONSOR(S): Hager
TIED BILLS: **IDEN./SIM. BILLS:** SB 1060

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee		Stranburg	Rubottom
2) Insurance & Banking Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The Department of Financial Services adopts rules establishing maximum allowable provider reimbursement rates applicable to medical care provided under Florida's Workers' Compensation laws. The maximum allowable reimbursements must be recommended by a three-member panel composed of the Chief Financial Officer of the State of Florida (CFO) or a designee and a representative of employers and a representative of employees each appointed by the Governor. Typically, the three-member panel adopts by reference a manual of policies, guidelines, codes, and maximum reimbursement allowances for services and supplies furnished by health care providers under the Workers' Compensation statutes. The manual also states the reimbursement policies and payment methodologies for pharmacists and medical suppliers pertaining to Workers' Compensation.

The Florida Administrative Procedure Act (APA) requires state agencies to assess whether a Statement of Estimated Regulatory Cost (SERC) must be prepared in conjunction with the promulgation of an administrative rule, such as the incorporation by reference of the Florida Workers' Compensation Health Care Provider Reimbursement Manual. The preparation of a SERC is required if a proposed rule will have an adverse impact on small business, or if it is likely to directly or indirectly increase regulatory costs by more than $200,000 within one year of implementation. If the SERC analysis indicates the rule is likely to have a specific economic impact exceeding $1 million aggregated in the first five years from implementation, then the rule must be ratified by the Legislature before going into effect. The APA requires that the rule be submitted to the President of the Senate and the Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.

In 2011, the Department adopted a rule adopting Health Care Provider reimbursement policies, approving approximately $60,000,000 in increases in maximum reimbursement rates. The rule was submitted to the Legislature for ratification and has not been ratified to date. An update to that maximum reimbursement rule rule is now pending and may be filed for adoption and submitted for ratification in during the 2015 Regular Session. Reimbursement manuals for ambulatory Surgical centers and hospitals have been adopted in 2011 and 2015 respectively without resort to ratification. Due to the volume of Workers Compensation cases in Florida, when maximum allowable reimbursement rates increase, the implementing rule will typically requires ratification, and will, when ratified, result in a Workers Compensation rate increase sufficient to support the higher medical payments.

The bill exempts from ratification under s. 120.541(3) all rules adopting maximum reimbursement allowances and manuals approved by the three-member panel.

The bill has an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Florida's workers' compensation law[1] provides medically necessary treatment and care for injured employees, including medications. The Department of Financial Services, Division of Workers' Compensation, (DFS) provides regulatory oversight of Florida's workers' compensation system. The law provides for reimbursement formulas and methodologies to compensate providers of health services to compensation claimants, subject to maximum reimbursement allowances (MRAs).[2] DFS incorporates the uniform schedules MRAs by rule in reimbursement manuals.[3]

Maximum Allowable Reimbursement Rates Rulemaking under Chapter 440, Workers Compensation

The Florida Department of Financial Services (DFS) from time to time adopts rules implementing maximum allowable reimbursement rates determined by a three-member panel established by law. The panel includes the CFO or a designee, as well as a representative each of employers and employees, appointed by the Governor and confirmed by the Florida Senate.[4] DFS periodically updates the Florida Workers' Compensation Health Care Provider Reimbursement Manual, the Reimbursement Manual for Ambulatory Surgical Centers, and the Reimbursement Manual for Hospitals ("the Manuals").[5] The Manuals contain reimbursement policies, guidelines, codes, and the Maximum Reimbursement Allowances (MRAs) for health care services, equipment and supplies.[6]

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[7] Rulemaking authority is delegated by the Legislature[8] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[9] a rule. Agencies do not have discretion whether to engage in rulemaking.[10] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[11] The grant of rulemaking authority itself need not be detailed.[12] The specific 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.[13]

An agency begins the formal rulemaking process by filing a notice of the proposed rule.[14] The notice is published by the Department of State in the Florida Administrative Weekly[15] and must provide certain

[1] Chapter 440, F.S.

[2] Section 440.13(12), F.S..

[3] Section 440.13(12), (14)(b), F.S. Chapter 69L-7, F.A.C.

[4] Section 440.13(14), F.S.

[5] Rules 69L-7.020, 69L-7.100, 69L-7.501, F.A.C.

[6] Section 440.13(12), F.S.

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

[8] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).

[9] Section 120.52(17).

[10] Section 120.54(1)(a), F.S.

[11] Section 120.52(8) & s. 120.536(1), F.S.

[12] *Save the Manatee Club, Inc.,* supra at 599.

[13] *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).

[14] Section 120.54(3)(a)1, F.S..

information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.[16]

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.[17] Next is the likely adverse impact on business competitiveness,[18] productivity, or innovation.[19] Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.[20] If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed $1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[21] A rule must be filed for adoption before it may go into effect[22] and cannot be filed for adoption until completion of the rulemaking process.[23] A rule projected to have a specific economic impact exceeding $1 million in the aggregate over 5 years[24] must be ratified by the Legislature before going into effect.[25] As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Effect of Proposed Changes

The bill amends s. 120.80, F.S., to include a provision exempting DFS's promulgation of rules adopting maximum reimbursement allowances and manuals from the legislative ratification requirement of s. 120.541(3), F.S. As a result, maximum reimbursement allowances and manuals promulgated by DFS in the future would not require legislative ratification before taking effect, even if the associated regulatory costs exceed the one million dollar threshold.

B. SECTION DIRECTORY:

Section 1: Amending s. 120.80, F.S., providing that administrative rules adopted by the Department of Financial Services to adopt maximum reimbursement allowances and manuals approved by a three-member panel pursuant to s. 440.13(12), F.S., are not subject to the legislative ratification requirement.

Section 2: Provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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[15] Section 120.55(1)(b)2, F.S.
[16] Section 120.541(2)(a), F.S.
[17] Section 120.541(2)(a)1., F.S.
[18] Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.
[19] Section 120.541(2)(a) 2., F.S.
[20] Section 120.541(2)(a) 3., F.S.
[21] Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State .
[22] Section 120.54(3)(e)6, F.S.
[23] Section 120.54(3)(e), F.S.
[24] Section 120.541(2)(a), F.S.
[25] Section 120.541(3), F.S.

None.

2. Expenditures:

   State government entities will bear implementation costs to the extent they provide workers' compensation coverage for their employees and operate as workers' compensation claims administrators.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   Local government entities will bear implementation costs to the extent they are required to secure workers' compensation coverage for their employees and that they operate as workers' compensation claims administrators.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The exemption could allow some maximum reimbursement rates to increase sooner than they might if ratification is required. The economic impact of more consistently maintaining reimbursement rates current in the health care market may contribute a benefit of exempting the rules from ratification.

The pending rule adopting the Health Care Provider Reimbursement Manual has an impact of approximately $ 61.0 million per year on health care costs and corresponding Workers' Compensation rates, impacts that would be allowed if the pending rule is exempted from present ratification requirements.

Additionally, Workers' Compensation claim administrators will bear implementation costs between $2.1 and 3.2 million to update their claim administration programs to implement the updated rates. These implementation costs would be a one-time, first year cost.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill removes the oversight of legislative ratification from a narrow class of rules adopted by DFS.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
2 An act relating to legislative ratification; amending
3 s. 120.80, F.S.; providing that the maximum
4 reimbursement allowances and manuals approved by a
5 three-member panel for purposes of the Workers'
6 Compensation Law are exempt from legislative
7 ratification under the Administrative Procedure Act if
8 the adverse impact or regulatory costs of such
9 allowances or manuals exceed specified criteria;
10 providing an effective date.
11
12 Be It Enacted by the Legislature of the State of Florida:
13
14 Section 1. Subsection (19) is added to section 120.80,
15 Florida Statutes, to read:
16 120.80 Exceptions and special requirements; agencies.—
17 (19) DEPARTMENT OF FINANCIAL SERVICES.—Section 120.541(3)
18 does not apply to the adoption of maximum reimbursement
19 allowances and manuals approved by a three-member panel pursuant
20 to s. 440.13(12).
21 Section 2. This act shall take effect July 1, 2015.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB RORS 15-03 Ratification of Department of Environmental Protection Rules (establishing minimum water flows and levels for water bodies)
SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom

SUMMARY ANALYSIS

The Department of Environmental Protection (DEP) or the five water management districts (WMDs) are required to establish minimum flows for surface watercourses and minimum levels for groundwater and surface waters within each district. "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. "Minimum level" is the level of groundwater in an aquifer or the level of a surface waterbody at which further withdrawals will significantly harm the water resources of the area.

For waterbodies that are below their minimum flows and levels (MFLs) or are projected to fall below them within 20 years, the WMDs are required to implement a recovery or prevention strategy, which includes the development of additional water supplies and other actions to achieve recovery to the established MFL as soon as practicable or prevent the existing MFL from falling below the established MFL. The recovery or prevention strategy must include phasing or a timetable that will allow for the provision of sufficient water supplies for all existing and projected reasonable-beneficial uses, including development of additional water supplies and implementation of conservation and other efficiency measures concurrent with, to the extent practical, and to offset, reductions in permitted withdrawals.

In June 2013, the Suwannee River Water Management District (SRWMD) governing board requested that DEP adopt MFLs it proposed for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs. The decision was based on the technical work conducted for the proposed MFLs by SRWMD staff, and the potential for cross-basin impacts originating outside of the SRWMD. SRWMD staff had also assessed the streamflows observed in the recent historical record and recent trends in the flow regime, and determined that a recovery strategy was required.

On March 7, 2014, DEP proposed Rule 62-42.300, F.A.C., establishing MFLs for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs, as well as regulatory flow recovery provisions. The proposed rule was estimated to have an economic impact in excess of $1 million over 5 years. If an agency rule meets that economic threshold, current law requires legislative ratification of the rule before it can take effect. However, an agency rule may not be ratified by the Legislature until it has been adopted by the agency. On April 8, 2014, the DEP filed a Notice of Change modifying the proposed rule. A challenge to the proposed rule was filed in the Department of Administrative Hearings, suspending rule adoption until after adjournment of the 2014 Regular Session of the Legislature. Because it was critical, according to DEP, for the rule to take effect as soon as possible, the Legislature passed HB 7171 (2014) which exempted the proposed rule from the ratification requirement.

The bill satisfies the legislative ratification requirement based on the rule's economic and regulatory cost impact. The bill expressly states that it serves no purpose other than satisfying the ratification requirement and that it will not be codified in the Florida Statutes.

The bill does not appear to have a fiscal impact on state government. According to DEP's Statement of Estimated Regulatory Costs (SERC), implementation of the rule if ratified will result in a negative fiscal impact of $300,000 on the SRWMD. The bill itself does not have a direct fiscal impact on the private sector; however, the substantive policy of the rule is expected to have an economic impact on the private sector. Those impacts are analyzed in DEP's SERC for the rule. In summary, the SERC estimates that the rule will have a negative fiscal impact of $3 million over a five-year timeframe on agricultural users that are required to eliminate or reduce the impact of new proposed withdrawal quantities on the MFLs. (See Fiscal Analysis Section).

The rule has an effective date upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Consumptive Use Permits

For water uses other than private wells for domestic use, the statutes authorize the Department of Environmental Protection (DEP) and the water management districts (WMDs) to require any person seeking to use "waters in the state"[1] to obtain a consumptive use permit (CUP).[2] A CUP establishes the duration and type of allowed water use as well as the maximum amount that may be used. Each CUP must be consistent with the objectives of the WMD and may not be harmful to the water resources of the area.[3] 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."[4] Specifically, the proposed water use:

1. Must be a reasonable-beneficial use;[5]
2. May not interfere with any presently existing legal use of water; and
3. Must be consistent with the public interest.

Minimum Flows and Levels (MFLs)

DEP or the five water management districts (WMDs) are required to establish minimum flows for surface watercourses and minimum levels for groundwater and surface waters within each district.[6] "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.[7] "Minimum level" is the level of groundwater in an aquifer or the level of a surface waterbody at which further withdrawals will significantly harm the water resources of the area.[8]

Section 373.042(2), F.S., requires each WMD to submit annually to DEP for review and approval of a priority list and schedule for the establishment of MFLs for surface watercourses, aquifers, and surface waters within the WMD. The priority list and schedule must identify those waterbodies for which the WMD will voluntarily undertake independent scientific peer review. The priority list and schedule must also identify:

- Any reservations proposed by the WMD to be established under s. 373.223(4), F.S.;[9] and
- Those listed waterbodies that have the potential to be affected by withdrawals in an adjacent WMD for which the DEP adoption of a reservation or MFL may be appropriate.

[1] Section 373.019(22), F.S., defines "water" or "waters in the state" to mean any and all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as all coastal waters within the jurisdiction of the state.
[2] Section 373.219, F.S.
[3] Section 373.219, F.S.
[4] Section 373.223, F.S.
[5] Section 373.019(16), F.S., defines "reasonable-beneficial use" to mean the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner that is both reasonable and consistent with the public interest.
[6] Section 373.042(1), F.S.
[7] Section 373.042(1)(a), F.S.
[8] Section 373.042(1)(b), F.S.
[9] Section 373.223(4), F.S., provides that the governing board or 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.

The WMDs use science that includes a variety of the best available information including meteorological, hydrological, and ecological data that typically includes a historical range of drought and flood conditions to establish scientifically the point beyond which additional withdrawals would cause significant harm.[10] Usually, a WMD selects a peer review committee to evaluate the scientific principles and methods used to establish MFLs. Once an MFL is calculated, it is adopted by rule and implemented by the district.[11]

For a waterbody that is below an MFL or is projected to fall below it within 20 years, the WMDs are required to implement a recovery or prevention strategy, which includes the development of additional water supplies and other actions to achieve recovery to the established MFL as soon as practicable or prevent the existing MFL from falling below the established MFL.[12] The recovery or prevention strategy must include phasing or a timetable that will allow for the provision of sufficient water supplies for all existing and projected reasonable-beneficial uses,[13] including development of additional water supplies and implementation of conservation and other efficiency measures concurrent with, to the extent practical, and to offset, reductions in permitted withdrawals.[14]

A WMD is required to provide DEP with technical information and staff support for the development of a reservation, MFL, or recovery or prevention strategy to be adopted by DEP by rule.[15] Furthermore, a WMD is required to apply any reservation, MFL, or recovery or prevention strategy adopted by DEP by rule without the WMD's adoption by rule of a reservation, MFL, or recovery or prevention strategy.[16]

Lower Santa Fe and Ichetucknee Rivers and Associated Springs

The Ichetucknee River and springs are part of the Ichetucknee Springs State Park. The park is a high quality natural area that is partly developed and whose heavy public use is highly regulated in order to minimize damage to the environment.[17] The Ichetucknee River has 11 springs that include one first magnitude spring,[18] seven second magnitude springs,[19] two third magnitude springs,[20] and one whose magnitude is unknown. A list of these springs can be found in Appendix A at the end of this analysis.

O'Leno State Park is located on the Santa Fe River and is also very popular due to the many springs on the Santa Fe River. The Santa Fe River has 67 springs that include 10 first magnitude springs, 23 second magnitude springs, 20 third magnitude springs, 8 fourth magnitude springs,[21] and 6 whose magnitude are unknown. A list of these springs can be found in Appendix A at the end of this analysis.

The following table shows the park attendance for each state park for the last five fiscal years:

	FY 2008/2009	FY 2009/2010	FY 2010/2011	FY 2011/2012	FY 2012/2013
O'Leno	63,625	58,586	63,023	63,035	71,429
Ichetucknee	161,990	184,151	204,586	148,213	135,923

Proposed MFL Rules for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs

[10] Minimum Flows and Levels Fact Sheet: Lower Santa Fe and Ichetucknee Rivers and Priority Springs Protecting Water Resources from Significant Harm. *See* Suwannee River Water Management District's website, available at http://www.mysuwanneeriver.com/Search/Results?searchPhrase=MFL+fact+sheet&page=1&perPage=10 (accessed March 9, 2015).
[11] Central Florida Water Initiative website; available at http://cfwiwater.com/MFLs.html (accessed March 9, 2015).
[12] Section 373.0421(2), F.S.
[13] Section 373.019(16), F.S., defines "reasonable-beneficial use" to mean the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner that is both reasonable and consistent with the public interest.
[14] Section 373.0421(2), F.S.
[15] Section 373.042(4), F.S.
[16] *Id.*
[17] Florida Geological Survey, Bulletin No.66, Springs of Florida, DEP; available at http://www.dep.state.fl.us/geology/geologictopics/springs/bulletin66.htm (accessed March 9, 2015).
[18] First magnitude springs discharge 64 million gallons of water per day (MGD).
[19] Second magnitude springs discharge 6.46 to 64.6 MGD.
[20] Third magnitude springs discharge 0.0646 to 6.46 MGD.
[21] Fourth magnitude springs discharge 448 gallons of water per minute.

The Lower Santa Fe and Ichetucknee Rivers are water bodies that have the potential to be affected by withdrawals in an adjacent WMD for which the DEP adoption of a reservation or MFL is required pursuant to s. 373.042(2), F.S. Consequently, the Suwannee River WMD (SRWMD) governing board requested that DEP adopt MFLs it proposed for the Lower Santa Fe and Ichetucknee Rivers and associated priority springs In June, 2013. The decision to make the request was also based on the technical work conducted for the proposed MFLs by SRWMD staff.[22] SRWMD staff had also assessed the streamflows observed in the recent historical record and recent trends in the flow regime, and determined that a recovery strategy was required.[23]

The science for analysis preferred in establishing the MFL as described above in the MFL section, shows that the Lower Santa Fe River and its associated priority springs are in "recovery," meaning that they have fallen below their proposed MFL.[24] The flow is 17 cubic feet per second (CFS), or 11 million gallons per day (MGD), *below* the proposed MFL at the river gage near Fort White. The MFL science shows that the Ichetucknee River and its associated priority springs are also in "recovery." The flow is 3 CFS or 2 MGD below the proposed MFL at the river gage located at the US 27 Bridge.

On March 7, 2014, DEP proposed Rules 62.42.100 and 62.42.200, F.A.C., providing the scope and definitions for DEP-adopted MFLs. DEP also proposed Rule 62.42.300, F.A.C., establishing MFLs for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs, as well as regulatory flow recovery provisions. The rules will apply to the SRWMD and the St. Johns River WMD (SJRWMD).

Proposed Rule 62-42.300, F.A.C., also adopts and incorporates by reference a document entitled "Supplemental Regulatory Measures," which contains regulatory provisions for the MFLs proposed for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs. The proposed rule will apply to renewal and new consumptive use permit applications for withdrawals within the SRWMD and Planning Region 1 of the SJRWMD.[25] Only those applications proposing new or additional withdrawal quantities that impact the Lower Santa Fe and Ichetucknee Rivers and Priority Springs MFLs will be subject to additional regulatory costs as a result of the proposed rule. These applications will be required to eliminate or reduce the impact of the new proposed withdrawal quantities on the MFLs. The proposed rule can be generally divided into two components, summarized as follows:[26]

1. Additional Review Criteria for all Individual Water Use Permit Applicants:
   - Primarily defines how the existing requirements that proposed water uses not cause harm to water resources will be addressed in the water use permitting review process with regard to the proposed MFLs.
   - Ensures that the impact of new withdrawals or increases in permitted water use will be eliminated or offset as a condition for issuance of a water use permit.
   - Provides protections for existing uses by specifying that existing uses that do not request increases in water use are considered consistent with the Recovery Strategy. Existing users who request new quantities will only be required to offset the impacts of their increase in water use, and not their existing use.

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[22] *See* s. 373.042(4), F.S.

[23] DEP Statement of Estimated Regulatory Costs; available at http://www.dep.state.fl.us/water/waterpolicy/mflrulemaking.htm (accessed March 9, 2015).

[24] The information in this paragraph was obtained from the *Minimum Flows and Levels Fact Sheet: Lower Santa Fe and Ichetucknee Rivers and Priority Springs Protecting Water Resources from Significant Harm. See* Suwannee River Water Management District's website, available at http://www.mysuwanneeriver.com/Search/Results?searchPhrase=MFL+fact+sheet&page=1&perPage=10 (accessed March 9, 2015).

[25] Region 1 includes Alachua, Baker, Bradford, Clay, Duval, Flagler, Nassau, Putnam, and St. Johns counties. Planning in this area is conducted as part of the North Florida Regional Water Supply Partnership in coordination with the SRWMD. *See* St. Johns River Water Management District website, available at http://floridaswater.com/watersupply/planning.html (accessed March 9, 2015).

[26] Minimum Flows and Levels Fact Sheet: Lower Santa Fe and Ichetucknee Rivers and Priority Springs Protecting Water Resources from Significant Harm. *See* Suwannee River Water Management District's website, available at http://www.mysuwanneeriver.com/Search/Results?searchPhrase=MFL+fact+sheet&page=1&perPage=10 (accessed March 9, 2015).

- Establishes that the WMD may use the best available information and modeling tools to evaluate the potential impacts of proposed water uses to MFL water bodies.
- Provides that the additional review criteria for individual water use permit applications will be implemented in the entirety of the SRWMD and the portion of the North Florida Regional Water Supply Planning Area in SJRWMD.

2. Additional Individual Permit Conditions:
   - Establishes two new special conditions that will be applied to new or renewed water use permits:
     - The first special condition will be applied to individual permits issued within the boundaries of the SRWMD and the portion of the North Florida Regional Water Supply Planning Area within the SJRWMD, and is designed to ensure continuing compliance of the water use with the ongoing efforts of the Recovery Strategy. This condition allows for future modification of the permit to address impacts to the MFL water bodies, and provides an important means for adaptive management by the issuing WMD in light of new technical tools, future hydrologic conditions, and the development of long-term recovery strategies to be developed in the context of the North Florida Regional Water Supply Plan.[27]
     - The second special condition will only be applied to individual water use permits for agricultural use located within Columbia, Suwannee, Union, and Gilchrist Counties, and the portions of Baker, Bradford, and Alachua Counties within the boundaries of the SRWMD. This special condition requires that the permittee participate in a Mobile Irrigation Lab (MIL) program and allow access to the Project Site for the purpose of conducting an MIL evaluation at least once every five years. This condition will provide the WMD with critical information about agricultural water use efficiency to direct future water conservation measures and agricultural cost-share programs.

Analysis of future water use projections and permit records indicates approximately 308 current water use permit holders in the SRWMD and affected area of SJRWMD will renew their permits in the next five years, including 49 non-agricultural users and 259 agricultural users. The assessment conducted indicated that it is unlikely that current non-agricultural water users will request increased water allocations that will be affected by the proposed rule in the next five years. Of the 259 agricultural water use permit holders likely to renew in this area in the next five years, approximately 28 would be expected to request new quantities likely to impact the MFLs, and would be required to offset or reduce their impacts to the MFL water bodies. The projected increase in water use that would require offsets of impacts among renewing existing permit holders is approximately 2.6 MGD.[28]

In addition to the renewal of current permits, assessment of water use projections and existing permit records and water uses indicated that it is unlikely that new non-agricultural permits will be affected by the proposed rule. However, approximately 400 new agricultural permit applications are anticipated over the next five years in the SRWMD. Of these, approximately 40 are projected to impact the MFL water bodies, requiring a total offset of approximately 11.2 MGD in new withdrawals.[29]

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of

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[27] The North Florida Regional Water Supply Plan is a collaborative effort between DEP, the SRWMD, the SJRWMD, local governments, and other stakeholders throughout the region to ensure sustainable water supplies and protect north Florida's waterways and natural systems. See the North Florida Regional Water Supply Partnership website, available at http://northfloridawater.com/

[28] Statement of Estimated Regulatory Costs for Rule 62-42.300, F.A.C., Executive Summary. On file with the House Rulemaking Oversight & Repeal Subcommittee.

[29] *Id.*

forms.[30] Rulemaking authority is delegated by the Legislature[31] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[32] a rule. Agencies do not have discretion as to whether to engage in rulemaking.[33] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[34] The grant of rulemaking authority itself need not be detailed.[35] The specific 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.[36]

An agency begins the formal rulemaking process by filing a notice of the proposed rule.[37] The notice is published by the Department of State in the Florida Administrative Register[38] and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC), if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.[39]

The economic analysis mandated for each SERC must analyze a rule's potential impact over the five-year period after the rule goes into effect. First discussed in the analysis is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.[40] Next is the likely adverse impact on business competitiveness,[41] productivity, or innovation.[42] Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.[43] If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed $1 million in the aggregate for the five-year period, the rule cannot go into effect until ratified by the Legislature.[44]

Current law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[45] A rule must be filed for adoption before it may go into effect[46] and cannot be filed for adoption until completion of the rulemaking process.[47] A rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, and must be filed for adoption before being submitted for legislative ratification.

The economic impact of DEP's proposed Rule 62-42.300, F.A.C., for MFLs for the Lower Santa Fe and Ichetucknee Rivers and Associated Springs is estimated to exceed the economic impact dollar threshold that triggers the legislative ratification requirement. The proposed rule was published in the Florida Administrative Register on March 7, 2014. A rulemaking hearing was scheduled for April 3, 2014.[48] A Notice of Change revising the Proposed Rules was published on April 8, 2014, with the result that the rule could not be filed for adoption and presented for legislative ratification before the end of

[30] 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).
[31] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).
[32] Section 120.52(17), F.S.
[33] Section 120.54(1)(a), F.S.
[34] Sections 120.52(8) & 120.536(1), F.S.
[35] *Save the Manatee Club, Inc.,* supra at 599.
[36] *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).
[37] Section 120.54(3)(a)1, F.S.
[38] Section 120.55(1)(b)2, F.S.
[39] Section 120.541(2)(a), F.S.
[40] Section 120.541(2)(a)1., F.S.
[41] Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.
[42] Section 120.541(2)(a) 2., F.S.
[43] Section 120.541(2)(a) 3., F.S.
[44] Section 120.541(3), F.S.
[45] Section 120.54(3)(e)6, F.S. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.
[46] Section 120.54(3)(e)6, F.S.
[47] Section 120.54(3)(e), F.S.
[48] Section 120.54(3)(c)1., F.S.

the 2014 Regular Session. To avoid any significant impact on water quality in the affected areas, the Legislature enacted HB 7171 (2014) exempting the rule as changed on April 8, 2014, from ratification.

Subsequently, a challenge to the rule was filed in DOAH. The Administrative Law Judge issued a ruling on September 11, 2014, finding that the proposed rules setting the river MFLs were vague because either the period of record or the technical source document for the flow duration curve used to set the MFLs was not referenced in the rule. He also found that the rest of proposed Chapter 62-42, including the springs MFLs and the recovery strategy are valid exercises of delegated legislative authority.

On November 7, 2014, a Notice of Change was published making changes adding the existing technical information that the DOAH judge found missing in the previous version of the rule. The November change did not change the proposed minimum flows or the recovery strategy included in the proposed rule. A subsequent DOAH challenge was successfully defended by the DEP and the rules was filed for adoption on February 18, 2015. A revised SERC was made available to the public on December 5, 2014.

Effect of Proposed Changes

The bill ratifies the Department of Environmental Protection's (DEP) proposed Rule 62-42.300, F.A.C., regarding minimum flows and levels (MFLs) for the Lower Santa Fe and Ichetucknee Rivers and their associated priority springs, satisfying the legislative ratification requirement in s. 120.541(3), F.S.

The bill expressly states that it serves no purpose other than satisfying the ratification requirement and that it will not be codified in the Florida Statutes. Furthermore, the bill specifies that it does not:

- Alter rulemaking authority delegated by prior law;
- Constitute legislative preemption of or exception to any provision of law governing adoption or enforcement of the rule cited; or
- 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.

B. SECTION DIRECTORY:

Section 1. Ratifies specified rules to satisfy the requirements of s. 120.541(3), F.S.

Section 2. The bill takes effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

   The bill does not appear to have a fiscal impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

According to the applicable SERC, and its revisions through December 12, 2014, implementation of the rule being ratified will result in a negative fiscal impact of $300,000 on the SRWMD. The rule requires DEP, in coordination with the SRWMD and the SJRWMD, to reevaluate the MFL and the present status of the waterbody and readopt the rule before December 31, 2019. Current statute[49] also requires that MFLs be reevaluated periodically and revised as needed. To the extent that these costs could be considered attributable to the proposed rule, SRWMD would include an analysis by district staff and would likely include contractor assistance and a peer review. (See C., below, for discussion of cost-share program of SRWMD relating to potential agricultural water conservation measures implicated by the likely reductions in water allocations under the rule.)

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill itself does not have a direct fiscal impact on the private sector; however, the substantive policy of the rule is expected to have an economic impact on the private sector. Those impacts are analyzed in DEP's Statement of Estimated Regulatory Costs (SERC) for the rule, as revised.[50]

According to the SERC , based on the SRWMD's analysis of likely water use permit renewals in the SRWMD and the SJRWMD (permits expiring in years 2014 through 2018) and assessment of future new water use projections and recent new water use permit applications, the SRWMD estimates Rule 62-42.300 is likely to affect some future agricultural water users (approximately 68 over a five-year timeframe) in the Santa Fe Basin because potential adverse impacts to the MFL waterbodies resulting from new and increased water quantity allocations must be offset for 13.8 MGD. If all of the 13.8 MGD were offset by implementing additional agricultural water conservation measures, the cost of providing these offsets would be approximately $3 million over a five-year timeframe (approximately $600,000 per year) for agricultural water users. The existing SRWMD cost-share program typically covers 80 percent of retrofit costs and is expected to substantially reduce the cost to be borne by the agricultural users.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

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[49] Section 373.0421(3), F.S.

[50] All versions of the SERC are available for review on the DEP rulemaking website at: http://www.dep.state.fl.us/water/waterpolicy/mflrulemaking.htm (accessed March 9, 2015).

None.

B. RULE-MAKING AUTHORITY:

The bill does not grant additional rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

APPENDIX A

Summary and List of Springs of the Santa Fe and Ichetucknee Rivers
Prepared by the Suwannee River Water Management District
March 2014

Springs of the Santa Fe River		
Spring Name	**County**	**Historic Magnitude**
COL1105041 (COLUMBIA)	COLUMBIA	1
COLUMBIA SPRING	COLUMBIA	1
DEVILS EAR SPRING (GILCHRIST)	GILCHRIST	1
DEVILS EYE SPRING (GILCHRIST)	GILCHRIST	1
HORNSBY SPRING	ALACHUA	1
JULY SPRING	COLUMBIA	1
SANTA FE RIVER RISE (ALACHUA)	ALACHUA	1
SANTA FE SPRING (COLUMBIA)	COLUMBIA	1
SIPHON CREEK RISE	GILCHRIST	1
TREEHOUSE SPRING	ALACHUA	1
ALA930971 (ALACHUA)	ALACHUA	2
ALA930972 (ALACHUA)	ALACHUA	2
ALLEN SPRING	COLUMBIA	2
COL1012972 (COLUMBIA)	COLUMBIA	2
COL101974 (COLUMBIA)	COLUMBIA	2
COL930971 (COLUMBIA)	COLUMBIA	2
DARBY SPRING	ALACHUA	2
DOGWOOD SPRING	GILCHRIST	2
GIL1012971 (GILCHRIST)	GILCHRIST	2
GIL1012974 (GILCHRIST)	GILCHRIST	2
GIL107971 (GILCHRIST)	GILCHRIST	2
GIL107972 (GILCHRIST)	GILCHRIST	2
GIL729971 (GILCHRIST)	GILCHRIST	2
GILCHRIST BLUE SPRING	GILCHRIST	2
GINNIE SPRING	GILCHRIST	2
JOHNSON SPRING	GILCHRIST	2
LILLY SPRING	GILCHRIST	2
MYRTLES FISSURE SPRING	GILCHRIST	2
PICKARD SPRING	GILCHRIST	2
POE SPRING	ALACHUA	2
SUW107971 (SUWANNEE)	SUWANNEE	2
TWIN SPRING	GILCHRIST	2
WILSON SPRING (COLUMBIA)	COLUMBIA	2
BETTY SPRING	SUWANNEE	3
CAMPGROUND SPRING (GILCHRIST)	GILCHRIST	3
COL101971 (COLUMBIA)	COLUMBIA	3

Springs of the Santa Fe River (cont.)		
Spring Name	County	Historic Magnitude
COL428981 (COLUMBIA)	COLUMBIA	3
COL917971 (COLUMBIA)	COLUMBIA	3
COL928971 (COLUMBIA)	COLUMBIA	3
DEER SPRING (GILCHRIST)	GILCHRIST	3
GIL1012972 (GILCHRIST)	GILCHRIST	3
GIL928971 (GILCHRIST)	GILCHRIST	3
GIL99972 (GILCHRIST)	GILCHRIST	3
GIL99974 (GILCHRIST)	GILCHRIST	3
JONATHAN SPRING	COLUMBIA	3
LITTLE DEVIL SPRING	GILCHRIST	3
OASIS SPRING	GILCHRIST	3
RUM ISLAND SPRING	COLUMBIA	3
SAWDUST SPRING	COLUMBIA	3
SUNBEAM SPRING	COLUMBIA	3
SUW917971 (SUWANNEE)	SUWANNEE	3
TRAIL SPRING	GILCHRIST	3
TROOP SPRING	GILCHRIST	3
COL101975 (COLUMBIA)	COLUMBIA	4
COL61982 (COLUMBIA)	COLUMBIA	4
GIL729972 (GILCHRIST)	GILCHRIST	4
GIL729973 (GILCHRIST)	GILCHRIST	4
GIL928972 (GILCHRIST)	GILCHRIST	4
GIL99971 (GILCHRIST)	GILCHRIST	4
SUW917972 (SUWANNEE)	GILCHRIST	4
WORTHINGTON SPRING	UNION	4
HOLLY SPRING	GILCHRIST	UNKNOWN
JAMISON SPRINGS	COLUMBIA	UNKNOWN
LITTLE BLUE SPRING (GILCHRIST)	GILCHRIST	UNKNOWN
NAKED SPRING	GILCHRIST	UNKNOWN
POE WOODS SPRING	ALACHUA	UNKNOWN
UNNAMED SPRING (GILCHRIST) 2953480824601	GILCHRIST	UNKNOWN

Springs of the Ichetucknee River		
Spring Name	**County**	**Historic Magnitude**
BLUE HOLE SPRING (COLUMBIA)	COLUMBIA	1
CEDAR HEAD SPRING	COLUMBIA	2
COL1012971 (COLUMBIA)	COLUMBIA	2
DEVILS EYE SPRINGS (SUWANNEE)	SUWANNEE	2
ICHETUCKNEE HEAD SPRING (SUWANNEE)	SUWANNEE	2
MILL POND SPRINGS (COLUMBIA)	COLUMBIA	2
MISSION SPRINGS	COLUMBIA	2
ROARING SPRING	COLUMBIA	2
COFFEE SPRINGS	SUWANNEE	3
GRASSY HOLE SPRING	COLUMBIA	3
SINGING SPRING	COLUMBIA	UNKNOWN

Springs of the Santa Fe and Ichetucknee Rivers by Historic Magnitude			
Spring Magnitude	**Santa Fe River Springs**	**Ichetucknee Springs**	**Total: Santa Fe and Ichetucknee**
1st Magnitude	10	1	11
2nd Magnitude	23	7	30
3rd Magnitude	20	2	22
4th Magnitude	8	0	8
Other/Unknown	6	1	7
Total:	**67**	**11**	**78**

Notes:

1) The above list only includes documented and mapped springs at the time of publication.
2) Several of the springs listed above are part of springs clusters, and are considered part of first magnitude spring groups.
3) Historic magnitudes presented were obtained from previous work conducted by SRWMD (Hornsby, D., & Ceryak, R. (1998). Springs of the Suwannee River Basin in Florida) and the Florida Geological Survey (Bulletin No. 66, 2004), as compiled by FDEP in 2011.
4) Collection of springflow data is ongoing and spring magnitudes may be subject to future revision.

1 A bill to be entitled
2 An act relating to ratification of Department of
3 Environmental Protection rules; ratifying specified
4 rules relating to minimum flows and levels and
5 recovery and prevention strategies, for the sole and
6 exclusive purpose of satisfying any condition on
7 effectiveness pursuant to s. 120.541(3), F.S., which
8 requires ratification of any rule meeting any
9 specified thresholds for likely adverse impact or
10 increase in regulatory costs; providing applicability;
11 providing an effective date.
12
13 Be It Enacted by the Legislature of the State of Florida:
14
15 Section 1. (1) The following rule is ratified for the sole
16 and exclusive purpose of satisfying any condition on
17 effectiveness imposed under s. 120.541(3), Florida Statutes:
18 Rule 62-42.300, Florida Administrative Code, titled "Minimum
19 Flows and Levels and Recovery and Prevention Strategies" as
20 filed for adoption with the Department of State pursuant to the
21 certification package dated February 18, 2015.
22 (2) This act serves no other purpose and shall not be
23 codified in the Florida Statutes. After this act becomes law,
24 its enactment and effective dates shall be noted in the Florida
25 Administrative Code, the Florida Administrative Register, or
26 both, as appropriate. This act does not alter rulemaking

27 authority delegated by prior law, does not constitute
28 legislative preemption of or exception to any provision of law
29 governing adoption or enforcement of the rules cited, and is
30 intended to preserve the status of any cited rule as a rule
31 under chapter 120, Florida Statutes. This act does not cure any
32 rulemaking defect or preempt any challenge based on a lack of
33 authority or a violation of the legal requirements governing the
34 adoption of any rule cited.
35 Section 2. This act shall take effect upon becoming a law.

V

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATEMENT OF ESTIMATED REGULATORY COSTS

Division: *Office of Water Policy*
Rule Number: *62-42.100, F.A.C.*
Rule Description: *Provides a Scope for rule Chapter 62-42, F.A.C., titled Minimum Flows and Levels.*
Contact Person: *Janet Llewellyn*

Rule 62-42.100, F.A.C. proposes a scope identifying the purposes of the chapter and recognizing that recovery and prevention strategies may contain non-regulatory provisions to be included in the applicable district water supply plans.

A. Is the rule likely to, **directly or indirectly**, have 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 5 years after the implementation of the rule?

1. Is the rule likely to reduce personal income? ☐ Yes ☒ No
2. Is the rule likely to reduce total non-farm employment? ☐ Yes ☒ No
3. Is the rule likely to reduce private housing starts? ☐ Yes ☒ No
4. Is the rule likely to reduce visitors to Florida? ☐ Yes ☒ No
5. Is the rule likely to reduce wages or salaries? ☐ Yes ☒ No
6. Is the rule likely to reduce property income? ☐ Yes ☒ No

B. Is the rule likely to, **directly or indirectly**, have 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 5 years after the implementation of the rule?

1. Is the rule likely to raise the price of goods or services provided by Florida business?
☐ Yes ☒ No

2. Is the rule likely to add regulation that is not present in other states or markets?
☐ Yes ☒ No

3. Is the rule likely to reduce the quantity of goods or services Florida businesses are able to produce, i.e. will goods or services become too expensive to produce?

☐ Yes ☒ No

4. Is the rule likely to cause Florida businesses to reduce workforces?
☐ Yes ☒ No

5. Is the rule likely to increase regulatory costs to the extent that Florida businesses will be unable to invest in product development or other innovation?
☐ Yes ☒ No

6. Is the rule likely to make illegal any product or service that is currently legal?
☐ Yes ☒ No

If any of these questions are answered "Yes," presume that there is a likely an adverse impact in excess of $1 million, and the rule must be submitted to the legislature for ratification.

C. Is the rule likely, **directly or indirectly**, to increase regulatory costs, including any transactional costs (see F below for examples of transactional costs), in excess of $1 million in the aggregate within 5 years after the implementation of this rule?
No.

D. Good faith estimates (numbers/types):

1. The number of individuals and entities likely to be required to comply with the rule.
Zero. The rule simply lays out the scope of the rule chapter and has no independent regulatory effect.

2. A general description of the types of individuals likely to be affected by the rule.
Zero. The rule simply lays out the scope of the rule chapter and has no independent regulatory effect.

E. Good faith estimates (costs):

1. Cost to the department of implementing the proposed rule:

   ☒ None. *The rule simply lays out the scope of the rule chapter and has no independent regulatory effect.*

   ☐ Minimal.

   ☐ Other.

2. Cost to any other state and local government entities of implementing the proposed rule:

☒ None. *The rule simply lays out the scope of the rule chapter and has no independent regulatory effect.*

☐ Minimal.

☐ Other.

3. Cost to the department of enforcing the proposed rule:

   ☒ None. *The rule simply lays out the scope of the rule chapter and has no independent regulatory effect.*

   ☐ Minimal.

   ☐ Other.

4. Cost to any other state and local government of enforcing the proposed rule:

   ☒ None. *The rule simply lays out the scope of the rule chapter and has no independent regulatory effect.*

   ☐ Minimal.

   ☐ Other.

F. Good faith estimates (transactional costs) likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the proposed rule. *(Includes filing fees, cost of obtaining a license, cost of equipment required to be installed or used, cost of implementing processes and procedures, cost of modifying existing processes and procedures, additional operating costs incurred, cost of monitoring, and cost of reporting, or any other costs necessary to comply with the rule).*

   ☒ None.

   ☐ Minimal.

   ☐ Other.

G. An analysis of the impact on small business as defined by s. 288.703, F.S., and an analysis of the impact on small counties and small cities as defined by s. 120.52, F.S.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATEMENT OF ESTIMATED REGULATORY COSTS

A small business is defined in Section 288.703, F.S., as "...an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than $5 million or any firm based in this state which has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the $5 million net worth requirement shall include both personal and business investments."

A small county is defined in Section 120.52(19), F.S., as "any county that has an unincarcerated population of 75,000 or less according to the most recent decennial census." And, a small city is defined in Section 120.52(18), F.S., as "any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census."

The estimated number of small businesses that would be subject to the rule:
None.

☐ 1-99 ☐ 100-499 ☐ 500-999
☐ 1,000-4,999 ☐ More than 5,000
☐ Unknown, please explain:

☐ Analysis of the impact on small business:

☒ There is no small county or small city that will be impacted by this proposed rule.

☐ A small county or small city will be impacted. Analysis:

☐ Lower impact alternatives were not implemented? Describe the alternatives and the basis for not implementing them.

H. Any additional information that the agency determines may be useful.

☒ None.

☐ Additional.

I. A description of any good faith written proposal for a lower cost regulatory alternative to the proposed rule which substantially accomplishes the objectives of the law being implemented and either a statement adopting the alternative or a statement of the reasons rejecting the alternative in favor of the proposed rule.

☐ No good faith written proposals for a lower cost regulatory alternative to the proposed rule were received.

☒ See attachment "B".

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATEMENT OF ESTIMATED REGULATORY COSTS

A Lower Cost Regulatory Alternative was received by the Department on March 20, 2014 from Dr. Paul Still, on behalf of himself.

☐ Adopted in entirety.

☐ Adopted / rejected in part. *(Provide a description of the parts adopted or rejected, and provide a brief statement of the reasons adopting or rejecting this alternative in part).*

☒ Rejected in entirety. *(Provide a brief statement of the reasons rejecting this alternative).*

Response to the LCRA is provided in Attachment B-1.

# # #

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATEMENT OF ESTIMATED REGULATORY COSTS

Division: *Office of Water Policy*
Rule Number: *62-42.200, F.A.C.*
Rule Description: *Provides definitions for terms used in rule Chapter 62-42, F.A.C., titled Minimum Flows and Levels.*
Contact Person: *Janet Llewellyn*

Rule 62-42.200, F.A.C. proposes definitions of two terms, "Flow Duration Curve" and "Flow Duration Frequency" that are used in Chapter 62-42, F.A.C.

A. Is the rule likely to, **directly or indirectly**, have 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 5 years after the implementation of the rule?

1. Is the rule likely to reduce personal income? ☐ Yes ☒ No
2. Is the rule likely to reduce total non-farm employment? ☐ Yes ☒ No
3. Is the rule likely to reduce private housing starts? ☐ Yes ☒ No
4. Is the rule likely to reduce visitors to Florida? ☐ Yes ☒ No
5. Is the rule likely to reduce wages or salaries? ☐ Yes ☒ No
6. Is the rule likely to reduce property income? ☐ Yes ☒ No

B. Is the rule likely to, **directly or indirectly**, have 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 5 years after the implementation of the rule?

1. Is the rule likely to raise the price of goods or services provided by Florida business?
☐ Yes ☒ No

2. Is the rule likely to add regulation that is not present in other states or markets?
☐ Yes ☒ No

3. Is the rule likely to reduce the quantity of goods or services Florida businesses are able to produce, i.e. will goods or services become too expensive to produce?
☐ Yes ☒ No

4. Is the rule likely to cause Florida businesses to reduce workforces?
☐ Yes ☒ No

5. Is the rule likely to increase regulatory costs to the extent that Florida businesses will be unable to invest in product development or other innovation?
☐ Yes ☒ No

6. Is the rule likely to make illegal any product or service that is currently legal?
☐ Yes ☒ No

If any of these questions are answered "Yes," presume that there is a likely an adverse impact in excess of $1 million, and the rule must be submitted to the legislature for ratification.

C. Is the rule likely, **directly or indirectly**, to increase regulatory costs, including any transactional costs (see F below for examples of transactional costs), in excess of $1 million in the aggregate within 5 years after the implementation of this rule?
No.

D. Good faith estimates (numbers/types):

1. The number of individuals and entities likely to be required to comply with the rule.
Zero. The rule simply lays out definitions of terms that are used in the remainder of the rule chapter and has no independent regulatory effect.

2. A general description of the types of individuals likely to be affected by the rule.
Zero. The rule simply lays out definitions of terms that are used in the remainder of the rule chapter and has no independent regulatory effect.

E. Good faith estimates (costs):

1. Cost to the department of implementing the proposed rule:

☒ None. *The rule simply lays out definitions of terms that are used in the remainder of the rule chapter and has no independent regulatory effect.*

☐ Minimal.

☐ Other.

2. Cost to any other state and local government entities of implementing the proposed rule:

☒ None. *The rule simply lays out definitions of terms that are used in the remainder of the rule chapter and has no independent regulatory effect.*

☐ Minimal.

☐ Other.

3. Cost to the department of enforcing the proposed rule:

   ☒ None. *The rule simply lays out definitions of terms that are used in the remainder of the rule chapter and has no independent regulatory effect.*

   ☐ Minimal.

   ☐ Other.

4. Cost to any other state and local government of enforcing the proposed rule:

   ☒ None. *The rule simply lays out definitions of terms that are used in the remainder of the rule chapter and has no independent regulatory effect.*

   ☐ Minimal.

   ☐ Other.

F. Good faith estimates (transactional costs) likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the proposed rule. *(Includes filing fees, cost of obtaining a license, cost of equipment required to be installed or used, cost of implementing processes and procedures, cost of modifying existing processes and procedures, additional operating costs incurred, cost of monitoring, and cost of reporting, or any other costs necessary to comply with the rule).*

   ☒ None.

   ☐ Minimal.

   ☐ Other.

G. An analysis of the impact on small business as defined by s. 288.703, F.S., and an analysis of the impact on small counties and small cities as defined by s. 120.52, F.S. A small business is defined in Section 288.703, F.S., as "...an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its

affiliates, has a net worth of not more than $5 million or any firm based in this state which has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the $5 million net worth requirement shall include both personal and business investments."

A small county is defined in Section 120.52(19), F.S., as "any county that has an unincarcerated population of 75,000 or less according to the most recent decennial census." And, a small city is defined in Section 120.52(18), F.S., as "any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census."

The estimated number of small businesses that would be subject to the rule:
None.

☐ 1-99 ☐ 100-499 ☐ 500-999
☐ 1,000-4,999 ☐ More than 5,000
☐ Unknown, please explain:

☐ Analysis of the impact on small business:

☒ There is no small county or small city that will be impacted by this proposed rule.

☐ A small county or small city will be impacted. Analysis:

☐ Lower impact alternatives were not implemented? Describe the alternatives and the basis for not implementing them.

H. Any additional information that the agency determines may be useful.

☒ None.

☐ Additional.

I. A description of any good faith written proposal for a lower cost regulatory alternative to the proposed rule which substantially accomplishes the objectives of the law being implemented and either a statement adopting the alternative or a statement of the reasons rejecting the alternative in favor of the proposed rule.

☐ No good faith written proposals for a lower cost regulatory alternative to the proposed rule were received.

☒ See attachment "B".
A Lower Cost Regulatory Alternative was received by the Department on March 20, 2014 from Dr. Paul Still, on behalf of himself.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATEMENT OF ESTIMATED REGULATORY COSTS

☐ Adopted in entirety.

☐ Adopted / rejected in part. *(Provide a description of the parts adopted or rejected, and provide a brief statement of the reasons adopting or rejecting this alternative in part).*

☒ Rejected in entirety. *(Provide a brief statement of the reasons rejecting this alternative).*

Response to the LCRA is provided in Attachment B-1.

# # #

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATEMENT OF ESTIMATED REGULATORY COSTS
April 8, 2014

Division: Office of Water Policy
Rule Number: 62-42.300, F.A.C.
Rule Description: Minimum Flows and Levels and Recovery Strategy for Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs
Contact Person: Janet Llewellyn

The information provided in this SERC represents the findings and conclusions of the economic assessment of the proposed rule subsequent to the Notice of Change published on April 8, 2014. "Attachment A: Summary of SERC Economic Assessment" provides further description of the methods, assumptions, results and findings of the economic assessment conducted for this SERC. This assessment was completed prior to the April 8, 2014 Notice of Change and was primarily focused on assessing the impacts on users requesting new permits or increased water quantities. The assessment was also used to inform the analysis below of the rule subsequent to the April 8, 2014 Notice of Change.

Summary of Proposed Rules

The Department proposes for adoption Minimum Flows and Levels (MFLs) for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs. The proposed rule also provides for a regulatory Recovery Strategy, which will be implemented by the Water Management Districts (WMDs). These regulatory measures provide protection to the MFL water bodies and existing uses, until the Department re-adopts the MFL and any required associated recovery or prevention strategy pursuant to the proposed Rule 62-42.300(1)(e). The proposed rule language is detailed in Section 6.0 of the overall Recovery Strategy for the Lower Santa Fe Basin and incorporated into the proposed rule, and can be generally divided into two measures, as summarized below:

1. *Additional Review Criteria for all Individual Water Use Permit:*

   - *This rule primarily defines how the existing requirements that proposed water uses not cause harm to water resources will be addressed in the water use permitting review process with regard to the proposed MFLs.*
   - *This rule ensures that the impact of new withdrawals or increases in permitted water use must be eliminated or offset as a condition for issuance of a water use permit.*
   - *These review criteria also provide protections for existing uses by specifying that existing uses, which do not request increases in water use, are considered consistent with the Recovery Strategy. Existing users which request new quantities will only be required to offset the impacts of their increase in water use, and not their existing use. Renewals for existing water use that impact the MFL water body are limited to a five year permit duration, unless the applicant*

will eliminate or offset the impacts of existing permitted quantities on the MFL water body, in which case a longer duration permit may be issued.

- *The rule establishes that the WMD shall use their best available information and modeling tools to evaluate the potential impacts of proposed water uses to MFL water bodies.*
- *These additional review criteria for individual water use permit applications will be implemented in the entirety of the SRWMD and the portion of the North Florida Regional Water Supply Planning Area in SJRWMD.*

2. *Additional Individual Permit Conditions:*

- *This rule establishes two new special conditions which will be applied to new or renewed water use permits.*
- *The first special condition will be applied to individual permits issued for a duration of greater than 5 years within the boundaries of the SRWMD and the portion of the North Florida Regional Water Supply Planning Area within the SJRWMD, and is designed to ensure continuing compliance of the water use with the ongoing efforts of the Recovery Strategy. This condition allows for future modification of the permit to address impacts to the MFL water bodies, and provides an important means for adaptive management by the issuing WMD in light of new technical tools, future hydrologic conditions, and the development of long-term recovery strategies to be developed in the context of the North Florida Regional Water Supply Plan.*
- *The second special condition shall only be applied to individual water use permits for agricultural use located within Columbia, Suwannee, Union, and Gilchrist Counties, and the portions of Baker, Bradford, and Alachua Counties within the boundaries of the SRWMD. This special condition requires that the permittee participate in a Mobile Irrigation Lab (MIL) program and allow access to the Project Site for the purpose of conducting an MIL evaluation at least once every five years. This condition will provide the District with critical information about agricultural water use efficiency to direct future water conservation measures and agricultural cost-share programs.*

The following sections of this SERC provide an analysis of the potential economic effects of these regulatory measures.

A. Is the rule likely to, **directly or indirectly**, have 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 5 years after the implementation of the rule?

1. Is the rule likely to reduce personal income? ☒ Yes ☐ No
2. Is the rule likely to reduce total non-farm employment? ☐ Yes ☒ No

3. Is the rule likely to reduce private housing starts? ☐ Yes ☒ No

4. Is the rule likely to reduce visitors to Florida? ☐ Yes ☒ No

5. Is the rule likely to reduce wages or salaries? ☐ Yes ☒ No

6. Is the rule likely to reduce property income? ☒ Yes ☐ No

Based on the assessment conducted, the proposed rule is likely to affect some future agricultural water users in the Santa Fe Basin because potential adverse impacts to the MFL water bodies resulting from new and increased water quantity allocations must be offset. To achieve compliance with the proposed rule, these users will be able to pursue available strategies such as:

1. *Water conservation or reductions in existing water use.*
2. *Reduction of requested allocation.*
3. *Changing the location of the proposed withdrawal.*
4. *Agricultural alternative water supplies.*

(See section 2.2 of Attachment A for explanation of each of these strategies).

The economic cost of these strategies will be determined primarily by the farming practices the users elect to adopt and future commodities markets. In some cases, implementation of these strategies may result in a reduction in agricultural revenues for certain users representing a reduction in personal income or property income. Attachment A provides the methodology of the economic assessment conducted for the proposed rule. Based on the assessment conducted, the proposed rule is likely to result in some future potential agricultural water users in the Santa Fe Basin electing to pursue lower water use agricultural practices or implement water conservation practices at existing operations, and there is likely to be some diversification of farming practices in the hydrologically sensitive areas of the SRWMD. This is likely to affect a relatively small portion of agricultural acreage based on current permitting trends, and the economic costs will be primarily determined by the farming practices the users elect to adopt and future commodities markets. The impact of the proposed rule on overall agricultural revenues in the SRWMD is expected to be minimal. The potential economic impacts associated with the potential strategies for compliance with the proposed rules are provided in section F, below.

Additionally, this rule will limit the duration of renewing water use permits to 5 years, if the existing water use allocation poses a potential impact to the MFL water bodies. This portion of the rule is likely to affect a small number of existing public supply, and commercial/industrial permittees in the SJRWMD and SRWMD, and a subset of existing agricultural permittees in hydrologically sensitive areas of the SRWMD. This portion of the rule will result in a small increase in transactional costs for the majority of affected permittees, in that they will be required to renew their water use permit on a more frequent

basis than they may have been required otherwise, and thus may have to pay the water use permit application fees more frequently. The increased transactional cost may be greater for a small group of affected larger permittees, depending on the professional services they may elect to retain for the water use application process.

This rule also allows for permits of longer duration to be issued, if the user elects to eliminate or offset the impacts of their existing allocation. As such, some affected users may elect to eliminate or offset the impacts of their water use via water conservation, the use of alternative water supplies, or participation in a water resource development project, representing a potential cost to some of the affected applicants.

Based upon the assessment of the proposed rule, the individuals likely to be affected, and the potential strategies for compliance, the proposed rules may result in increased costs to a small number of agricultural water use applicants in excess of $1 million in the aggregate over a five year period.

B. Is the rule likely to, **directly or indirectly**, have 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 5 years after the implementation of the rule?

1. Is the rule likely to raise the price of goods or services provided by Florida business?

☒ Yes ☐ No

New or increased water allocations: *The assessment indicates that the most likely individuals to be affected by the proposed rule are a small number of new agricultural water use permit applicants in the Santa Fe Basin. The prices of agricultural commodities prices are driven entirely by external agricultural commodities markets, which are international in nature, and unlikely to be affected by the proposed rule.*

Existing water users: *Under the new rule, existing water use permits with no change in requested allocation shall be issued for a duration of no more than five years provided an applicant meets all the conditions for issuance. However, while not required by the rule, existing water users may choose to eliminate or offset the impacts of their existing permitted quantities in order to obtain a longer duration permit. Should an applicant choose to pursue this option, the cost of projects necessary to provide for water conservation, alterative water supplies, or recharge projects to eliminate or offset impacts may be passed on to the consumer in the form of higher utility rates in the case of public water suppliers, or higher cost of consumer goods produced by commercial or industrial water users.*

2. Is the rule likely to add regulation that is not present in other states or markets?

☒ Yes ☐ No

Regulations adopted under the Florida's MFL program are designed to protect local and regional water resources, and thus are local and regional in nature. Similar restrictions are in place throughout the state of Florida. Other states have varying degrees of water resource protections.

3. Is the rule likely to reduce the quantity of goods or services Florida businesses are able to produce, i.e. will goods or services become too expensive to produce?

☐ Yes ☒ No

The proposed rule protects existing water allocations such that there is no likely impact to the quantity of goods or services currently produced. Obtaining a five year permit would not be expected to reduce the quantity of goods or services businesses are able to produce. Additionally, impacts to future agricultural growth as a result of the rule are expected to be minimal. See section 2.2 of Attachment A for additional details.

4. Is the rule likely to cause Florida businesses to reduce workforces?

☐ Yes ☒ No

5. Is the rule likely to increase regulatory costs to the extent that Florida businesses will be unable to invest in product development or other innovation?

☐ Yes ☒ No

6. Is the rule likely to make illegal any product or service that is currently legal?

☐ Yes ☒ No

Explanation:

If any of these questions are answered "Yes," presume that there is a likely an adverse impact in excess of $1 million, and the rule must be submitted to the legislature for ratification.

C. Is the rule likely, **directly or indirectly**, to increase regulatory costs, including any transactional costs (see F below for examples of transactional costs), in excess of $1 million in the aggregate within 5 years after the implementation of this rule?

The assessment indicated that the proposed rule was likely to increase regulatory costs, directly or indirectly, on a small number of future potential agricultural users (approximately 68 over a five-year window) in excess of $1 million in the aggregate within the next five years. See sections 2.1 and 2.2 of Attachment A. Based on the assessment conducted, the proposed rule is likely to result in some future potential agricultural water users in the Santa Fe Basin electing to pursue lower water use agricultural practices or implement water conservation practices at existing operations, and there is likely to be some diversification of farming practices in the hydrologically sensitive areas of the SRWMD. This is likely to affect a relatively small portion of agricultural acreage based on

current permitting trends, and the economic costs will be primarily determined by the farming practices the users elect to adopt and future commodities markets. The impact of the proposed rule on overall agricultural revenues in the SRWMD is expected to be minimal. The potential economic impacts associated with the potential strategies for compliance with the proposed rules are provided in section F, below.

The proposed rule, although protective of existing water use allocations, will limit the duration of permits posing a potential impact to the MFL water bodies to 5 years. Although the proposed rule does not alter the fee schedule for water use permit applications, there is likely to be a small increase in transactional costs in that the issuance of shorter duration permits will necessitate more frequent renewal of some permits. Examination of likely permit renewals in the SRWMD and SJRWMD indicates that approximately 75 individuals would likely be subject to the 5-year permit limitation under this rule. Although the additional transactional costs due to more frequent renewals would be incurred outside of the five year evaluation period of this SERC, the sum of the one-time application fees for these users is estimated to be approximately $9,000 in total. The average application fee expected for affected individuals would be $115 in the SRWMD and $200 in the SJRWMD. Additionally, a very small group of existing water use permittees would likely elect to hire consultants to assist in the water use permit preparation and review process. It is estimated that these indirect costs would be accrued to a very small number of commercial/industrial and public supply permittees, and that individually, these potential one-time costs could range from several thousand dollars to over one hundred thousand dollars, but would be highly dependent on the level of services the applicants elect to retain. In some cases, applicants have reported consulting fees of several hundred thousand dollars for water use permit applications; however, this would be considered atypical of the cost of obtaining a water use permit.

D. Good faith estimates (numbers/types):

1. The number of individuals and entities likely to be required to comply with the rule.

Affected Permit Renewals and Modifications:
The estimated number of water use permittees likely to require renewal over the next five years includes a total of approximately 308 potential permittees including: 7 commercial and industrial permittees; 259 agricultural permittees; 14 public supply permittees; 10 recreational permittees; and 18 other permittees. Of those, 75 permittees are estimated to pose a potential impact to the MFL water bodies, and be subject to a 5-year permit limitation under the proposed rule. This includes approximately 3 commercial/industrial permittees in SJRWMD, 1 public supply utility in SJRWMD, 1 public supply utility in SRWMD, 1 recreational/aesthetic use in SRWMD, and approximately 69 agricultural permittees in the SRWMD. Therefore, the number of individuals and entities likely to be affected by the proposed rule's renewal provision is limited to an estimated 75 users. Of this group, an even smaller fraction, approximately 28 agricultural permittees, is estimated to

request new quantities, which would require an offset of impacts to the MFL water bodies under this rule. See Section 2.1.1 of Attachment A.

Affected New Permits:
Based on the number of new water use applicants received by the SRWMD in 2013, the assessment indicated that approximately 400 new agricultural water use permits would be reviewed by the SRWMD over the next five years. The assessment indicates that approximately 10% of these new applications (approximately 40 users) would have the potential to adversely impact the MFL water bodies. The assessment indicates that other user groups seeking new allocations would not likely be impacted by the proposed rule. Therefore, the number of individuals and entities likely to be affected by the proposed rule's new allocation provision is limited to an estimated 40 users. See Section 2.1.2 of Attachment A.

Estimate of Affected Individuals:
Based on the above, assessment of likely water use permit renewals in the SRWMD and SJRWMD, recent new water use permit applications, and future water use projections, it is estimated that the additional permit review criteria in the proposed rule have the potential to affect approximately 115 water use permit applicants (new and renewals) in the 2014 through 2018 timeframe. This group of individuals would likely consist of agricultural operations located in close proximity to the Lower Santa Fe or Ichetucknee River or Associated Priority Springs or highly sensitive areas of the Santa Fe Basin, and a very small number of public supply utilities and commercial/industrial users in both SRWMD and SJRWMD. Of these affected individuals, approximately 75 permittees would be subject to a 5-year permit limitation under this rule, and approximately 68 projected agricultural permittees would likely be required to develop offsets of impacts to the MFL water bodies due to new water or increased water use, with some crossover between these two groups. The 68 projected agricultural permittees likely to be required to develop offsets of impacts would represent 11% of the approximately 611 agricultural water user permits estimated to be reviewed in the SRWMD in this timeframe.

2. A general description of the types of individuals likely to be affected by the rule.

   In accordance with the explanation above, the entities most likely to be affected by the proposed rule are a subset of agricultural water use permit applicants in hydrologically sensitive areas of the Santa Fe and Ichetucknee River Basin or springsheds. A very small subset of exiting users from commercial/industrial and public supply utilities in the SRWMD and SJRWMD are also expected to be affected.

E. Good faith estimates (costs):

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATEMENT OF ESTIMATED REGULATORY COSTS
April 8, 2014

1. Cost to the department of implementing the proposed rule:

   ☐ None.

   ☒ Minimal. *The permit application process for the consumptive use of water is administered by the five water management districts. The rule does require that the Department, in coordination with the SRWMD and the SJRWMD, reevaluate the MFL and the present status of the waterbody and re-adopt the rule following completion of the North Florida Southeast Georgia Ground Water Flow Model but prior to December 31, 2019. Section 373.0421(3), F.S., requires that minimum flows and levels be reevaluated periodically and revised as needed. However, to the extent these costs could be considered attributable to the proposed rule, this reevaluation and re-adoption of the rule will be conducted with existing staff.*

   ☐ Other.

2. Cost to any other state and local government entities of implementing the proposed rule:

   ☐ None.

   ☐ Minimal.

   ☒ Other. *The SRWMD and SJRWMD intend to conduct permitting under the proposed rule within their current workloads with existing staff. The rule does require that the Department, in coordination with the SRWMD and the SJRWMD, reevaluate the MFL and the present status of the waterbody and re-adopt the rule following completion of the North Florida Southeast Georgia Ground Water Flow Model but prior to December 31, 2019. Section 373.0421(3), F.S., requires that minimum flows and levels be reevaluated periodically and revised as needed. However, to the extent these costs could be considered attributable to the proposed rule, SRWMD involvement would include analysis by District staff and is likely to include contractor assistance and a Peer Review. The estimated cost to the SRWMD associated with these work efforts is $300,000. Involvement by the SJRWMD is expected to be conducted with existing staff resources.*

   The SRWMD has also identified water resource projects that could potentially be implemented by the SRWMD to assist in the recovery and protection of the MFL water bodies. These projects, however, are not required by rule and may be implemented at the discretion of the SRWMD. The total costs for these projects are discussed in the document entitled "Recovery Strategy: Lower Santa Fe River Basin."

3. Cost to the department of enforcing the proposed rule:

☒ None. *The permit application process for the consumptive use of water is administered by the five water management districts.*

☐ Minimal.

☐ Other.

4. Cost to any other state and local government of enforcing the proposed rule:

☐ None.

☒ Minimal. *The SRWMD and SJRWMD intend to enforce the proposed rule within their current water use permitting programs with existing staff.*

☐ Other.

F. Good faith estimates (transactional costs) likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the proposed rule. *(Includes filing fees, cost of obtaining a license, cost of equipment required to be installed or used, cost of implementing processes and procedures, cost of modifying existing processes and procedures, additional operating costs incurred, cost of monitoring, and cost of reporting, or any other costs necessary to comply with the rule).*

☐ None.

☐ Minimal.

☒ Other.

Offsets of Impacts of New or Increased Quantities:

Based on the assessment conducted, the proposed rule is likely to result in some future potential agricultural water users in the Santa Fe Basin electing to pursue lower water use agricultural practices or implement water conservation practices at existing operations, and there is likely to be some diversification of farming practices in the hydrologically sensitive areas of the SRWMD. This is likely to affect a relatively small portion of agricultural acreage based on current permitting trends, and the economic costs will be primarily determined by the farming practices the users elect to adopt and future commodities markets. The impact of the proposed rule on overall agricultural revenues in the SRWMD is expected to be minimal. The potential economic impacts associated with the potential strategies for compliance with the proposed rules are as follows:

1. ***Water Conservation or Reductions in Existing Water Use:*** *Some agricultural water users will likely elect to offset the impacts of potential new water uses by implementing water conservation practices to reduce existing water use. Should all of the new and renewed water permit applicants expected to be required to offset the impacts of new water use allocation under this rule elect to pursue water conservation as a compliance strategy, the total cost of compliance would approach $3 million over five years. Many of these users would be expected to enroll in the SRWMD's existing cost-share programs, which typically cover up to 80% of the total cost of these types of projects. See section 2.2.1 in Attachment A.*

2. ***Reducing Requested Allocations****: Some agricultural water use applicants in hydrologically sensitive areas of the Santa Fe Basin may elect to reduce their requested water use allocation to avoid posing a potential adverse impact to the Lower Santa Fe Basin MFLs. This would typically result in the implementation of lower water use agricultural practices among new water users, and the diversification of lower irrigation crops and practices. The cost of this compliance strategy would be entirely dependent on the operations users elect to pursue, and future agricultural commodities prices. Based upon the relatively small acreage likely to be affected by this strategy, there is some potential for a lost opportunity cost of up to several thousand dollars annually should certain crops with high irrigation requirements increase in value. However, there is potential that lower water use agricultural goods could increase in value resulting in increases in farm revenues. It is not anticipated that this rule will result a reduction in acreage of agricultural land in the SRWMD, as there appear to be economically viable agricultural activities across a wide range of water demands. See section 2.2.2 in Attachment A.*

3. ***Changing the location of the proposed withdrawal****: In some cases where a requested allocation is tied to a specific desired agricultural operation and cannot be modified, new agricultural water users may seek to locate in less hydrologically sensitive areas of the SRWMD. This has the potential to result in some relatively small costs to future new agricultural operations that may otherwise have located in hydrologically sensitive areas of the Santa Fe Basin. This also has the potential to indirectly result in some reduction in property incomes in the most hydrologically sensitive areas of the Basin, although changes in property income would be influenced by a significant number of other factors unrelated to this rule. See section 2.2.3 in Attachment A.*

4. ***Agricultural Alternative Water Supply:*** *The development of alternative water supplies for agricultural use resulting from the adoption of the proposed rule is reasonably expected to be minimal. This option is likely to be significantly limited by cost and feasibility and is therefore the least likely available option to be selected by impacted users. See section 2.2.4 in Attachment A for an example of the costs associated with alternative water supply.*

Transactional Costs of 5-Year Permits

Based upon the changes to the proposed rule described in the Notice of Change, the proposed rule, although protective of existing water use allocations, will limit the duration of permits posing a potential impact to the MFL water bodies to 5 years. Although the the proposed rule does not alter the fee schedule for water use permit applications, this portion of the rule will result in a small increase in transactional costs for the majority of affected permittees, in that they will be required to renew their water use permit on a more frequent basis than they may have been required otherwise, and thus may have to pay the water use permit application fees more frequently. The application fees for water use permits in the SRWMD range from $115 to $265, depending on the allocation, and the application fees in the SJRWMD range from $100 to $1000, depending on the allocation and other factors. Examination of likely renewals in the SRWMD and SJRWMD indicates that approximately 75 individuals would be likely to be subject to the 5 year permit limitation under this rule. Although the additional transactional costs due to more frequent renewals would be incurred outside of the five year evaluation period of this SERC, the sum of the one-time application fees for these users is estimated to be approximately $9000 in total. The average application fee expected for affected individuals would be $115 in the SRWMD and $200 in the SJRWMD.

In the SRWMD, it is very uncommon for agricultural water use permit applicants to retain consultants to assist with the water use permitting process. As such, additional indirect costs due to limited permit duration for agricultural users would be expected to be minimal, and would likely be limited to the cost of the time required for the applicant to complete the permit application and review process. It is more common for public supply utilities and commercial/industrial users to retain consultants to assist with the permit application and review process, and the costs of these services are highly variable and depend on the type and quantity of water use, geographic location of the user, and the types of services provided. It is estimated that these indirect costs associated with the permit application process can range from a few thousand dollars for small, routine permits to several tens of thousands of dollars for large or complex water uses. In some cases, applicants have reported consulting fees of several hundred thousand dollars for water use permit applications; however, this would be considered atypical of the cost of renewing a water use permit.

Finally, some users may elect to eliminate or offset the impacts of their existing water use allocations so as to receive a longer duration permit, according to a schedule included in the permit. As a result, many of the costs associated with an elimination or offset of an impact to the MFL water bodies would likely be incurred outside of the 5-year evaluation period of this SERC. However, to provide a more complete view of the potential economic effects of this rule, these potential cost are discussed below.

Offsetting or eliminating the impacts of existing water uses could be accomplished via a variety of strategies, such as conservation or the use of alternative water supplies,

as previously discussed for new quantities. The amount of allocation that an applicant would need to eliminate or offset would be highly applicant specific. Similarly, the cost of eliminating or offsetting the impacts of the withdrawal would be highly dependent on the options available to and chosen by the applicant.

Water conservation is frequently the least expensive option for reducing the need for water withdrawals or offsetting the impacts of groundwater withdrawals. As provided in the Recovery Strategy, typical costs for water conservation projects in this region range from $0.20 to $3.00 per 1000 gallons on an annual basis.

To provide examples of types of alternative water supply projects employed statewide and their associated typical costs, the Department calculated the average cost, by project type, of the 389 alternative water supply projects that have received funding under the statewide Water Protection and Sustainability Program. The average costs per MGD are given in the table below.

Project Type	Construction Cost Per MGD
Reclaimed Water	$6,160,476
Aquifer Storage and Recovery	$3,184,280
Seawater	$12,564,040
Brackish Groundwater	$3,665,028
Surface Water Storage	$5,717,243
Stormwater	$536,081
Other	$998,371

The project types listed above are provided for reference and are not intended to be an exclusive list of the types of projects available to applicants subject to this rule. Additionally, local water resource development projects may also be feasible, but those costs are highly dependent on project location and type. Furthermore the water management district may elect to participate in offsets or make cost share funding available.

It should be noted that the SRWMD has utilized limited-duration, 5-year water use permits as a management tool in the Lower Santa Fe Basin Water Resource Caution Area in recent years. Thus, this requirement does not represent a significant departure from current permitting practice in the SRWMD. As such, and based on the relatively high costs of offsetting existing impacts, and the relatively minor costs associated with permit renewal, it is anticipated that relatively few permit applicants will elect to pursue offsets of existing impacts so as to receive a longer duration permit.

The proposed rule does not impose additional monitoring or reporting requirements beyond current water use permitting rules.

Conclusions:

In conclusion and based upon assessment of the proposed rule, the individuals likely to be affected, and the potential strategies for compliance, there is some potential that the proposed rules may increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within 5 years of rule implementation.

G. An analysis of the impact on small business as defined by s. 288.703, F.S., and an analysis of the impact on small counties and small cities as defined by s. 120.52, F.S.
A small business is defined in Section 288.703, F.S., as "...an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than $5 million or any firm based in this state which has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the $5 million net worth requirement shall include both personal and business investments."

A small county is defined in Section 120.52(19), F.S., as "any county that has an unincarcerated population of 75,000 or less according to the most recent decennial census." And, a small city is defined in Section 120.52(18), F.S., as "any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census."

The estimated number of small businesses that would be subject to the rule:

☐ 1-99 ☒ 100-499 ☐ 500-999
☐ 1,000-4,999 ☐ More than 5,000
☐ Unknown, please explain:

☒ Analysis of the impact on small business:

The assessment indicates that the most likely entities to be economically affected by the proposed rules are agricultural water use applicants in hydrologically sensitive areas of the Santa Fe River Basin. It is likely that the majority of these entities would qualify as small businesses as defined in Section 288.703, F.S. The proposed rule is likely to result in some future potential agricultural water users in the Santa Fe Basin electing to implement water conservation practices or to pursue lower water use agricultural practices, and there is likely to be some diversification of farming practices in the hydrologically sensitive areas of the SRWMD. This is likely to affect a relatively small portion of agricultural acreage in the SRWMD based on current permitting trends, and the economic costs will be primarily determined by the farming practices the users elect to adopt and future agricultural commodities markets. Commodity prices are driven by market factors and there is some potential for a lost opportunity cost should certain crops with high irrigation requirements increase in value; however, lower water use agricultural goods could increase in value resulting in increases in farm revenues. It is not anticipated that this rule will result a reduction in acreage of agricultural land in the SRWMD, as there appear to be economically viable agricultural

activities across a wide range of water demands. The impact of the proposed rule on overall agricultural revenues in the SRWMD is expected to be minimal.

In addition to agricultural users, one small recreational facility in the SRWMD was identified which possesses a water use permit for public supply, and is in close proximity to the Santa Fe River. This user is likely to qualify as a small business as defined in Section 288.703, F.S.; however, further inspection of this permit indicated that based upon current permitting rules, this facility is likely to qualify for a general water use permit by rule, and thus would not be subject to proposed permit review criteria in the recovery strategy.

☐ There is no small county or small city that will be impacted by this proposed rule.

☒ A small county or small city will be impacted. Analysis:

City of Starke: The assessment indicates that the City of Starke's public water utility may have an adverse impact on the proposed Lower Santa Fe MFLs. Based on SRWMD water use projections, the City of Starke's current water use permit is sufficient to meet future needs and an increase in permitted water use allocation is unlikely. Thus the City of Starke is unlikely to be required to offset the impact of new or increased water use under this rule. Preliminary assessment indicates that based upon the potential for impacts to the MFL water bodies, the City of Starke would likely be subject to the 5-year permit limitation under the proposed rules. This would likely result in a small increase in transactional cost to this municipality due to the need to renew its permit after five years. Although outside of the evaluation period of this SERC, these transactional cost to the City of Starke would likely consist of the water use permit application fee and potential consulting cost to prepare and submit an additional water use permit application, as discussed above.

☐ Lower impact alternatives were not implemented? Describe the alternatives and the basis for not implementing them.

H. Any additional information that the agency determines may be useful.

☐ None.

☒ Additional.

The information provided in this Statement of Estimated Regulatory Costs represents the findings and conclusions of the economic assessment of the proposed rule as revised by the Notice of Change published on April 8, 2014. "Attachment A: Summary of SERC Economic Assessment" provides a more detailed description of the methods, assumptions, results and findings of the economic analysis conducted for this SERC. This assessment was completed prior to the April 8, 2014 Notice of Change and was primarily focused on assessing the impacts on users requesting new permits or increased water

quantities. The assessment was also used to inform this analysis of the rule subsequent to the April 8, 2014 Notice of Change. Attachment A is incorporated herein.

I. A description of any good faith written proposal for a lower cost regulatory alternative to the proposed rule which substantially accomplishes the objectives of the law being implemented and either a statement adopting the alternative or a statement of the reasons rejecting the alternative in favor of the proposed rule.

☐ No good faith written proposals for a lower cost regulatory alternative to the proposed rule were received.

☒ See attachment "B". *A Lower Cost Regulatory Alternative was received by the Department on March 20, 2014 from Dr. Paul Still, on behalf of himself.*

☐ Adopted in entirety.

☐ Adopted / rejected in part. *(Provide a description of the parts adopted or rejected, and provide a brief statement of the reasons adopting or rejecting this alternative in part).*

☒ Rejected in entirety. *(Provide a brief statement of the reasons rejecting this alternative).*

Response to the LCRA is provided in B-1.

ATTACHMENT A: Summary of SERC Economic Assessment

Statement of Estimated Regulatory Costs:

Recovery Strategy: Lower Santa Fe River Basin
Lower Santa Fe and Ichetucknee Rivers and Priority Springs
Minimum Flows and Levels

Prepared for:

Florida Department of Environmental Protection

Prepared by:

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February 28, 2014

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1.0 INTRODUCTION

The Florida Department of Environmental Protection (Department) is establishing Minimum Flows and Levels (MFLs) for the Lower Santa Fe and Ichetucknee Rivers and Priority Springs in coordination with the Suwannee River Water Management District (SRWMD). The Department is also adopting the regulatory component of the Recovery Strategy for these priority water bodies, which was developed by SRWMD, the Department, and the St. Johns River Water Management District (SJRWMD). This report contains an analysis of draft recommended regulatory recovery strategies required to satisfy the requirements of section 120.541(2), Florida Statues - Statement of Estimated Regulatory Costs (SERC).

A SERC must include whether a proposed rule, directly or indirectly, is likely to:

- Have 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 5 years after the implementation of the rule;

- Have 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 5 years after the implementation of the rule;

- Increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within 5 years after the implementation of the rule.

In addition, a SERC must provide a good faith estimate of:

- The number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule;

- The cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues;

- The transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule.

Finally, a SERC must include an analysis of the impact on small businesses, small counties, and small cities as defined in Chapter 120, F.S. This technical document provides the methodology used to derive the responses to the above required analysis contained in the SERC.

1.1 BACKGROUND

The State of Florida's Water Resource Act of 1972 requires the five Water Management Districts (WMDs) of the State to establish MFLs to ensure that water bodies do not experience significant harm as a result of water withdrawals. Specifically, Section 373.042(1), F.S., states that minimum flows are to be established at "the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area." Once established, MFLs provide a metric to guide the WMDs water use planning and permitting processes for the protection and sustainable use of Florida's water resources. The Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs MFLs and Recovery Strategy were developed pursuant to these statutory directives.

In June 2013, the SRWMD Governing Board requested that the Florida Department of Environmental Protection adopt the proposed MFLs for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs MFLs. This decision was based on the technical work conducted for the proposed MFLs for the Lower Santa Fe and Ichetucknee Rivers and Priority Springs MFLs by SRWMD staff, and the potential for cross-basin impacts originating outside of the SRWMD. SRWMD staff had also assessed the streamflows observed in the recent historical record and recent trends in the flow regime, and determined that a recovery strategy was required pursuant to section 373.0421(2), F.S., which specifies that an MFL Prevention or Recovery Strategy be undertaken under the following conditions:

> *(2) If the existing flow or level in a water body is below, or is projected to fall within 20 years below, the applicable minimum flow or level established pursuant to s. 373.042, the department or governing board, as part of the regional water supply plan described in s. 373.709, shall expeditiously implement a recovery or prevention strategy, which includes the development of additional water supplies and other actions, consistent with the authority granted by this chapter, to:*
>
> *(a) Achieve recovery to the established minimum flow or level as soon as practicable; or*
> *(b) Prevent the existing flow or level from falling below the established minimum flow or level.*
>
> *The recovery or prevention strategy shall include phasing or a timetable which will allow for the provision of sufficient water supplies for all existing and projected reasonable-beneficial uses, including development of additional water supplies and implementation of conservation and other efficiency measures concurrent with, to the extent practical, and to offset, reductions in permitted withdrawals, consistent with the provisions of this chapter.*

The proposed rule adopts regulatory provisions of a document titled "Recovery Strategy: Lower Santa Fe River Basin" for the Lower Santa Fe and Ichetucknee Rivers and Priority Springs Minimum Flows and Levels. The recovery strategy contains both regulatory and non-regulatory approaches to restoring minimum flows in the Lower Santa Fe Basin priority water bodies. To implement the rule portion of the Recovery Strategy, the Department will also adopt the regulatory portion of the Recovery Strategy by rule, which will thereafter be implemented by the WMDs with no further rulemaking required. The remaining non-rule portions of the Recovery Strategy will then be implemented jointly and cooperatively by the water management districts. The purpose of this SERC is to examine the estimated regulatory cost of the Lower Santa Fe Basin Recovery Strategy, in accordance with section 120.541(2), F.S.

1.2 SUMMARY OF PROPOSED RULES

The rule portion of the Lower Santa Fe Basin Recovery Strategy is contained in Section 6.0 of the Recovery Strategy Document. The Department will adopt the rule portion of the Recovery Strategy by reference into Rule 62-42.300, F.A.C. with the following language proposed to be added to Section 62-42.300(d) F.A.C.:

> *Pursuant to section 373.0421, F.S., the Department hereby adopts and incorporates by reference Section 6.0, entitled Supplemental Regulatory Measures, of the "Recovery Strategy for the Lower Santa Fe, Ichetucknee, and Associated Priority Springs," effective date ______. Copies of Section 6.0 entitled Supplemental Regulatory Measures is available at [DOS WEBSITE LINK] or you may find a copy of the complete document entitled "Recovery Strategy for the Lower Santa Fe, Ichetucknee, and Associated Priority Springs," including all*

sections as well as Section 6.0, on the Department's website at http://www.dep.state.fl.us/water/waterpolicy/pubs.htm.

Discussion of Proposed Rules

The regulatory measures provided in Section 6.0 of the recovery strategy and proposed for adoption will be implemented by the WMDs. These regulatory measures provide protection to the MFL water bodies and existing uses, until the Department re-adopts the MFL and any required associated recovery or prevention strategy pursuant to the proposed Rule 62-42.300(1)(e). The proposed rule language is detailed Section 6.0 of the recovery strategy and incorporated into the proposed rule, and can be generally divided into two measures, as summarized below:

1. Additional Review Criteria for all Individual Consumptive Use Permit (CUP) Applicants:

    - This rule primarily defines how the existing requirements that proposed water uses not cause harm to water resources will be addressed in the consumptive use permitting review process with regard to the proposed MFLs.
    - This rule ensures that the impact of new withdrawals or increases in permitted water use must be eliminated or offset as a condition for issuance of a consumptive use permit.
    - These review criteria also provide protections for existing uses by specifying that existing uses which do not request increases in water use are considered consistent with the Recovery Strategy. Existing users which request new quantities will only be required to offset the impacts of their increase in water use, and not their existing use.
    - The rule establishes that the WMD may use their best available information and modeling tools to evaluate the potential impacts of proposed water uses to MFL water bodies.
    - These additional review criteria for individual consumptive use permit applications will be implemented in the entirety of the SRWMD and the portion of the North Florida Regional Water Supply Planning Area in SJRWMD (SJRWMD Planning Region 1).

2. Additional Individual Permit Conditions:

    - This rule establishes two new special conditions which will be applied to new or renewed consumptive use permits.
    - The first special condition will be applied to individual permits issued within the boundaries of the SRWMD and the portion of the North Florida Regional Water Supply Planning Area within the SJRWMD, and is designed to ensure continuing compliance of the water use with the ongoing efforts of the Recovery Strategy. This condition allows for future modification of the permit to address impacts to the MFL water bodies, and provides an important means for adaptive management by the issuing WMD in light of new technical tools, future hydrologic conditions, and the development of long-term recovery strategies to be developed in the context of the North Florida Regional Water Supply Plan.
    - The second special condition shall only be applied to individual consumptive use permits for agricultural use located within Columbia, Suwannee, Union, and Gilchrist Counties, and the portions of Baker, Bradford, and Alachua Counties within the boundaries of the SRWMD. This special condition requires that the permittee participate in a Mobile Irrigation Lab (MIL) program and allow access to the Project Site for the purpose of conducting an MIL evaluation at least once every five years. This condition will provide the District with critical information about agricultural water use efficiency to direct future water conservation measures and agricultural cost-share programs.

The rule also acknowledges section 373.709(2)(a)2., F.S., which recognizes that "...alternative water supply options for agricultural self-suppliers are limited" and that the districts may participate in developing offsets for proposed uses for the purposes of protecting the MFL water bodies consistent with the goals of the Recovery Strategy.

The following sections of this assessment provide an analysis of the potential economic effects of these regulatory measures.

2.0 ADDITIONAL REVIEW CRITERIA FOR ALL INDIVIDUAL APPLICANTS

Section 2 of this report discusses draft rules developed by SRWMD, SJRWMD, and the Department, and analyzes the potential effects in the context of a SERC. SRWMD conducted the analysis using various datasets including the SRWMD and SJRWMD consumptive use permit databases, and current SRWMD groundwater modeling tools and other sources as described below.

2.1 ESTIMATION OF AFFECTED INDIVIDUALS

The proposed rule states that new allocations or requests from existing Consumptive Use Permit (CUP, or equivalently, Water Use Permits in SRWMD) holders for increased allocations must be evaluated to determine if the proposed water use poses potential impacts to MFL water bodies. The individuals likely to be impacted by the proposed rules are consumptive use permit applicants who:

1) Are located within the SRWMD or Planning Region 1 of the SJRWMD (the geographic extent of the rules);

2) Propose a water use that will impact the Lower Santa Fe and Ichetucknee Rivers and Priority Springs MFLs based on the magnitude and location of their proposed withdrawal, as determined by current modeling tools; and

3) Request increases in water use allocations or new consumptive use permits which impact the proposed MFLs.

To develop an estimate of the number of individuals likely to be economically impacted by the proposed rules, consumptive use permit datasets from the SRWMD and SJRWMD consumptive use permit databases and water use projections from the SRWMD 2010 Water Supply Assessment were used. The likely consumptive use permit applications to be processed in the five year window following the adoption of these rules (2014-2018) were identified. The SRWMD also utilized its water use projections from the SRWMD 2010 Water Supply Assessment to inform this analysis. In determining the number of water use applicants likely to be affected by the proposed rule, SRWMD staff assessed: (1) likely renewals for consumptive use permits (section 2.1.1.) and (2) likely new consumptive use permit applicants (section 2.1.2.), each described individually below.

2.1.1 Assessment of Renewed Consumptive Use Permit Applications

The SRWMD estimated the number of permit renewals likely to be impacted by the additional review criteria of the proposed rule by analyzing the records of existing consumptive use permits in the SRWMD and Planning Region 1 of the SJRWMD that would expire within the next five years (2014 through 2018), and would thus likely renew while this rule is in effect. The general method employed to estimate the number of these individuals is as follows:

1) SRWMD staff isolated the consumptive use permits dated to expire in water years 2014 through 2018 in the SRWMD and Planning Region 1 of the SJRWMD. Staff did not include permits with permitted allocations less than 50,000 gallons per day, as these are highly likely to qualify for a general permit by rule upon renewal, and would not be subject to the additional review criteria of the proposed rule.

2) SRWMD staff utilized groundwater modeling outputs from the SRWMD's current regional groundwater model (North Florida Model v1.03) to simulate the likely impact from each renewing permit on the MFLs, expressed as a predicted reduction in streamflow at the MFL river gauges.

3) SRWMD staff determined which permits would be likely to adversely impact the Lower Santa Fe Basin water bodies under existing consumptive use permitting rules. Under current SRWMD permit application review criteria, a model simulation resulting in a 0.1 percent or more reduction in streamflow at various river gauging stations due to the proposed withdrawal is an indication that the potential for adverse impacts may exist.

4) The analysis described in (3) above was repeated to assess the number of permits which would be likely to be determined to have an impact to the proposed MFLs under the proposed rules. For the purposes of this assessment, SRWMD utilized a modeled streamflow reduction of 0.05 mgd as an indicator of potential impacts at the MFL gauges to estimate of the numbers and types of permits likely to be determined to pose a potential adverse impact to the MFL under the proposed rule.

5) SRWMD staff then compared the list of renewing permits determined to adversely impact the MFL gauging stations under existing review criteria with the number of permits likely to adversely impact the MFL gauging stations under the proposed Recovery Strategy rule.

6) SRWMD staff examined the permit renewals with potential adverse impacts to the proposed MFL and estimated the number of renewals likely to request an increase in allocation. Applicants requesting increases in allocation would be required to offset the adverse impacts resulting from the increase, and therefore will incur an economic cost.

It should be noted that permits in the SJRWMD that were outside of the geographic extents of the North Florida Model were not evaluated. These permits were primarily located in southern and eastern Flagler County, and based upon their location relative to the Santa Fe Basin, were assumed to be unlikely to adversely impact the proposed MFLs. Thus, such records were excluded from the analysis. The results of the permit renewal analysis are listed below by use category:

- **Commercial/Industrial Uses:** Three large industrial permittees due for renewal during the next five years and located in the SJRWMD were determined to have the potential for adverse impacts to the Lower Santa Fe River under both current and proposed rules. As groundwater use for each of these users has been largely flat or decreased over time and remained below

the permitted allocations, requests for increases in allocation were determined to be unlikely; therefore, it is unlikely that the proposed rules will create additional costs for existing commercial/industrial users likely to renew consumptive use permits in the established timeframe. It is unlikely that this user group will be impacted as a result of the proposed rule.

- Public Supply Uses: Two small public supply uses due for renewal during the next five years and located in the SRWMD were determined to have the potential for adverse impacts to the Lower Santa Fe River under the proposed rules but not existing permit review criteria. Based upon the water use projections contained in the 2010 SRWMD Water Supply Assessment, these two permittees' existing allocations are likely to be sufficient to meet future demands and requests for increases in allocations are unlikely.

  Additionally, one large public supply utility due for renewal during the next five years and located in SJRWMD was determined to have an impact to Lower Santa Fe priority water bodies under both current and proposed rules. The renewal of this permit is currently underway and an increase in allocation has not been requested by the applicant. As such, this utility would not be required to offset current impacts under the proposed rule. It is unlikely that this user group will be impacted as a result of the proposed rule.

- **Recreational Uses:** One small recreational use due for renewal during the next five years and located in the SRWMD was determined to have an impact to the Lower Santa Fe MFLs. Inspection of this permit record indicated the use is for the augmentation of an aesthetic pond and is unlikely to increase. As a result, this user is unlikely to incur an economic cost under the proposed rule. It is unlikely that this user group will be impacted as a result of the proposed rule.

- **Agricultural Uses:** Based on available information and the methodology described below, 69 agricultural uses due for renewal during the next five years and located in the SRWMD were estimated to have a potential for adverse impacts to the Lower Santa Fe MFLs on an individual basis. There is a considerable number of agricultural operations located in the Lower Santa Fe Basin. As such, additional analysis of the potential effects of the proposed rule on agricultural water users in the SRWMD was warranted. A summary of SRWMD's more detailed analysis is provided in the following section.

  Based on the model simulations, no agricultural uses due for renewal during the next five years and located in the SJRWMD Planning Area 1 were identified that would result in potentially adverse impacts on the MFL gauging stations on an individual basis. Thus it is unlikely that agricultural consumptive use permit renewals in SJRWMD will incur an economic cost due to the proposed rule. It is unlikely that this user group will be impacted in the SJRWMD as a result of the proposed rule.

SRWMD AGRICULTURAL CONSUMPTIVE USE PERMIT RENEWALS

The method for estimating the number of agricultural consumptive use permits renewals likely to be affected by the proposed rule was similar to the method employed for other user groups. However, as a significant portion of renewing consumptive use permit applicants in SRWMD has requested increases in allocations in recent years, it was necessary to develop a method to simulate these requested increases to more fully assess the number of individuals likely to be affected by the proposed rule. Based on review of the agricultural consumptive use permit renewals and modifications processed by the SRWMD in water year 2013, 44% of agricultural consumptive use permit renewals requested an increase in allocation. Of those requesting an increase in allocation, the average increase requested

represented a 33% increase in individual water use. To simulate this trend, SRWMD staff utilized a random number generator to assign 33% increases in water use allocations to the list of existing agricultural permits likely to renew in 2014 through 2018, such that approximately 44% of these anticipated renewals would have increases in allocation. Staff then analyzed the entire list of likely renewals to determine how many permits would be likely to be determined to impact the Lower Santa Fe Basin priority water bodies under existing rules and under the proposed recovery strategy rules using groundwater modeling outputs from the SRWMD's North Florida Model as described above. This simulation was repeated ten times, re-assigning the random allocation increases to the renewal permit data set each time, and the results of the ten simulations were averaged to give an estimation of the number of permits likely to 1) have a potential impact to the Lower Santa Fe Basin MFLs under the proposed rule, and 2) request an increase in allocation that would be likely to require an offset of increased adverse impact under the proposed rule. The results of this analysis are discussed in the following section.

Based upon an examination of the agricultural consumptive use permits within the SRWMD likely to be renewed in 2014 through 2018, and on the projection of recent trends in agricultural water use permit renewals, the SRWMD anticipates that approximately 211 agricultural consumptive use permits will be renewed in the 2014 through 2018 timeframe in the SRWMD, representing a predicted total water use allocation of approximately 65 MGD. Of these renewals, SRWMD estimates that approximately 28 of these renewals would be required to provide an offset for increased water use allocations likely to pose an adverse impact the Lower Santa Fe MFLs that would not have been considered to impact these water bodies under current permitting rules and permit review criteria. The estimated total increase in water use likely to require offsets is approximately 2.6 MGD, or 4% of predicted agricultural water use allocations among consumptive use permit renewals in the SRWMD in the 2014 through 2018 timeframe.

Tables 2-1 through 2-3 provide a summary of the results of the assessment of consumptive use permit renewals by user group for both the SRWMD and Planning Region 1 of the SJRWMD.

RESULTS: CONSUMPTIVE USE PERMIT RENEWALS

Table 2-1. Summary of SRWMD CUPs due for Renewal 2014-2018

	Total Permits due for Renewal (2014-2018, SRWMD District-wide)		Proposed Rule		Existing rules/ Permit Review Criteria	
	Number of Permits	Total ADR (MGD)	Permits with Potential for Adverse Impacts to MFLs	Number of Permits Requiring Offsets	Permits with Potential for Adverse Impacts	Number of Permits Requiring Offsets
Commercial / Industrial	4	0.33	0	0	0	0
Agricultural	211	65	69**	35***	13	7
Public Supply	13	2.65	2	0	0	0
Recreational	1	0.28	1	0	0	0
Other*	1	0.05	0	0	0	0

Notes:
1) MGD= million gallons per day.
2) ADR= Average Daily Rate. This represents the permitting consumptive use allocation in SRWMD permits in MGD
3) For SJRWMD permits the "End of Permit" allocation, or EOP, was used in comparison to the SRWMD ADRs.
4) The ADRs presented for agricultural use in this table are based on the 2014-2018 renewal allocations with the simulated increases previously described.
5) *One permit record use type was listed as "drinking." Likely a public supply type use.
6) **Includes both renewals with increases in allocations and without increases in allocations.
7) ***Only includes permits which request increases in water use allocation.

Table 2-2. Summary of SJRWMD Planning Region 1 CUPs due for Renewal 2014-2018

	Total Permits due for Renewal (2014-2018, Region 1 SJRWMD)		Proposed Rule		Existing rules/ Permit Review Criteria	
	Number of Permits	Total ADR (MGD)	Permits with Potential for Adverse Impacts to MFLs	Number of Permits Requiring Offsets	Permits with Potential for Adverse Impacts	Number of Permits Requiring Offsets
Commercial / Industrial	3	51	3	0	3	0
Agricultural	48	17.5	0	0	0	0
Public Supply	1	30.29	1	0	1	0
Recreational	9	0.96	0	0	0	0
Other*	17	0.25	0	0	0	0

Notes:
1) MGD= million gallons per day
2) ADR= Average Daily Rate; This represents the permitting consumptive use allocation in SRWMD permits in MGD
3) For SJRWMD permits the "End of Permit" allocation, or EOP was considered analogous to the SRWMD ADRs
4) The ADRs presented for agricultural use in this table are based on the 2014-2018 renewal allocations with the simulated increases previously described.
5) *The "Other" use category as listed here consisted of SJRWMD permits records for mining/dewatering uses and records with undefined use types.
6) Planning Region 1 of the SJRWMD extends beyond the geographic extents of the SRWMD North Florida Model. Permits outside of the extents of the North Florida Model were assumed to not pose potential adverse impacts on an individual basis, and were not included in this analysis. The statistics above thus do not reflect SJRWMD permits located outside of the extent SRWMD's North Florida Model. The excluded permits are primarily located in southern and eastern Flagler County.

Table 2-3. Summary of SRWMD and SJRWMD Planning Region 1 CUPs due for Renewal 2014-2018 with Predicted Impact Offset Requirements

Water Use Type	Summary of Permits Expiring 2014-2018 (SRWMD and Region 1 SJRWMD)		Proposed Rule: Permits with Potential for Adverse Impacts to MFLs				Existing rules/ Permit Review Criteria: Permits with Potential for Adverse Impacts				Increased Impact of Proposed vs. Existing Rule	
	Number of Permits	Total ADR (MGD)	Number of Permits	Total ADR (MGD)	Number of Permits Requiring Offsets	Offset Required under proposed rule (MGD)	Number of Permits	Total ADR (MGD)	Number of Permits Requiring Offsets	Offset Required under existing rule (MGD)	Additional Number of Permits Requiring Offsets under Proposed Rule	Additional Offset Required under Proposed Rule (MGD)
Commercial / Industrial	7	51.33	3	51	0	0	3	51	0	0	0	0
Agricultural	259	82.5	69	32.4	35	4.4	13	13.1	7	1.8	28	2.6
Public Supply	14	32.94	3	32.09	0	0	1	30.29	0	0	0	0
Recreational	10	1.24	1	0.28	0	0	0	0	0	0	0	0
Other	18	0.3	0	0	0	0	0	0	0	0	0	0

Notes:
1) MGD= million gallons per day
2) ADR= Average Daily Rate; This represents the permitting water consumptive use allocation in SRWMD permits in MGD
3) For SJRWMD permits the "End of Permit" allocation, or EOP was considered analogous to the SRWMD ADRs
4) The ADRs presented for agricultural use in this table are based on the 2014-2018 renewal allocations with the simulated increases previously described.
5) Planning Region 1 of the SJRWMD extends beyond the geographic extents of the SRWMD North Florida Model. Permits outside of the extents of the North Florida Model were assumed to not pose potential adverse impacts on an individual basis, and were not included in this analysis. The statistics above thus do not reflect SJRWMD permits located outside of the extent SRWMD's North Florida Model. The excluded permits are primarily located in southern and eastern Flagler County.

2.1.2 Assessment of New Consumptive Use Permit Applicants

SRWMD staff utilized the results of the water use projections in the 2010 SRWMD Water Supply Assessment and the 2013 SJRWMD Draft Water Supply plan to assess the likelihood that future new consumptive use permit applicants would be economically affected by the additional review criteria of the proposed rule. The results of the new permit analysis are listed below by use category:

- **Commercial/Industrial Uses:** The 2010 SRWMD Water Supply Assessment concluded that Commercial and Industrial water use rates in the SRWMD are likely to remain constant through 2030. Additionally, as explained in Section 2.1.1., no individual commercial or industrial renewal in the SRWMD was found likely to have an individual potential adverse impact on the Lower Santa Fe Basin MFLs. Based on those two assessments, it is unlikely that there will be new commercial and industrial consumptive use permit applicants that would be affected by the proposed rule in the next five years.

  In Planning Region 1 of the SJRWMD, Commercial/Industrial water use is expected to increase by approximately 6 MGD between 2015 and 2020 (2013 SJRWMD Draft Water Supply Plan). The previous analysis of SJRWMD likely permit renewals indicated that only three commercial industrial and institutional 2014-2018 renewals would be estimated to impact the Lower Santa Fe priority water bodies. Each of these permits were allocated between 9 and 23 MGD of water use individually. SJRWMD does not anticipate that new large industrial water users of this nature are likely to apply for consumptive use permits in Region 1 in the next five years, and the majority of the growth in self-supplied commercial and industrial water use will be smaller dispersed water users unlikely to pose an individual potential impact to the Lower Santa Fe River Basin MFLs. As such, it is unlikely that new commercial and industrial self-supplied water users in the SJRWMD will be economically impacted by the proposed rule.

  Conclusion: It is unlikely that this user group will be impacted as a result of the proposed rule.

- **Public Supply Uses:** Based on the water use projections provided in the 2010 SRWMD Water Supply Assessment, and in the 2013 SJRWMD Draft Water Supply Plan, no new public supply utilities likely to pose an impact to the Lower Santa Fe Basin MFLs are anticipated to apply for consumptive use permits in the SRWMD or Planning Region 1 of the SJRWMD in the 2014-2018 timeframe covered by this SERC. Although there is some potential for additional new residential development outside of the projections for existing utilities, in the absence of existing plans for the creation of new public supply utilities in the next five years, it would be speculative to conclude that new public supply users would impact the Lower Santa Fe Basin MFLs. Furthermore, as much new residential development in the region is served by domestic self-supply wells which would not fall under this rule, SRWMD considers it unlikely that there will be new public supply permits affected by the proposed rule.

  Conclusion: It is unlikely that this user group will be impacted as a result of the proposed rule.

- **Recreational Uses:** Previous assessment of consumptive use permit renewals indicated that only one small recreational consumptive use permit renewal in the SRWMD was likely to have an individual potential impact on the Lower Santa Fe Basin MFLs. Thus, based on

these results and recreational water use projections in the 2010 SRWMD Water Supply Assessment and in the 2013 SJRWMD Draft Water Supply Plan, SRWMD considers it unlikely that future new recreational water use applicants will be affected by the proposed rule.

Conclusion: It is unlikely that this user group will be impacted as a result of the proposed rule.

- **Agricultural Uses:** As previously stated, the majority of consumptive use permit applications issued within the SRWMD are for agricultural water uses and there are a considerable number of agricultural operations located in the Lower Santa Fe Basin. As such, additional analysis of the potential effects of the proposed rule on new agricultural water users in the SRWMD was warranted. A summary of SRWMD's analysis of the potential effects of the proposed rule on new agricultural consumptive use permits is provided in the following section.

  Based on a projected decline in agricultural water use in Region 1 of the SJRWMD, and because no agricultural consumptive use permit renewals in SJRWMD were identified to be likely to pose an individual potential impact to the Lower Santa Fe River Basin MFLs, SRWMD concluded that it is unlikely that future new agricultural consumptive use permit applicants in the SJRWMD will be economically affected by the proposed rule.

  Conclusions: It is unlikely that agricultural water users in the SJRWMD will be impacted as a result of the proposed rule. Additional analysis of the potential effects of the proposed rule is warranted for new agricultural water users in SRWMD.

ANALYSIS OF NEW SRWMD AGRICULTURAL CONSUMPTIVE USE PERMITS

To assess the potential economic costs of the proposed rule on new agricultural consumptive use permit applicants in the SRWMD, the SRWMD elected to analyze recent trends in new agricultural consumptive use permits. To this end, the SRWMD examined permit records from the 2013 water year to assess the effects that the proposed rules would have had on new agricultural consumptive use permit applicants had the proposed rules been in place in the 2013 water year (October 1, 2012 through September 30, 2013). The method employed is as follows:

1) SRWMD staff identified the new agricultural consumptive use permits issued in the SRWMD in water year 2013.

2) SRWMD staff utilized groundwater modeling outputs from the SRWMD's current regional groundwater model (North Florida Model V1.03) to estimate the likely individual effect on the Lower Santa Fe Basin priority water bodies from each new 2013 permit. The individual effect of each permit was expressed as a predicted reduction in streamflow at the MFL river gages.

3) SRWMD staff determined which of the new 2013 permits would be likely to pose a potential adverse impact to the Lower Santa Fe Basin priority water bodies on an individual basis under existing consumptive use permitting rules and review practices. This was approximated as a modeled 0.1% reduction in streamflow at various river gaging stations due to the proposed withdrawal, as is typical under the current SRWMD permit application review process. It should be noted that SRWMD's permit review criteria were updated in August 2013. This analysis reflects the current review criteria and does not necessarily reflect the review criteria at the time of issuance of each 2013 consumptive use permit.

4) The analysis described in (3) above was repeated to assess the number of permits which would be likely to be determined to have an impact to the proposed Lower Santa Fe Basin MFLs under the proposed rules. For the purposes of this assessment, SRWMD utilized a modeled streamflow reduction of 0.05 mgd as an indicator of potential impacts at the MFL gauges to estimate of the numbers and types of permits likely to be determined to pose a potential adverse impact to the MFLs under the proposed rule.

5) SRWMD staff then compared the number of new permits issued in 2013 determined to impact the MFL water bodies under existing permit review criteria with the number of permits likely to adversely impact the MFLs under the proposed Recovery Strategy rules. Assuming that 2013 was a "typical" year for new consumptive use permit applications, this comparison provides a good faith estimation of the number of individuals and allocated quantities likely to be affected by the rule on an annual basis.

RESULTS: NEW CONSUMPTIVE USE PERMIT APPLICANTS

In 2013, the SRWMD issued 80 new consumptive use permits for agricultural water use throughout the entirety of the SRWMD geographic boundaries. These permits represented approximately 23 MGD of permitted water use (see **Table 2.4**). Of these, three permits representing approximately 5 MGD of permitted water use would have been likely to be determined to have impacts to the Lower Santa Fe or Ichetucknee Rivers under current rules and permit review practices. Under the additional review criteria in the proposed rules, approximately eleven of these permit applications would have been likely to be required to provide offsets of impacts to these water bodies had the proposed rules been in place. This includes the three permits which would likely have required offsets of impacts under existing rules and present review criteria; thus, approximately eight new agricultural consumptive use permits in the SRWMD would have been required to offset impacts to the Lower Santa Fe and Ichetucknee Rivers due to the proposed rule. The total allocation of these new permits which would have required offsets would represent approximately 2.2 MGD of permitted water use, or roughly 10% of the new agricultural consumptive use allocations issued in the SRWMD 2013.

Table 2-4. Analysis of SRWMD 2013 New Consumptive Use Permits

	Number of Permits	Total ADR (mgd)
New SRWMD Agricultural Consumptive Use Permits (2013)	80	23.38
Proposed Rule: Permits with Potential for Adverse Impacts to MFLs	11	7.22
Existing Rules/ Permit Review Criteria: Permits with Potential for Adverse Impacts	3	4.98
Permits with Impact Offsets Required due to the Proposed Rule (Proposed vs Existing)	**8**	**2.24**

If the permitting activity seen in 2013 is typical of the types and quantities of new consumptive use permit applications likely to occur during the five years subsequent to the adoption of the proposed rule, then it is reasonable to estimate that similar numbers of individual new consumptive use permit applicants would be affected by the proposed rule each year. Thus, over the next five years, SRWMD would expect to process approximately 400 new agricultural consumptive use permit applications districtwide. Approximately 40 new consumptive use permit applicants would be expected to be affected by the proposed rule.

2.1.3 Conclusions: Estimates of Affected Individuals

Based on the SRWMD's analysis of likely consumptive use permit renewals in the SRWMD and SJRWMD (permits expiring in water years 2014 through 2018) and assessment of future new water use projections and recent new consumptive use permit applications (2013 new consumptive use permits), the SRWMD estimates that the proposed additional permit review criteria in the proposed rule have the potential to affect approximately 68 consumptive use permit applicants in the 2014 through 2018 timeframe. This group of individuals would likely consist of agricultural operations located in close proximity to the Lower Santa Fe or Ichetucknee River or priority springs or highly sensitive areas of the Santa Fe Basin, and would represent 11% of the approximately 611 agricultural water user permits estimated to be processed in the SRWMD in this timeframe. The projected new water uses or increases in water use associated with those permits likely to pose potential impacts to the Lower Santa Fe Basin MFLs potentially represent approximately 13.8 MGD of new permitted water use. This would correspond to 8% of the approximately 182 MGD agricultural water use allocations likely to be requested in the SRWMD in the 2014 through 2018 timeframe. It should also be noted that the existing permitted agricultural water users expected to renew in this timeframe will also benefit from the proposed rule in that their existing allocations will be granted some legal protection under the proposed rule, and will be considered consistent with the Recovery Strategy. **Table 2-5** provides a summary of the estimates of individuals likely to be affected by the additional permit review criteria.

Table 2-5. Summary of Individuals Likely to be Affected by the Additional Review Criteria

	Estimates of Total Likely SRWMD Permit Applications (2014-2018)		Estimates of Total SRWMD Permits Likely to be Affected by the Proposed Rule	
	Number of Permits	Total ADR (MGD)	Number of Permits Requiring Offsets	Additional Offset Required under Proposed Rule (MGD)
Consumptive Use Permit Renewals (Agricultural)	211	65	28	2.6
New Consumptive Use Permits (Agricultural)	400	117	40	11.2
Total	**611**	**182**	**68**	**13.8**

Note: Five-year new consumptive use permit projections are based on SRWMD 2013 new consumptive use permit statistics multiplied by a factor of five to estimate the total numbers of new permits likely to be processed in 2014-2018, based on 2013 trends.

The SRWMD also examined the potential effects of the additional review criteria of the proposed rules on commercial/industrial self-suppliers, public supply uses, and recreational uses in both the SRWMD and Region 1 of the SJRWMD. The SRWMD concluded that it is unlikely that consumptive use permit applicants from these user groups will be required to offset impacts to the Lower Santa Fe Basin MFLs due to the proposed rule in the 2014-2018 timeframe. The SRWMD further concluded that several larger industrial and public supply permit holders with potential to impact the Lower Santa Fe and Ichetucknee Rivers based on current allocations, will benefit from the legal protections afforded to existing water uses by this rule.

2.2 ECONOMIC ANALYSIS OF ADDITIONAL REVIEW CRITERIA

Having established the numbers and types of entities likely to be affected by the proposed rules, SRWMD subsequently assessed the potential economic effects of the additional review criteria. The economic effects of the proposed rule will almost entirely be dependent on how consumptive use permit applicants seek to comply with the requirement to offset the hydrologic effects of new groundwater withdrawals which pose a potential adverse impact to the Lower Santa Fe Basin MFLs. SRWMD concluded that among agricultural water users, the strategies likely available to be pursued to comply with the rule are as follows:

1. **Water Conservation or Reductions in Existing Water Use**: Some agricultural water users will have the ability to offset the impacts of potential new water uses by implementing water conservation practices to reduce existing water use. Additionally, some permittees may have the ability to offset impacts from new withdrawals by decreasing existing use in another location in the Santa Fe Basin.

2. **Reduce the Requested Allocation**: In existing cases where proposed water uses are expected to pose an adverse impact on a water body, water use applicants will often reduce their requested withdrawal so as not to adversely impact the water resource. In the case of agricultural producers, this reduction in allocation may involve a change of proposed crop rotations to a less irrigation intensive use, or removing some portion of the operation from irrigation.

3. **Changing the Location of the Proposed Withdrawal**: New agricultural water users may seek to locate in less hydrologically sensitive areas of the SRWMD.

4. **Agricultural Alternative Water Supply:** Some agricultural water in the SRWMD may have the ability to develop alternative water supplies for agricultural use. This option is likely to be significantly limited by cost and feasibility, and would be expected to be pursued by few agricultural operations.

The economic implications of each of these methods of the complying with the proposed additional review criteria are discussed in the following sections.

2.2.1 Water Conservation and Reductions in Existing Water Use

As previously stated, consumptive use permit applicants may have the ability to implement water conservation measures to reduce the impact of their current groundwater withdrawals as an offset for new proposed groundwater uses. In the SRWMD this most often takes the form of retrofits to existing irrigation systems to increase the efficiency by which water is delivered to planted areas. By increasing delivery efficiency, less water is withdrawn while still applying the required quantity of supplemental irrigation to target crops.

The SRWMD has implemented or administered agricultural cost share programs which seek to improve irrigation efficiency among SRWMD agricultural producers. The current, most commonly implemented efficiency measure is the retrofitting of existing center-pivot irrigation systems. Based on statistics compiled by the SRWMD, the total cost of retrofitting one center-pivot is approximately $9500, including efficiency evaluations by a Mobile Irrigation Lab. The average annual water savings for a "typical" center-pivot retrofit, which covers 80 acres of irrigated land, is 16 million gallons per year, or roughly 44,000 gallons per day (0.044 MGD). Existing SRWMD agricultural cost share programs typically cover $7600 of the cost of a center-pivot retrofit, or about 80% of the total cost. **Table 2-6** below provides an estimate

of the total costs of offsetting the increases in water use allocation likely to be affected by the proposed rule, were these offsets to be achieved via agricultural water conservation.

Table 2-6. Estimates of Potential Costs of Offsets via Conservation

SRWMD Permits Likely to Require Offsets of Impacts to Proposed MFL	Project Type	Number of Permits Required to Offset Impacts	Water Use Volume to be Offset (MGD)	Est. Cost	Estimated Cost per Consumptive Use Permit
Consumptive Use Permit Renewals (Agricultural)	Water Conservation (Center-Pivot Retrofits)	28	2.6	$560,000	$20,000
New Consumptive Use Permits (Agricultural)	Water Conservation (Center-Pivot Retrofits)	40	11.2	$2,420,000	$60,500
Total	Water Conservation (Center-Pivot Retrofits)	68	13.8	$2,980,000	$43,800

Note: Costs represent typical unit costs from SRWMD center-pivot retrofit cost share program with an assumed 5-year service life.

As previously stated, the SRWMD estimates that approximately 2.6 MGD of increases in allocation will be requested by renewing consumptive use permit applicants in the 2014 to 2018 timeframe. If these increases in allocations were to be entirely offset by equal reductions in water use via center-pivot retrofits, approximately 30 to 60 retrofits would be required, at a total cost of approximately $560,000. Thus, if all offsets of impacts from the estimated increases to renewed consumptive use permits were achieved via enrollment in the SRWMD center-pivot retrofit program, the estimated total cost to existing permit holders would be approximately $112,000, and the total cost to the existing SRWMD cost share program would be approximately $448,000. The estimated number of renewing permit holders required to develop offsets of increased impacts is approximately 28 individuals, and the estimated average cost per individual would likely be approximately $4000 per applicant. The SRWMD considers renewing water use permit holders to be most likely to offset potential impacts via conservation, as they are more likely to have existing agricultural operations where conservation practices can be implemented.

If both renewing and new consumptive use permit applicants expected to be required to offset potential adverse impacts to the proposed MFL were to offset their new water use via equal reductions in agricultural water conservation, the total water conservation required would be 13.8 MGD of existing water use. The total estimated cost to achieve this conservation goal would be approximately $2,980,000 over the five year timeframe. Thus, if all offsets of impacts from the estimated increases to renewed and new consumptive use permits were achieved via enrollment in the SRWMD center-pivot retrofit program, the estimated total cost to existing permit holders would be approximately $596,000, and the total cost to the existing SRWMD cost share program would be approximately $2,384,000. The estimated number of renewing and new permit holders required to develop offsets of increased impacts is approximately 68 individuals, and the estimated average cost per individual would be approximately $8800 per applicant.

It is worth noting that in administering cost-share funds for the Santa Fe River Basin Management Action Plan, designed to reduce nutrient loadings to the Lower Santa Fe River, the SRWMD has already committed cost-share funding to retrofit 61 center-pivot irrigation systems in the Santa Fe River Basin. Once implemented, the anticipated reduction in water use in the Santa Fe Basin is expected to be 2.65 MGD, at a total cost of $887,000, which also includes other projects for water quality improvements. The SRWMD governing board may elect to make a portion of this water savings available for offsetting future

water use in other parts of the Santa Fe Basin, which would significantly reduce the costs of offsetting future impacts from new water use.

Not all groundwater withdrawals in the Santa Fe Basin have the same impact on springflows and streamflows in the Santa Fe and Ichetucknee Rivers. The analysis above assumes that impacts from new water uses in the Santa Fe Basin would be offset by a one-to-one reduction in existing use. One strategy that can significantly decrease the cost of offsetting the impact of new withdrawals is implementing a water conservation program at an existing agricultural operation in a very hydrologically sensitive area of the Santa Fe Basin. By achieving a reduction in existing water use in a very hydrologically sensitive area of the Basin, a new user could potentially offset the impact of a larger use in a less sensitive area of the Basin. For example, based on the SRWMD's current groundwater model, a hypothetical reduction in water use of 1 MGD in a hydrologically sensitive area of southern Columbia County near the Santa Fe River could offset the adverse impact to the Santa Fe River of a 5 MGD withdrawal proposed in central Columbia County. These types of collaborative efforts can significantly decrease the costs of offsetting new withdrawals.

Similarly, an additional measure which users could consider to offset potential adverse impacts from new water uses is the reduction in water use allocation of another consumptive use permit. For example, if a grower were planning to convert an existing row crop operation to grazing (a significant reduction in water use), this reduction in groundwater use could be utilized to offset the impact of a new water use elsewhere in the Santa Fe Basin. As previously stated, smaller reductions in water use in hydrologically sensitive areas of the Basin could be used to offset the impacts of larger new uses in less hydrologically sensitive areas.

The water conservation analysis above does not take into account the feasibility of implementing these water conservation practices at individual locations at a local level, but does provide high level, planning level estimates to the cost of achieving these water conservation or water use offset targets. Based upon the results presented above, there is the potential that the cost of compliance with the proposed rule could exceed $1,000,000 in aggregate in the five years subsequent to implementation, should the potential water users likely to be affected elect to offset their future increased in water use allocations via agricultural water conservation practices. SRWMD considers this scenario somewhat unlikely, as many water users will likely pursue other strategies to achieve compliance with the proposed rule, as described in the following sections.

2.2.2 Reductions in Requested Allocations:

In the SRWMD consumptive use permitting program, agricultural consumptive use permits are issued utilizing specialized tools which calculate the irrigation requirements for an agricultural operation based upon the acreage to be irrigated and the annual irrigation demands of the proposed crop rotation. In most cases in the SRWMD, agricultural consumptive use permit applicants do not retain consultants to assist in the permitting process, and very rarely conduct groundwater modeling to assess for the potential for a proposed water use to adversely impact water resources or MFL water bodies. This modeling is typically conducted by SRWMD permitting staff as a portion of the permit review process. If a proposed water use is predicted to adversely impact a water resource or MFL, the permittee is then informed by staff. In cases where proposed water uses are expected to adversely impact a water body, water use applicants will often reduce their requested withdrawal so as not to impact the water resource. In the case of agricultural producers, this reduction in allocation may involve a change of proposed crop rotations to a less irrigation intensive use, or removing some portion of the operation from irrigation. To evaluate the potential economic effects of new water users in the Santa Fe Basin potentially altering proposed agricultural activities to reduce impacts to the Santa Fe Basin MFLs in response to this rule,

SRWMD examined the water use requirements of typical agricultural activities in the SRWMD and the agricultural revenues associated with these agricultural practices using the following methodology:

1. A reduction in requested water use by an agricultural permit was assumed to correspond to a change in crop rotation or agricultural practices.

2. SRWMD utilized its WUPAR (*Water Use Permitting and Reporting*) permitting database tool to estimate the average annual irrigation requirements of several typical crops and crop rotations for the Lower Santa Fe Basin. The WUPAR tools are based on previously published IFAS crop irrigation tables.

3. SRWMD utilized agricultural revenue models developed by the Suwannee Valley Agricultural Extension Center and other applicable agricultural revenue models published by land-grant universities to assess the range of revenues for the different crops and crop rotations. These models were based on typical yields and costs expected for operations in the SRWMD. SRWMD utilized these models to examine the net revenues of various crops and agricultural operations on a per acre basis for various market prices for agricultural commodities.

4. SRWMD staff then compared the per acre net revenues for the various crops and operations to the irrigation demands of these operations to determine the potential effects of reduced water use on agricultural revenues.

The crops and crop rotations SRWMD selected for analysis were selected based upon common agricultural practices in the SRWMD and availability of applicable revenue models. The crops that SRWMD reviewed were: corn, peanuts, soybeans, non-irrigated cotton, and alternating corn/peanut rotations and peanut/cotton rotations. SRWMD also analyzed information for a sod-based rotation consisting of cotton, peanuts, Bahia grass, and calf/cow grazing. Sod-based rotations have been studied by the University of Florida, in collaboration with FDACS other land grant universities in the Southeast, and are considered an economically viable farming practice for the North Florida region. Staff also examined the revenues and water demands of calf/cow grazing operations, which are relatively common in the SRWMD and the Santa Fe Basin. **Table 2-7** provides a summary of the estimated net revenues and irrigation requirements that could be expected in the SRWMD at "typical" and "high" commodities prices.

Table 2-7. Estimated Net Revenues and Irrigation Requirements For Various Agricultural Operations

Crop/Agricultural Operation	Average Annual Irrigation Requirement	Typical Net Revenue		High Net Revenue	
	inches/acre	Typical Commodity Price	$/acre	High Commodity Price	$/acre
Corn	15.63	$4.50/bushel	-$154	$7.00/bushel	$346
Peanut	10.44	$450/ton	$105	$550/ton	$340
Dryland Cotton (non-irrigated)	0.00	$0.75/lb.	$32	$0.85/lb.	$107
Soybean	9.09	$11/bushel	$72	$13/bushel	$182
Sod Based Rotation	7.81	*	$236	*	$382
Corn/Peanut Rotation	13.04	**	-$25	**	$343
Peanut/Dry Cotton Rotation	5.22	**	$69	**	$224
Calf/cow	0.20	$1.25/lb. (550-600 lb. calf)	$209	$1.58/lb. (550-600 lb. calf)	$388

Notes:
*Sod based rotation estimated using revenue model developed from "Economics of Sod-Based rotation" by J. J. Marois and D. L. Wright, *2003 Proceedings of Sod Based Cropping Systems Conference*. Prices and costs were updated to reflect current 2013 commodities prices and estimated production costs as for other analyses summarized above.
**Corn/Peanut and Peanut/Dry Cotton rotations assumed that 50% of acreage would be in each crop annually. Commodities prices were as listed for each individual crop.

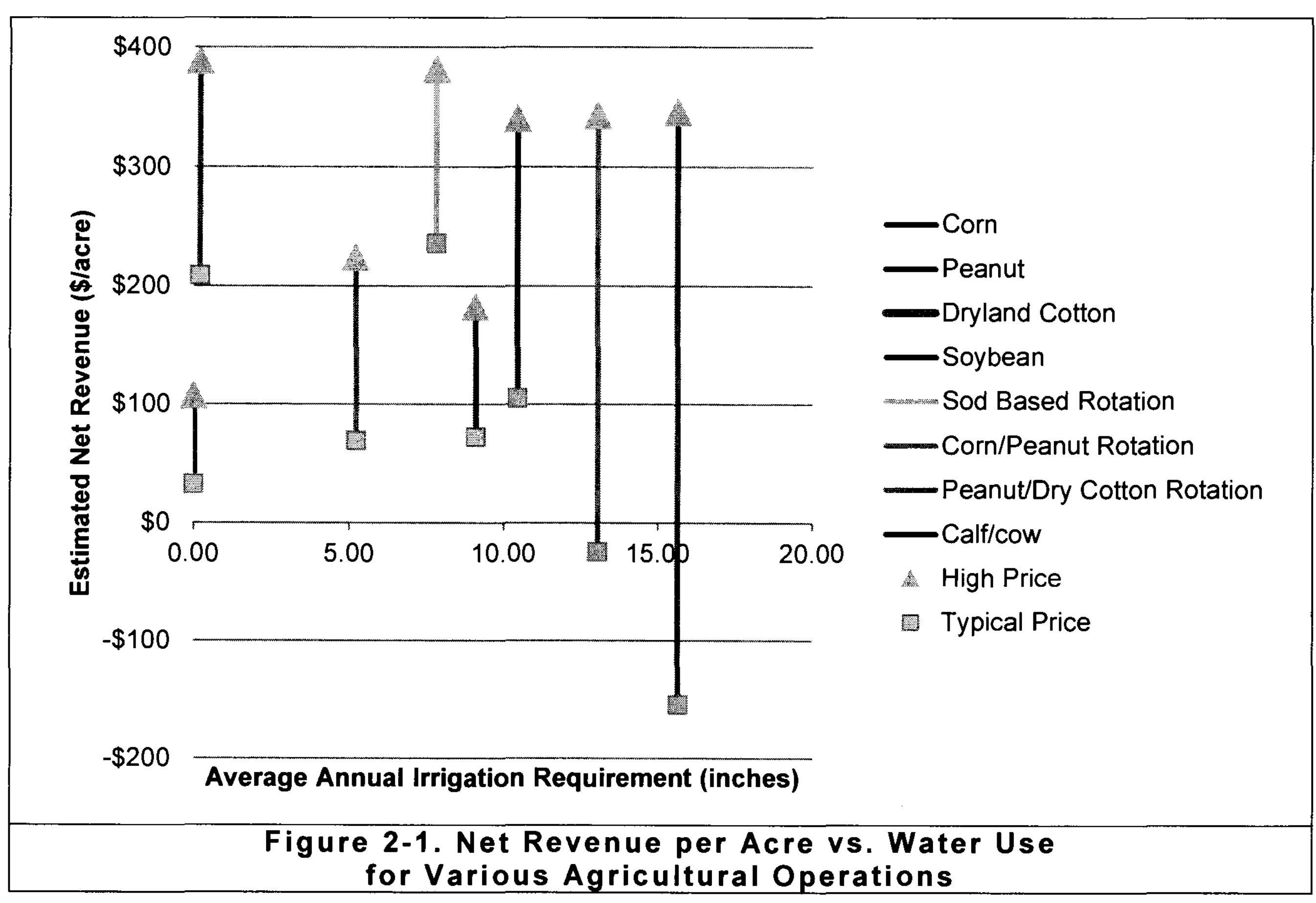

Figure 2-1. Net Revenue per Acre vs. Water Use for Various Agricultural Operations

As would be expected in agricultural operations, the net revenues estimated for these agricultural activities in the SRWMD are highly related to commodities prices. As illustrated in **Figure 2-1**, agricultural revenues are not correlated to irrigation requirements, and economically viable crop rotations or agricultural operations are likely to be available for most agricultural lands in the Santa Fe Basin, even in highly hydrologically sensitive areas.

Previous analysis of the effects of the proposed rules on new consumptive use permits issued by the SRWMD in 2013 indicates that approximately eight additional proposed agricultural water uses would be expected to be determined to have an adverse impact to the Lower Santa Fe Basin MFLs on annual basis. This represents an estimated 2.2 MGD of newly permitted water use likely to be affected by the rule on an annual basis. Further examination of these permit records indicated that the eight permits with potential to have an adverse impact on the MFLs consisted of 1124 acres of agricultural land, an average of approximately 140 acres per permit. Each of these operations was located in close proximity to the Lower Santa Fe or Ichetucknee Rivers in relatively hydrologically sensitive areas. Should this trend continue, and were each of these potential new water uses to hypothetically request a water use allocation sufficient to grow irrigated corn (a relatively highly irrigated crop), it is estimated that the annual net revenue of these operations would range from a $173,000 loss to a $389,000 profit. In the event that the potential future permittees were to elect to conduct calf/cow grazing (a land use with very low water requirements) on this acreage, the potential estimated net revenues would range from $235,000 to $436,000 annually. It is also noteworthy that if each of these operations elected to pursue calf/cow operations, their required water use would likely be sufficiently reduced so as to potentially qualify for a general consumptive use permit by rule, which would not be affected by the proposed Recovery Strategy rules. Each of these ranges of revenue estimates is based upon a range of likely commodities prices for corn and beef respectively, and demonstrate the high degree influence commodities prices can have on farm revenues in North Florida.

Based on the range of potential per acre farm revenues provided in **Table 2-7,** there appear to be economically viable agricultural operations that can be implemented in the Santa Fe Basin across a range of supplemental irrigation requirements. As such, the SRWMD does not expect the proposed rule would preclude future agricultural growth in the Santa Fe Basin. Based upon this analysis it is likely that the proposed rule will cause a diversification of new agricultural practices in the hydrologically sensitive areas of the Santa Fe Basin, as future new agricultural water users in these areas may likely seek reduced water use allocations so as to avoid impacting the Lower Santa Fe MFLs. This will likely be accomplished via a transition to lower water use agricultural operations. Should new water users in hydrologically sensitive areas of the Santa Fe Basin elect to pursue this strategy, the economic impact of this rule will likely be almost exclusively determined by: 1) the alternative crop rotations or agricultural operations the users elect to conduct; and 2) the prices of agricultural commodities in international markets.

In conclusion, based on the potential estimated acreages likely to be considered under this rule on an annual basis, and future commodities markets, there is potential that the proposed rule could cause changes (positive or negative) in agricultural revenue for the small number of affected operations of several hundred thousand dollars in total annually. As such, there is the potential that the cost of compliance with the proposed rule could exceed $1,000,000 in aggregate in the five years subsequent to implementation, should the potential water users likely to be affected elect to pursue smaller water use allocations to avoid potential adverse impacts to the Lower Santa Fe MFLs.

2.2.3 Changing the Location of Proposed Withdrawals:

In some cases reducing the requested water use allocation may not be plausible for a given agricultural operation. If prospective water users desire to implement a specific operation with specific water use

requirements, changing the requested location of the proposed withdrawal can lessen or eliminate its potential adverse impact to MFL water bodies. In some cases, this can be as simple as relocating the proposed withdrawal point (well location) to another portion of the project site. This would often represent no increased cost to the applicant. In the case of very large proposed water uses, it is possible that some future new users would likely seek to locate future projects in less hydrologically sensitive areas of the Santa Fe Basin or SRWMD to avoid the need to offset impacts to the MFL water bodies. Based upon preliminary groundwater modeling, the SRWMD does not anticipate that typical agricultural water uses in SRWMD currently allowable under existing rules would be precluded from locating to the SRWMD by the proposed rules. It is possible that this rule could lead to new larger water users electing to locate to less hydrologically sensitive areas of the SRWMD and the Santa Fe Basin. However, as agricultural land is generally readily available within most parts of the SRWMD at relatively low costs, the SRWMD expects that additional expected costs for new users to locate to these areas would be minimal. As such, based on SRWMD's examination of recent trends in agricultural water use in the SRWMD, this rule could reasonably be expected to cause some shift in the geographic location of future agricultural practices and new water uses in the areas in close proximity to the Santa Fe Basin. This rule is unlikely to have an adverse impact on overall agricultural growth, competitiveness, or revenues for new agricultural water users in the SRWMD.

2.2.4 Agricultural Alternative Water Supply

Generally, the most viable alternative sources of water for agricultural use in the SRWMD are surface water sources (farm ponds or natural features), tailwater recovery and reuse (collection of runoff from agricultural land), and reclaimed municipal wastewater. The SRWMD anticipates that based upon the local geology of the Lower Santa Fe Basin and the availability of reclaimed water, it is unlikely that alternative water supplies could be developed to meet the estimated 13.8 MGD of new water use allocations which would likely be required to be offset under this rule, if alternative supplies were developed on a one-to-one basis for the projected new water use. It should be noted that the costs of developing alternative water supplies can be considerably greater than the cost of conservation or reductions in water use, and could increase the overall cost of compliance with the proposed rule. For example, by assuming that the costs of developing agricultural alternative water supplies would be approximately $2.00 per 1000 gallons (note that this is an annualized production value) for a 1 MGD alternative agricultural supply project with a 20 year service life, the theoretical capital cost would be approximately $9,000,000. Obviously, this would likely outweigh the potential revenues of an agricultural operation in the Santa Fe Basin, and the SRWMD considers the widespread use of agricultural alternative supplies in the Santa Fe Basin to be unlikely from both an economic and feasibility perspective. Although some new agricultural water users may elect to install tailwater recovery systems or irrigate from farm ponds (relatively lower cost options), the SRWMD expects that the development of alternative supplies for agricultural water use will be limited to relatively few individuals likely to be affected by the proposed rule.

2.2.5 Conclusions

In conclusion, the proposed rule is most likely to affect a small number (approximately 68 over a five year window) of agricultural consumptive use permit applicants. Based on the assessment conducted, the proposed rule is likely to result in some future potential agricultural water users in the Santa Fe Basin electing to pursue lower water use agricultural practices or implement water conservation practices at existing operations. There is also likely to be some diversification of farming practices in the hydrologically sensitive areas of the SRWMD as a result of this rule. This is likely to affect a relatively small portion of agricultural acreage based on current permitting trends, and the economic costs of the proposed rule will be primarily determined by the farming practices the users elect to adopt and future commodities markets. The impact of the proposed rule on overall agricultural revenues in the SRWMD

is expected to be minimal. The potential economic impacts associated with the potential strategies for compliance with the proposed rules are as follows:

1. **Water Conservation or Reductions in Existing Water Use**: Some agricultural water users will likely elect to offset the impacts of potential new water uses by implementing water conservation practices to reduce existing water use. Should all of the new and renewed water permit applicants expected to be required to offset the impacts of new water use allocation under this rule elect to pursue water conservation as a compliance strategy, the total cost of compliance would approach $3 million over five years. Many of these users would be expected to enroll in the SRWMD's existing cost-share programs, which typically cover up to 80% of the total cost of these types of projects.

2. **Reducing Requested Allocations**: Some agricultural water use applicants in hydrologically sensitive areas of the Santa Fe Basin may elect to reduce their requested water use allocation to avoid posing a potential adverse impact to the Lower Santa Fe Basin MFLs. This would typically result in the implementation of lower water use agricultural practices among new water users, and the diversification of lower irrigation crops and practices. The cost of this compliance strategy would be entirely dependent on the agricultural operations users elect to pursue, and future agricultural commodities prices. Based upon the relatively small acreage likely to be affected by this strategy, there is some potential for a lost opportunity cost of up to several thousand dollars annually should certain crops with high irrigation requirements increase in value. However, there is potential that lower water use agricultural goods could increase in value resulting in increases in farm revenues. It is not anticipated that this rule will result a reduction in acreage of agricultural land in the SRWMD, as there appear to be economically viable agricultural activities across a wide range of water demands.

3. **Changing the location of the proposed withdrawal**: In some cases where a requested allocation is tied to a specific desired agricultural operation and cannot be modified, new agricultural water users may seek to locate in less hydrologically sensitive areas of the SRWMD. This has the potential to result in some relatively small costs to future new agricultural operations that may otherwise have located in hydrologically sensitive areas of the Santa Fe Basin. This also has the potential to indirectly result in some reduction in property incomes in the most hydrologically sensitive areas of the Basin, although changes in property income would be influenced by a significant number of other factors unrelated to this rule.

4. **Agricultural Alternative Water Supply:** The development of alternative water supplies for agricultural use resulting from the adoption of the proposed rule is reasonably expected to be minimal. This option is likely to be significantly limited by cost and feasibility and is therefore the least likely available option to be selected by impacted users.

In conclusion and based upon assessment of the proposed rule requirement (*Additional Permit Review Criteria*), the individuals likely to be affected, and the potential strategies for compliance, there is some potential that the proposed rules may increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within 5 years of rule implementation. These costs may accrue to a small number of agricultural water use applicants as the result of implementation of water conservation practices, diversification of agricultural operations, and lost opportunity costs in the agricultural revenues depending on market conditions.

3.0 SPECIAL PERMIT CONDITIONS

In addition to the additional permit review criteria established under the proposed rules, the recovery strategy rules also provide for two special permit conditions to be applied to certain consumptive use permits.

The first special condition shall be applied to consumptive use permits issued in the SRWMD and Region 1 of the SJRWMD for durations of longer than five years, and would state:

> *Following the effective date of the re-evaluated Minimum Flows and Levels adopted pursuant to Rule 62-42.300(1)(e), F.A.C., this permit is subject to modification during the term of the permit, upon reasonable notice by the District to the permittee, to achieve compliance with any approved MFL recovery or prevention strategy for the Lower Santa Fe River, Ichetucknee River, and Associated Priority Springs. Nothing herein shall be construed to alter the District's authority to modify a permit under circumstances not addressed in this condition.*

This condition was established in recognition that the Recovery Strategy will be implemented in a phased manner, with long term recovery measures being developed in the North Florida Regional Water Supply Plan by the SRWMD and the SJRWMD. Based on the likely permit renewals in these regions, and the numbers of new permits issued in these regions in 2013, it estimated that between 500 and 1000 permits would be issued with this condition. Presently, consumptive use permits issued in the SRWMD and SJRWMD are issued with special conditions designed to protect water management district adopted MFL water bodies from significant harm. No additional regulatory requirements will imposed on permittees as a result of this condition while the proposed rule is in effect.

The second special condition of the draft rules would be applied to new or renewed agricultural consumptive use permits in Columbia, Suwannee, Union, and Gilchrist Counties, and the portions of Baker, Bradford, and Alachua Counties within the boundaries of the SRWMD (the majority of the Santa Fe River Basin) and would state:

> *The permittee agrees to participate in a Mobile Irrigation Lab (MIL) program and allow access to the Project Site for the purpose of conducting a MIL evaluation at least once every five years.*

This condition would require the permit holder to obtain a Mobile Irrigation Lab (MIL) evaluation at least once every five years. During an MIL evaluation, trained technicians are invited to a grower's field to collect irrigation system and field data. System pressure and irrigation uniformity data are then reviewed and computer-analyzed. A report provides recommendations for improvements and irrigation schedules. An irrigation schedule offers a general guide to determine when and how much to irrigate based on system efficiency, crop requirements and soil characteristics. Technicians return several times for further data collection and install free soil moisture-sensing devices to help growers adapt the schedule to a site and train farmers to calibrate and maintain the devices. Data from the Southwest Florida Water Management District indicate that with only minor improvements, overall system irrigation efficiency can improve by an estimated 17 percent.

In 2013 in the affected area, approximately 82 agricultural consumptive use permittees requested new permits or requested increased allocations. Based on this figure it is reasonable to assume that 70 to 90 new allocations or requests for increased allocations would come from agricultural producers in the affected area on annual basis over the next five years. It should be noted that many of the agricultural

renewals conducted during 2013 renewed their permits as a part of the SRWMD's agricultural cost-share program for increasing irrigation efficiency. The permittees involved in this program received MIL evaluations as a part of the cost share program, and would thus already be in compliance with this rule. Operated in conjunction with USDA NRCS, MIL evaluations are currently conducted as a free, re-imbursement based service to the agricultural community in the SRWMD by the SRWMD and other participating agencies. Thus this requirement would not impose transactional costs to the affected entities in the specified area; nor would it impose additional costs to the SRWMD or SJRWMD, but would merely increase participation in an existing program at present funding levels.

In conclusion and based upon assessment of the proposed rule requirement (*Special Permit Conditions*), and the individuals likely to be affected, the proposed rules are not expected to increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate within 5 years of rule implementation.

Proposal to the Florida Department of Environmental Protection for a Lower Cost Regulatory Alternative to CHAPTER 62-42 MINIMUM FLOWS AND LEVELS

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The alternative language presented in this proposal is in response to the email received on 3/7/2014 copied below and the links included in the email.

> The purpose of this e-mail is to update you on the status of proposed Chapter 62-42, F.A.C., Minimum Flows and Levels. The Department is conducting rulemaking to establish Minimum Flows and Levels (MFLs) for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs. A Notice of Proposed Rule is scheduled to be published in the Florida Administrative Register (FAR) on March 7, 2014. The notice and draft rule language can be accessed at the FAR website at the following link: http://www.FLRules.org/gateway/View_Notice.asp?id=14292094
> I would also like to inform you of the availability of a Statement of Estimated Regulatory Costs (SERC) that was prepared for proposed Rule 62-42.300, F.A.C. The SERC may now be downloaded from the DEP MFL Rulemaking webpage at: http://www.dep.state.fl.us/water/waterpolicy/mflrulemaking.htm. Rules 62-42.100, F.A.C., and 62.42.200, F.A.C., did not require a SERC because they set forth only scope and definitions and do not have independent regulatory effect. Additional information on the rule and supporting documents can be found at the DEP MFL Rulemaking webpage above and at the Suwannee River Water Management District Lower Santa Fe MFL webpages at: http://fl-suwanneeriver.civicplus.com/index.aspx?NID=121
> Thank you for your interest.
> Linda Ann Clemens, P.G.

Statement of How the Petitioner's substantial Interests are Affected

Paul Still owns 117 acres of land on the west side of Lake Sampson in Bradford County that is managed for timber production. He would have to meet the requirements set out in the Florida Department of Environmental Protection (FDEP) proposed rule FAC 62-42 if he applied for a Consumptive Use Permit.

Over 50% of the Petitioner's property is wetlands impacted by drainage ditches installed prior to his obtaining the property. The Petitioner's property would be a candidate for projects to enhance aquifer recharge by wetlands storage of rain water and surface flows using methods discussed in the "Recovery Strategy for the Lower Santa Fe and Ichetucknee Rivers and Priority Springs Minimum Flows and Levels". These projects could result in payment of ecological services or payment for conservation easements. The supporting documentation for Noticed Rule FAC 62-42 fails to adequately describe or evaluate the role the Upper Santa Fe Basin plays in sustaining flows in the Lower Santa Fe and the levels of the Floridan Aquifer. This failure results in an undervaluation of the impacts that aquifer recharge projects on his property would have in addressing any shortfalls in flows or levels in the Lower Santa Fe River. This undervaluation impacts the potential monetary value of ecological services or of a conservation easement for his property. The Statement of Estimated Regulatory Costs (SERC) fails to address the costs associated with projects designed to increase aquifer recharge. Not having those costs included in the SERC could also result in his property being undervalued for its ecological services and conservation easements.

Lower Cost Proposals

This proposal has two options for lower regulatory costs for the Notice FDEP rule 62-42 and is presented as established in FS 120.541. The first proposal is for a "do not adopt" option and the second proposal is to eliminate vague language and reduce the impact on small businesses.

Do not Adopt Option

FAC 40-B-2.301(2)(g)4 protects all water bodies including the MFL water bodies from harm. Adopting a MFL for the water bodies to protect them from significant harm is not required immediately.

There is a clear benefit to waiting 6 months to allow for a reevaluation of the MFLs using a new surface flow model. This new model should be available around April 1, 2014. The new surface water model is being done as part of the development of the new regional groundwater model. This surface water model should provide a tool to better establish base flow and baseline flow in the Lower Santa Fe River. These two flows are critical in the establishment of the MFLs. The period of record used to establish the MFLs should also be extended from the end date of 2010 in the current MFL technical report to at least the end of 2013.

The "do not adopt" option also avoids the costs associated with the anticipated Administrative Hearings for the Noticed rule and the SERC for the Noticed Rule.

Paul Still's Proposed Rule Language

CHAPTER 62-42

MINIMUM FLOWS AND LEVELS

62-42.100 Scope

62-42.200 Definitions

62-42.300 Minimum Flows and Levels

62-42.100 Scope

(1) The purpose of this chapter is to set forth Department-adopted minimum flows and levels (MFLs) and the regulatory provisions of any required related recovery or prevention strategy as provided in Section 373.042 (4), F.S.

(2) The Department recognizes that recovery and prevention strategies may contain both regulatory and non regulatory provisions. The non-regulatory provisions are not included in this rule, and will be included in a Recovery or Prevention Strategy Document approved by the appropriate districts and adopted by the Department simultaneously with this rule pursuant with this rule to s. 373.0421(2) and s. 373.709, F.S.

Rulemaking Authority 373.026(7), 373.036(1)(d), 373.043, 373.171 FS. Law Implemented 373.023, 373.026, 373.033, 373.036(1)(d), 373.0391, 373.0395, 373.042, 373.0421, 373.0831, 373.086, 373.103, 373.106, 373.171, 373.175, 373.185, 373.1961, 373.223, 373.246, 373.250, 373.418, 373.451, 373.453, 403.0615(3), 403.064, 403.0891 FS., Ch. 2002-296, s. 38, Laws of Florida. History–New xx-xx-xxxx.

62-42.200 Definitions

When used in this chapter, the following words shall have the indicated meanings unless the rule indicates otherwise:

(1) Flow Duration Curve means a plot of magnitude of flow versus percent of time the magnitude of flow is equaled or exceeded.

(2) Flow Duration Frequency means the percentage of time that a given flow is equaled or exceeded.

Rulemaking Authority 373.026(7), 373.036(1)(d), 373.043, 373.171 FS. Law Implemented 373.023, 373.026, 373.033, 373.036(1)(d), 373.0391, 373.0395, 373.042, 373.046, 373.0831, 373.086, 373.103, 373.106, 373.171, 373.175, 373.185, 373.1961, 373.223, 373.246, 373.250, 373.418, 373.451, 373.453, 403.0615(3), 403.064, 403.0891 FS., Ch. 2002-296, s. 38, Laws of Florida. History–New xx-xx-xxxx.

62-42.300 Minimum Flows and Levels

The Department hereby establishes the following minimum flows and levels in accordance with section 373.042, F.S.

(1) Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs: The minimum surface water flows for the Lower Santa Fe and Ichetucknee River and Associated Priority Springs are provided below:

(a) The minimum surface water flows for the Lower Santa Fe at the Santa Fe River near Ft. White, FL are the following points on the flow duration curve:

1. 1,768 cubic feet per second (cfs) for a flow duration frequency of 25 percent;

2. 1,214 cubic feet per second (cfs) for a flow duration frequency of 50 percent

3. 920 cubic feet per second (cfs) for a flow duration frequency of 75 percent;

4. 749 cubic feet per second (cfs) for a flow duration frequency of 90 percent;

5. 672 cubic feet per second (cfs) for a flow duration frequency of 95 percent;

(b) The minimum surface water flows for the Ichetucknee River at U.S. Highway 27 are the following points on the flow duration curve:

1. 473 cubic feet per second (cfs) for a flow duration frequency of five percent;

2. 448 cubic feet per second (cfs) for a flow duration frequency of 10 percent;

3. 386 cubic feet per second (cfs) for a flow duration frequency of 25 percent;

4. 343 cubic feet per second (cfs) for a flow duration frequency of 50 percent;

5. 318 cubic feet per second (cfs) for a flow duration frequency of 75 percent;

6. 282 cubic feet per second (cfs) for a flow duration frequency of 90 percent;

7. 246 cubic feet per second (cfs) for a flow duration frequency of 95 percent;

(c) The minimum surface water flows for the Priority Springs are established as a percent reduction from the median baseline flow contribution of each spring to the

flow at the respective river gages listed in paragraphs 62- 42.300(1)(a) and (b), F.A.C.:

1. Lower Santa Fe River Priority Springs:

    a. Santa Fe Rise: Eight percent

    b. ALA112971 (Treehouse): Eight percent

    c. Hornsby: Eight percent

    d. Columbia: Eight percent

    e. Poe: Eight percent

    f. COL 101974 (Unnamed): Eight percent

    g. Rum Island: Eight percent

    h. July: Eight percent

    i. Devil's Ear (Ginnie Group): Eight percent

    j. GIL.1012973 (Siphon Creek Rise): Eight percent

2. Ichetucknee River Priority Springs:

    a. Ichetucknee Head: Three percent

    b. Blue Hole: Three percent

    c. Mission: Three percent

    d. Devil's Eye: Three percent

    e. Grassy Hole: Three percent

    f. Mill Pond: Three percent

(d) Pursuant to section 373.0421, F.S., the Department will adopt a "Prevention or Recovery Strategy for the Lower Santa Fe, Ichetucknee, and Associated Priority Springs," effective date XXXXXX. The "Prevention or Recovery Strategy for the

Lower Santa Fe, Ichetucknee, and Associated Priority Springs,"is available at [DOS WEBSITE LINK] or the Department's website at [DEP WEBSITE LINK].

(e) Upon completion of the North Florida Southeast Georgia Regional Groundwater Flow Model currently under development, the Department, in coordination with the Suwannee River Water Management District and the St. Johns River Water Management District, shall re evaluate the Minimum Flows and Levels and the present status of the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs pursuant to Section 373.0421(3), F.S. No later than three years from the publication of the final peer review report on the North Florida Southeast Georgia Regional Groundwater Flow Model, or by December 31, 2019, whichever is earlier, the Department shall:

1. Publish a Notice of Proposed Rule to strike paragraphs 62-42.300(1)(a) through (d), F.A.C., and re-propose for adoption Minimum Flows and Levels for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs and any associated recovery or prevention strategies; and

2. Adopt the proposed rule in accordance with the timeframes provided in section 120.54(3), F.S.

(3) This section provides additional criteria for review of consumptive use permit applications prior to the completion of the North Florida Southeast Georgia Regional Groundwater Flow Model and development of long-term recovery measures in the North Florida Regional Water Supply Plan (NFRWSP). Prior to the completion of the North Florida Southeast Georgia Regional Groundwater Flow Model, each District shall apply existing permit evaluation tools to evaluate permit applications and their potential impact

to the MFL water bodies in the Lower Santa Fe River Basin. Upon completion of the North Florida Southeast Georgia Regional Groundwater Flow Model, the MFLs and these additional regulatory criteria shall be reevaluated pursuant to Rule 62-42.300(1)(e), F.A.C.

(a) In view of the statutory recognition in section 373.709(2)(a)2., F.S., that "... alternative water supply options for agricultural self-suppliers are limited," the Department recognizes that the districts may participate in developing offsets for proposed uses for the purposes of protecting the MFL water bodies consistent with the goals of the Recovery Strategy.

(b) Definitions used in this section

1. "MFL water bodies," means MFLs established for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs adopted in subparagraph 62- 42.300(1)(a)–(c), F.A.C. "MFL water body" shall mean any one of the MFL water bodies described in this definition;

2."significant harm" means when a use, diversion, or withdrawal causes adverse impact to an existing legal use of water, offsite land use, water resource, or environmental feature associated with the water resource and is expressed as flow or level determined by a water management districts current permitting standards and is a flow or level that can not be lower than the permitting standard for harm.

3. "impact" means to cause significant harm;

4. "North Florida Regional Water Supply Planing Area" means the counties of Alachua, Baker, Bradford. Clay, Columbia, Duval, Flagler Gilchrist, Hamilton, Putnam, St Johns, Suwannee, and Union.;

5. "offset" means the use of a method defined and listed in the Prevention or Recovery Strategy for the Lower Santa Fe, Ichetucknee, and Associated Priority Springs," or the method defined and listed in the Prevention or Recovery Strategy for the Lower Santa Fe, Ichetucknee, and Associated Priority Springs";

6. "elimination" means the reduction in a amount of withdrawals in an issued Consumptive Use Permit..

(c). Additional Review Criteria for all Individual Permit Applicants for Consumptive Use Permits within the boundaries of the SRWMD and the parts of the SJRWMD that are in the North Florida Regional Water Supply Planing area.

1. All applications, including applications for renewals, modifications, and new uses, shall be evaluated for their potential impact on the MFL water bodies utilizing the methods established to evaluate Consumptive Use Permits at the time of the application. Potential impacts to the MFL water bodies shall be assessed based on potential changes to flow at the Lower Santa Fe River Ft. White Gage and the Ichetucknee River US Highway 27 Gage.

2. New Permits:

a. Applications that do not demonstrate a potential impact to the MFL water bodies shall be issued provided the applicant meets the conditions for issuance.

b. Applications that demonstrate a potential impact to the MFL water bodies shall provide reasonable assurance of elimination or offset of the potential impact. No offsets or eliminations will be required for permits with estimated flow reductions less than 1 cubic foot per second. Such applications shall be considered consistent with the Recovery Strategy, provided the applicant meets all other existing conditions for issuance.

3. Renewals and Modifications with Increased Allocations:

a. Applications that do not demonstrate a potential impact to the MFL water bodies based on the total requested allocation shall be issued provided the applicant meets the conditions for issuance.

b. Renewal and modification applications that demonstrate a potential impact to the MFL water bodies based on the total requested allocation shall 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 the MFL water bodies. No offsets or eliminations will be required for permits with estimated flow reductions less than 1 cubic foot per second. Such applications shall be considered

consistent with the Prevention or Recovery Strategy and the existing impacts on the MFL water body will not be a basis for permit denial under any of the conditions for issuance, as the Prevention or Recovery Strategy, taken as a whole, is intended to achieve recovery to the established MFL as soon as practicable. Applicants under this provision shall be issued a permit for a duration of up to 20 years, provided the applicant meets all other conditions for issuance. Permits in excess of 5 years shall include the condition in paragraph 6.a., below.

4. Renewals and Modifications with No Increase in Allocations:

a. Applications which do not demonstrate a potential impact to the MFL water bodies based on the total requested allocation shall be issued provided the applicant meets the conditions for issuance.

b. Renewal and modification applicants that demonstrate a potential impact to the MFL water bodies based on the requested allocation shall be considered consistent with the Recovery Strategy and the existing impacts on the MFL water body will not be a basis for permit denial under any of the conditions for issuance, as the Recovery Strategy, taken as a whole, is intended to achieve recovery to the established MFL as soon as practicable. Applicants under this provision shall be issued a permit for a duration of up to 20 years, provided the applicant meets all other

existing conditions for issuance. Permits in excess of 5 years shall include the condition in paragraph 6.a., below.

5. Existing permitted uses: Existing permitted uses shall be considered consistent with the Recovery Strategy provided the permittee does not exceed its permitted quantity. Such permits shall not be subject to modification during the term of the permit due to potential impacts to the MFL water bodies unless otherwise provided for in rule revisions pursuant to Rule 62-42.300(1)(e), F.A.C. Nothing in this section shall be construed to alter the District's authority to enforce or modify a permit under circumstances not addressed in this provision.

6. Nothing contained in this Section shall be construed to require a permittee in Florida to be responsible for recovery from impacts to an MFL water body from water users in Georgia, or in any case to be responsible for more than its proportionate share of impacts to an MFL water body that fails to meet the established minimum flow or level.

7. Additional Individual Permit Conditions:

a. Permits within the boundaries of the SRWMD and that portion of the North Florida Regional Water Supply Planning Area within the SJRWMD that are issued for a duration of greater than five years shall be issued with the following permit condition: Following the effective date of the re-evaluated Minimum Flows and Levels adopted pursuant to Rule 62-42.300(1)(e), F.A.C., this permit is subject to modification during the term of the permit,

upon reasonable notice by the District to the permittee, to achieve compliance with any approved MFL recovery or prevention strategy for the Lower Santa Fe River, Ichetucknee River, and Associated Priority Springs. Nothing herein shall be construed to alter the District's authority to modify a permit under circumstances not addressed in this condition.

b. Permits for agricultural use located within Columbia, Suwannee, Union, and Gilchrist Counties, and the portions of Baker, Bradford, and Alachua Counties within the boundaries of the SRWMD, shall include the following condition:

The permittee agrees to participate in a Mobile Irrigation Lab (MIL) program and allow access to the Project Site for the purpose of conducting a MIL evaluation at least once every five years.

Rulemaking Authority *373.026(7), 373.036(1)(d), 373.043, 373.171 FS. Law Implemented 373.023, 373.026, 373.033, 373.036(1)(d), 373.0391, 373.0395, 373.042, 373.046, 373.0831, 373.086, 373.103, 373.106, 373.171, 373.175, 373.185, 373.1961, 373.223, 373.246, 373.250, 373.418, 373.451, 373.453, 403.0615(3), 403.064, 403.0891 FS., Ch. 2002-296, s. 38, Laws of Florida. History–New*

Major Changes in Rule Language and their Impact on Regulatory Cost

62-42.100

Referencing the water supply plan was deleted and replaced with language to have the Recovery or Prevention Strategy approved and adopted.

62-42.300

Recovery strategy was removed. Section 6 does not meet the requirements for a prevention or recovery strategy. A separate prevention or recovery strategy will have to be adopted.

62-42.300(1)(a)

The MFLs for flows above 1,768 cubic feet per second are removed. Flows above 1,768 cubic feet per second (cfs)are primarily the result of surface flows and no surface water withdrawals are anticipated in the next 5 years. The data supporting the setting of the MFLs above 1,768 cfs are very weak.

Setting high flow MFLs could impede some of the most cost effective potential aquifer recharge projects. Since the SERC did not evaluate the costs associated with recharge projects no estimate can be provided for the reduction in cost provided by this change. The "Recovery Strategy for the Lower Santa Fe and Ichetucknee Rivers and Priority Springs Minimum Flows and Levels" placed a cost estimate of over $10,000,000 for these projects.

62-42.300(1)(d)

Language referring to "Recovery Strategy for the Lower Santa Fe and Ichetucknee Rivers and Priority Springs Minimum Flows and Levels" was deleted and the fact that FDEP will adopt a prevention or recovery strategy noted.

The language formally incorporated by reference is modified and included directly in the rule.

62-42.300(2)(b)

Definitions for significant harm, impact, North Florida Regional Water Supply Planning Area, offset, and elimination are added. These definitions address the problem of vague language in the proposed FAC 62-42.

The definition of offset calls for offsets to be clearly defined in the Prevention or Recovery plan. This addresses the issue of what would be acceptable offsets. That issue is currently vague in the Noticed rule.

The definition of "significant harm" is very important. The term significant harm would suggest that significant harm would be caused by a reduction in flows greater than the reductions in flows required to cause harm. For the SERC the SRWMD Division of Water Supply set a modeled impact 0.05 mgd (0.077 cfs). The SERC indicates a use that had an impact of 0.05 mgd would require offsets. The 3 lowest flows in the MFL rule are 672 cfs (434 mgd), 749 cfs (484 mgd) and 920cfs (590 mgd). The current SRWMD method used to evaluate permits allows a 0.1% reduction in flows before harm occurs. The 0.1% standard would indicate harm for the 3 lowest MFL flows would occur if the modeled flows were reduced by 0.672 cfs (0.434 mgd), 0.749 cfs (0.484 mgd)and 0.920 cfs (0.59 mgd) respectively. The SERC method would trigger the need for offsets at flow reduction 8 times lower than the current permitting standard for harm. This major difference in when offsets would be required point to the need to clearly define significant harm and set the flows or levels that would indicate significant harm.

When incorporated into the rule 62-42.300(1)(c), the use of these definitions result in major reductions in regulatory costs because the number of permits requiring offsets or elimination will be greatly reduced.

One important point is that just the existence of a requirement to provide offsets in new permits or increases in existing permits could inhibit smaller agricultural business from applying for a permit and thus deprive them of the economic benefits of increased agricultural production methods that use irrigation.

FAC 62-42.300(1)(c)

Relief from the requirement to provide offsets or eliminations for impacts below 1 cubic foot per second reduces the burden on small businesses (agricultural operations). The SERC clearly demonstrates that the major cost associated with this rule is due to limitations placed on agricultural operations in selecting the potentially most profitable production plan based on market conditions. Taking advantage of those market conditions may require small increases in permit allocations or the application for new permits. The elimination of the need for offsets or eliminations for impacts below 1 cubic feet per second removes a potential impediment for these small businesses and would allow them to seek the most profitable production options available to them. These permittees would still have to meet the requirements of in FAC 40-B-2.301(2)(g)4 as it relates to harm.

The SERC placed the total offset requirement for agriculture at 13.8 MGD. This is more than the estimated MFL streamflow deficit of 17 cfs (approximately 11 MGD) for the Lower Santa Fe River. The SERC analysis would place the entire burden of meeting the MFL on agriculture.

The SERC calculations for Paul Still's proposed rule can be used to measure the impact on the effectiveness of the Noticed rule to Paul Still' proposed rule but for comparison the

SERC for the proposed rule needs to be redone to reflect the cost associated with the 0.1% reduction currently used to indicate harm in current SRWMD permit reviews.

It is important to note that particularly for agriculture permits the actual water used may be significantly lower than the permit allocation. Impacts or effectiveness of the rule need to be measured by projected water use not permit allocation.

Paul Still
Paul Still 3/20/2014
The above typed name is to be considered a signature

Attachment B-1:

Department's Response to the Lower Cost Regulatory Alternative (see Attachment B)

I. Introduction

On March 7, 2014, the Department published a Notice of Proposed Rule for three rules in a newly-created Chapter 62-42, F.A.C. These rules set forth a chapter addressing Minimum Flows and Levels to be adopted by the Department pursuant to its authority in section 373.0421, F.S. The proposed rule included a scope (62-42.100), definitions (62-42.200), and a section to adopt Minimum Flows and Levels and Recovery and Prevention Strategies (62-42.300). Specifically, the later proposed rule adopted Minimum Flows and an Associated Recovery Strategy for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs (collectively "MFL water bodies") (62-42.300(1)). With the proposed rule 62-42.300, the Department made available a Statement of Estimated Regulatory Costs (SERC). The Department had previously determined that a SERC was not required for proposed rules 62-42.100 and 62-42.200. Based on the submittal of the LCRA, the Department has prepared SERCs for proposed rules 62-42.100 and 62-42.200 and revised the SERC for proposed rule 62-42.300. This Attachment B-1 includes the Department's response to the LCRA.

On March 20, 2014, the Department received a Lower Regulatory Cost Alternative on Chapter 62-42 pursuant to section 120.541, F.S., which provides:

> Within 21 days after publication of the notice required under section 120.54(3)(a), a substantially affected person may submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. The proposal may include the alternative of not adopting any rule if the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule.

The LCRA was submitted by Dr. Paul Still on his own behalf. Dr. Still included a "Statement of How the Petitioner's [sic] substantial Interests are Affected." The Department recognizes that the statute requires the submitter of a LCRA to be a "substantially affected person." The Department has reviewed Dr. Still's substantial interests and does not believe that Dr. Still is substantially affected by the rule and reserves all rights to raise issues of standing in any future proceeding on the rule. However, the Department has responded to the submitted LCRA through the development of a SERC for Rule 62-42.100, Rule 62-42.200, and a revised SERC for Rule 62-42.300 in order to avoid any potential material failure to follow the applicable rulemaking procedures set forth in Chapter 120, F.S.

II. Submitter's "Do not Adopt Option"

The first Lower Cost Regulatory Alternative proposed by the Submitter is to not adopt the proposed chapter 62-42, focusing on proposed rule 62-42.300. When a LCRA proposal includes the alternative of not adopting any rule, section 120.541(1)(a), F.S., requires that the Submitter

explain how the lower costs and objectives of the law will be achieved by not adopting any rule. The Submitter implies that the objectives of the law can be achieved by relying on the consumptive use permitting program to protect water bodies without the need to meet a rule-adopted MFL. The Submitter further indicates that adoption should be delayed until a new surface water flow model is completed. The Submitter indicates that this represents a lower regulatory cost by avoiding the cost of "anticipated administrative hearings" and the costs described in the Department's SERC.

While the Department disagrees that avoidance of the costs of an administrative hearing to challenge the proposed rule is an appropriate cost to consider as an estimated regulatory cost, the Department agrees that not adopting the rule would likely reduce regulatory costs in the immediate future. Though not mentioned by the Submitter, not adopting the rule would eliminate the requirement for applicants proposing new water withdrawals that impact MFL waterbodies to eliminate or offset the impact. While this would reduce regulatory costs in the immediate future, it could *increase* regulatory costs over time by increasing the amount of recovery needed in the future. Additionally, not adopting the rule would allow further lowering of flows in water bodies already experiencing significant harm, contrary to the objectives of sections 373.042 and 373.0421, F.S.

Sections 373.042 and 373.0421, F.S., require that MFLs be adopted for water bodies within each water management district according to a priority list and schedule approved by the Department. The statutes clearly require that MFLs be established in addition to the operation of the consumptive use permitting program under Part II of Chapter 373, F.S. When a water body is not meeting its MFL, section 373.0421, F.S., requires that the district expeditiously implement a recovery strategy to "achieve recovery to the established minimum flow or level as soon as practicable." Delaying adoption of the rule would further delay the implementation of the needed recovery strategy, and, in fact, would allow the flows in the MFL water bodies to be further reduced by new withdrawals. Failing to adopt the MFLs in accordance with the established priority lists would therefore fail to achieve the objectives of the law.

In addition, section 373.042(1), F.S., provides that MFLs are to be established using the "best information available." Recognizing that new information and technical tools may become available over time, section 373.0421(3), F.S., provides that MFLs "shall be reevaluated periodically and revised as needed." The Department's proposed rule is based on sound science, using the tools and data currently available. It is unclear what new surface water model the Submitter is referring to and no information has been submitted to demonstrate that this alternative model would be the best available tool to establish an MFL. No information has been presented by the Submitter to demonstrate that the use of the alternative surface water model he believes will be available around April 1, 2014, would alter the proposed MFL in a way so as to reduce regulatory costs over the next five years. However, the Department's proposed rule 62-42.300(1)(e) recognizes that a new regional groundwater model, the North Florida Southeast Georgia Regional Groundwater Flow Model, is currently under development, and specifically provides that the MFL shall be reevaluated and readopted following the model completion using the best available scientific or technical data, methodologies, and models available.

Because the Submitter's proposal to not adopt the rule would not meet the statutory objectives that (1) require timely establishment of MFLs for priority water bodies using the best available information and (2) require implementation of recovery strategies to recover to the MFL as soon as practicable, the proposal of "no adoption" is rejected.

III. Modification of Rule Text

As an alternative to not adopting, the Submitter has proposed edits to the proposed rules that he states will "eliminate vague language and reduce the impact on small businesses." The Department has reviewed and considered the proposed changes and discusses them below by rule.

A. Proposed edits to 62-42.100 (Scope)

The Submitter has proposed edits to the "scope" of the rule. The Department's proposed rule recognizes that recovery and prevention strategies have regulatory and non-regulatory strategies and states that non-regulatory strategies would not be included in this rule, but would be included in the applicable regional water supply plan approved by the appropriate district. The Submitter has changed the scope to strike reference to the regional water supply plan and to require non-regulatory recovery and prevention strategies to be adopted by the Department. There is some internal inconsistency to the Submitter's proposed language, in that the phrase includes language that says non-regulatory provisions "are not included with this rule" and also language that the Department adopt such provisions "simultaneously with this rule" and "pursuant with [sic] this rule." For the purpose of this response, the Department had to assume that the Submitter intended to mean that the entire recovery and prevention strategy, including both regulatory and non-regulatory provisions, be adopted by the Department by rule at the time the MFL is adopted.

The Department rejects the changes proposed by the Submitter. A lower cost regulatory proposal must substantially accomplish the objective of the law being implemented and a proposed rule may not be an invalid exercise of delegated authority. A lower cost regulatory proposal must also actually provide for a lower regulatory cost.

Section 373.0421, F.S., provides that recovery and prevention strategies be made "part of the regional water supply plan as described in s. 373.709…." The non-regulatory provisions of the recovery strategy are planning strategies in excess of the regulatory strategies being employed. They are not intended to be binding or enforceable upon applicants and therefore are not appropriate for a proposed rule. Therefore, as provided by statute, the regional water supply plan is the appropriate vehicle for those provisions of the recovery strategy that are planning tools.

Additionally, the Submitter has failed to state why his change would result in lower regulatory costs. While the Department cannot speculate as to why the Submitter believes that lower regulatory costs would result, the Department does not believe that the changes would result in any lower regulatory cost.

B. **Submitter's Proposed edits to 62-42.300**

i. **Proposed edits to 62-42.300(1)(a) - Elimination of High Flows in the MFL**

The Submitter proposes to eliminate any established minimum flows above 1,768 cubic feet per second on the Lower Santa Fe River. A lower cost regulatory proposal must substantially accomplish the objective of the law being implemented and a proposed rule may not be an invalid exercise of delegated authority, including enlarging, modifying, or contravening the law implemented. A lower cost regulatory proposal must also actually provide for a lower regulatory cost.

The Submitter states that flows above this level are primarily the result of surface flows and no surface water withdrawals are anticipated in the next five years. The Submitter states that the Department's proposed MFL would make unavailable "some of the most cost effective potential aquifer recharge projects." It is presumed that the Submitter is referring to projects that would involve withdrawing water from the Lower Santa Fe River when it is flowing above 1,768 cubic feet per second, and using the water to recharge the aquifer to provide offsets for consumptive use withdrawals in order to meet the MFLs established for lower flow conditions. No estimated regulatory cost reductions were included in the submittal.

Pursuant to section 373.042, F.S., minimum flows for surface watercourses are to be established at "the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area." When determining "significant harm" to the water resources or ecology of a water body, Rule 62-40.473, F.A.C. (the Water Resource Implementation Rule) lays out policy guiding the implementation of that statutory provision. The rule indicates that in order to protect the ecological values of the water body, the MFL should be expressed as multiple flows or levels defining a minimum hydrologic regime. Protection of high flows is important in riverine systems, such as the Lower Santa Fe River. High flows provide for periodic flooding of the river floodplain, which supports ecological values such as fish and wildlife habitat and the transfer of detrital material. Whether these high flows are the result of surface water flows or base flows (derived from groundwater) in the river is not relevant to the establishment of the MFL. Therefore, arbitrarily excluding the protection of needed high flows from inclusion in the MFL would result in an MFL that does not "establish the level at with further withdrawals would be significantly harmful to the water resources or ecology" as required by statute. For the reasons set forth herein, the proposed elimination of high flows as part of the MFL would not be consistent with the objectives of the statute.

The Department's proposed rule does not preclude flows above the minimum needed high flows from being withdrawn and used for aquifer recharge. Nevertheless, it is not likely that withdrawing water from the river during high flows for recharging the aquifer would be less costly than other possible approaches to offset withdrawal impacts. Aquifer recharge, while a valuable tool, can include high costs for development of the infrastructure needed for the storage and transmission of the water withdrawn, and the associated operation and maintenance costs. Therefore, the Department does not believe that the proposed language would result in a lower regulatory cost simply because water

from the Lower Santa Fe River would be available for aquifer recharge during the expressed high flows in the MFL.

For the reasons stated above, these changes are rejected.

ii. Proposed Rule 62-42.300(1)(d), F.A.C.

While some of the proposed changes made to the rule in the proposed LCRA are conflicting on this point, it appears that the Submitter intends for the Department to adopt the entire Recovery Strategy for the Lower Santa Fe, Ichetucknee, and Associated Priority Springs by reference as part of the proposed rule, including both non-regulatory and regulatory provisions. A lower cost regulatory proposal must substantially accomplish the objective of the law being implemented and a proposed rule may not be an invalid exercise of delegated authority. A lower cost regulatory proposal must also actually provide for a lower regulatory cost.

The non-regulatory provisions of the Department's proposed recovery strategy for the MFL water bodies are not required to be adopted by rule as discussed more completely in section III.A. of this document relating to the Submitter's proposed edits to the "Scope" of the rule chapter. Further, the Submitter does not specify how adopting the non-regulatory provisions of the recovery strategy would result in lower regulatory costs and the Department does not believe that it would result in lower regulatory costs.

Additionally, in his proposed edits, the Submitter deletes the adoption of the regulatory provisions of the Recovery Strategy (Section 6) by reference, and instead proposes incorporating the text of that section directly into the proposed rule. The Submitter does not specify how this would result in lower regulatory costs and the Department does not believe that it would result in lower regulatory costs as both methods achieve the identical result.

Finally, the Submitter has removed the Department's proposed language found in Rule 62-42.300(1)(d), F.A.C., which states:

> "Levels adopted in paragraphs 62-42.300(1)(a) through (c), F.A.C., above, and the Section 6.0 Supplemental Regulatory measures adopted herein are inseverable, shall be construed as a whole, and are adopted simultaneously pursuant to subsection 62-40.473(5), F.A.C."

The Submitter does not explain how deletion of this sentence would result in a lower regulatory cost and the Department does not believe that it would result in lower regulatory costs.

For the reasons stated above, these changes are rejected.

iii. Proposed rule 62-42.300(1)(e), F.A.C.

The Submitter proposes to delete a phrase that requires that when the MFLs are re-evaluated the Department shall do so "using the best available scientific or technical data, methodologies, and models." The Submitter does not specify how this would result in lower regulatory costs, and the Department does not believe that it would result in lower regulatory costs. In fact, this provision implements the objective of section 373.042(1), F.S., that the MFL be based on "best information available."

For the reasons stated above, these changes are rejected.

C. **New proposed 62-42.300(2)(b) (Definitions)**

The Submitter's proposed edits to the rule include the inclusion of the recovery strategy in the rule text and the addition of definitions for the terms "significant harm," "impact," "North Florida Regional Water Supply Planning Area," "offset," and "elimination." The Submitter states that the purpose of the additions is to "address the problem of vague language...." Additionally, the Submitter states that the "use of these definitions result in major reductions in regulatory costs because the number of permits requiring offsets or elimination will be greatly reduced."

The Department rejects the changes proposed by the Submitter. A lower cost regulatory proposal must substantially accomplish the objective of the law being implemented and a proposed rule may not be an invalid exercise of delegated authority, including enlarging, modifying, or contravening the law implemented. It must also actually provide for a lower regulatory cost. The Department addresses each of the proposed definitions individually.

i. **Significant harm and impact.** The Submitter's definition of "impact" means to cause "significant harm," which he has also defined. Those two, together, must be read to interpret the provisions of both the Department's proposed rule and the Submitter's proposed edits relating to additional review criteria for individual permit applicants. The Submitter's definition of impact and significant harm, and the reasoning provided by the Submitter as to how their inclusion represents a lower regulatory cost, are problematic for several reasons as discussed below.

   The inclusion of a definition of "significant harm" here is inappropriate. That phrase is used in section 373.042(1), F.S., in the definition of a minimum flow, which is the "limit at which further withdrawals are *significantly harmful* to the water resources or ecology of the area" [italics added]. While the statutory use of the term significant harm includes only the effects on water resources or the ecology of the area, the Submitter has broadened the term inappropriately to include effects on "existing legal use of water, offsite land use, water resource or environmental feature associated with the water resource." The inclusion of these additional criteria would be an enlargement on the law being implemented and would incorrectly utilize a concept used in setting an MFL as a regulatory standard.

The Submitter's explanation as to why inclusion of these definitions would result in a lower cost regulatory alternative is unclear. The Department below addresses two possible interpretations of the Submitter's explanation.

The Submitter appears to be concerned that that impacts to the MFL water bodies as provided for in the Department's proposed rule, which would represent "significant harm" to the water bodies, is a standard that is stricter than the District's current method for evaluating "harm." Specifically, the Submitter states that the term significant harm "would be caused by a reduction in flows greater than the reductions in flows required to cause harm." Based on the analysis provided in the SERC, the Submitter appears to incorrectly assume that the District's permitting process would not change after the adoption of the MFL.

In the SERC, the Department and District used a 0.1% reduction in flow as a screening tool to evaluate the likelihood of impacts on the MFL water bodies under the existing consumptive use permitting program and *without* consideration of the proposed rule. Under current District permit application review criteria, a model simulation resulting in a 0.1% or more reduction in streamflow at various river gauging stations due to the proposed withdrawal is an indication that the potential for adverse impacts may exist. In order to provide a good faith estimate of the number of permittees likely subject to the Department's proposed rule as compared to current regulatory requirements, a screening tool of 0.05 mgd reduction in the flow was used in the SERC. This number was used solely for the purposes of the SERC and was never intended to be a permitting standard; that threshold does not appear in the Department's proposed rule. A proposed withdrawal's predicted change in flow would be determined during the District's permitting process using the best available tool. The Submitter appears to incorrectly assume that the existing screening threshold of 0.1% reduction in flow would remain in place after the adoption of the MFL when that is not the case. Given that the regulatory process will incorporate the finding that the MFL water bodies are experiencing significant harm, and the 0.1% reduction in flow will no longer be used to indicate the potential for adverse impacts, the addition of these definitions does not provide for clarification or for a lower cost regulatory alternative.

Alternatively, the Submitter may be arguing that District's current permitting thresholds *should* remain in place after adoption of the MFL in order to reduce regulatory costs. "Significant harm" was found to be already occurring in the MFL waterbodies; therefore, any further *impact* would result in harm during an application review. If the Submitter intends to redefine impacts and significant harm to match the District's current screening threshold of 0.1% reduction of flow, which admittedly would reduce regulatory costs, it would allow new water withdrawals that further reduce the flows in the MFL water bodies that are already experiencing significant harm. Such reductions would be contrary to the objectives of section 373.0421, F.S., which requires water bodies below an established MFL to "achieve recovery to the established MFL as soon as practicable." A lower cost regulatory proposal must substantially accomplish the objective of the law being implemented. Additionally, while reducing regulatory costs in the short term, the

proposed definitions and use of 0.1% reduction in flow would allow flow conditions to worsen even further and would add to the cost of eventual recovery.

For the various reasons set forth above, the Department rejects these proposed definitions.

ii. **North Florida Regional Water Supply Planning Area.** The Submitter also defines North Florida Regional Water Supply Planning Area. The Department included a map in its proposed rule to define this area. The Submitter's proposed definition defines the area by county name and eliminates Nassau County. The Submitter has not provided any explanation on how redefining the North Florida Regional Water Supply Planning Area would reduce regulatory costs. Additionally, the purpose of the Department's Planning Area is to ensure a review of permittees with the potential to impact the MFL water bodies. Amending that area in an arbitrary fashion may reduce costs for permittees in Nassau County, but would increase costs for those remaining in the planning area in the future since unaccounted for impacts could increase the amount required to be recovered. However, without having the benefit of further explanation on how this re-definition would reduce costs, the Department cannot further respond to this added definition.

iii. **Offset and elimination.** Finally, the Submitter has proposed definitions for offset and elimination. The Submitter has failed to include any explanation of how the addition of these definitions would decrease regulatory costs. Based on the Department's review of his proposed language, the Submitter has actually limited the options available to users on how they may offset or eliminate their impact and, in so doing, would *increase* regulatory costs. For example, the Submitter states that elimination would be the reduction in the amount of withdrawals. An alternative method for elimination of impact that the Submitter's definition rejects would be to move the withdrawal point of the proposed water use, for example. Similarly, the Submitter has limited the types of offsets available to the regulated community to only those specifically identified by the District in the recovery strategy. Under the Department's proposed rule, an impacted applicant may propose *any* method of providing an offset, which would imply a lower regulatory cost and less prescriptive regulation on the regulated community as compared to the Submitter's proposed rule language. Without having the benefit of further explanation on how the Submitter's added definitions would reduce costs, the Department cannot further respond to these added definitions.

For the reasons stated above, these proposed definitions are rejected.

D. **New proposed 62-42.300(2) (Threshold)**

The Department's proposed rule currently requires that new permit applicants seeking new water withdrawals and renewal applicants seeking additional withdrawals that have a potential adverse impact on the MFL water bodies must eliminate or offset the impact in order to receive a permit. The Submitter proposes to add an additional sentence to these provisions as follows:

> "No offsets or eliminations will be required for permits with estimated flow reductions less than 1 cubic foot per second."

The Submitter states that this provision would reduce regulatory costs, particularly for agricultural users, as it would allow them to select the most profitable production plan based on market conditions without having to provide elimination or offset of impacts. A lower cost regulatory proposal must substantially accomplish the objective of the law being implemented. While this provision may reduce regulatory costs, it would allow new water withdrawals that further reduce the flows in the MFL water bodies that are already experiencing significant harm. In fact, the Submitter's proposal would allow more flow reduction in the MFL water bodies than is presently allowed under the District's existing consumptive use permitting program. The District's assessment indicates that the Lower Santa Fe River is currently 17 cfs below, and the Ichetucknee River is 3 cfs below, their respective MFLs. If each applicant is allowed to further reduce flows by 1 cfs without providing an offset, flow conditions would significantly worsen. Allowing flow conditions to worsen even further would add to the cost of eventual recovery, perhaps transferring those costs to other users. Allowing further impacts to the MFL water bodies is not consistent with the statutory objective of implementing a recovery strategy to return the flows to the MFL as soon as practicable.

Additionally, no rational was provided by the Submitter for the selection of 1 cubic foot per second. A proposed rule must not be an invalid exercise of delegated authority, which includes a requirement that an agency not adopt a rule that "is arbitrary or capricious." A rule is considered arbitrary and capricious when it is "not supported by logic or the necessary facts" and is "without thought or reason or is irrational." Selecting an arbitrary threshold for flow reductions is not a valid exercise of delegated authority.

For the reasons stated above, these changes are rejected.

IV. Conclusion

Based on the foregoing, the Department rejects the LCRA proposal in its entirety.

On an unrelated matter, the Department would like to note that it has found a scrivener's error in Attachment A to the SERC. While the scrivener's error does not change the number of estimated entities impacted by the rule or any estimated regulatory costs, the Department would like to take the opportunity to correct the scrivener's error so as to not cause confusion. The scrivener's error, which appeared in Section 2.2.1 (page 17) of the SERC's attachment A, is highlighted in strike-through/underline below and is correct as attached to the revised SERC for rule 62-42.300.

> If both renewing and new consumptive use permit applicants expected to be required to offset potential adverse impacts to the proposed MFL were to offset their new water use via equal reductions in agricultural water conservation, the total water conservation required would be 13.8 MGD of existing water use. The total

estimated cost to achieve this conservation goal would be approximately \$2,980,000 over the five year timeframe. Thus, if all offsets of impacts from the estimated increases to renewed and new consumptive use permits were achieved via enrollment in the SRWMD center-pivot retrofit program, the estimated total cost to existing permit holders would be approximately \$596,000, and the total cost to the existing SRWMD cost share program would be approximately \$2,384,000. The estimated number of renewing and new permit holders required to develop offsets of increased impacts is approximately 68 individuals, and the estimated average cost per individual would be approximately \$8800 per applicant.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
ADDENDUM TO APRIL 8, 2014 STATEMENT
OF ESTIMATED REGULATORY COSTS
December 4, 2014

Division: Office of Water Policy
Rule Number: 62-42.300, F.A.C.
Rule Description: Minimum Flows and Levels and Recovery Strategy for Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs
Contact Person: Janet Llewellyn

Background

On March 7, 2014, the Department published a Notice of Proposed Rule for Rule 62-42.300, F.A.C., and further revised the proposed rule in a Notice of Change published on April 8, 2014. The proposed rule includes Minimum Flows and Levels (MFLs) for the Lower Santa Fe and Ichetucknee Rivers and Associated Priority Springs as well as a regulatory recovery strategy. A Statement of Estimated Regulatory Costs (SERC), reflecting the rule as revised in the April 8, 2014 Notice of Change was also provided on April 8, 2014. The April 8, 2014 SERC included the Department's response to a Lower Cost Regulatory Alternative (LCRA) proposed by Dr. Paul Still submitted on March 20, 2014. Dr. Still's March 20, 2014 LCRA was rejected in its entirety in the April 8, 2014 SERC.

Dr. Still submitted a second LCRA on April 21, 2014. The Department notified Dr. Still by letter on April 23, 2014 that his second LCRA was not submitted timely under the requirements of s. 120.541, F.S.

The proposed rule, as reflected in the April 8, 2014 Notice of Change, was challenged under section 120.54, F.S., by Dr. Still and other petitioners. In addition, Dr. Still challenged the Department's determination that his April 21, 2014 LCRA was not timely submitted. An Administrative Hearing was held before the Division of Administrative Hearings on May 28-30 and June 12-13, 2014, and a final order was issued on September 11, 2014. The Administrative Law Judge found portions of the rule invalid due to vagueness. The Administrative Law Judge, without ruling on the timeliness of the submittal, also found that Dr. Still did not demonstrate that he was materially affected by the rejection of his second LCRA.

In response to the Administrative Law Judge's order, the Department published a notice of change on November 7, 2014 to redress the finding of vagueness. The November 7, 2014 Notice of Change did not change the minimum flows established nor the regulatory provisions to implement them. The proposed change to the rule only provides additional technical information as to the data used to establish the minimum flows. Following the publication of the November 7 Notice of Change, on November 24, 2014, the Department received a third Lower Cost Regulatory Alternative from Dr. Still. The Department believes that the November 24, 2014 submittal is untimely based on the requirements of s.120.541, F.S. In addition, the Department recognizes that the statute requires the submitter of a LCRA to be a "substantially affected person." The

Department has reviewed Dr. Still's substantial interests and does not believe that Dr. Still is substantially affected by the rule nor the notice of change and reserves all rights to raise issues of standing in any future proceeding on the rule. Notwithstanding those objections, the Department is amending the SERC through this Addendum to respond to Mr. Still's proposed LCRA.

Summary of November 7, 2014 Notice of Change

The Notice of Change filed on November 7, 2014 does not change the proposed minimum flows or the recovery strategy included in the proposed rules. The Notice of Change merely adds the existing technical information that the Administrative Law Judge found missing in the original rule text, which resulted in the proposed rule being found by the Judge to be vague. Specifically, these changes include:

1) Adding the period of record used to establish the baseline flows in the Lower Santa Fe and Ichetucknee Rivers and subsequently used to develop the proposed minimum flows, and,

2) Adding the method used for filling the data gaps in the baseline flow record for the Ichetucknee River.

The information included in the Notice of Change is not new. It was a part of the technical development of the proposed MFL that was made public throughout rule development and was thoroughly vetted at the Administrative Hearing before the Division of Administrative Hearings.

Effect of November 7, 2014 Notice of Change on Estimated Regulatory Costs

The Notice of Change filed on November 7, 2014 does not change the proposed minimum flows or the recovery strategy included in the proposed rules. The inclusion of the additional technical information used in MFL development in the rule text does not result in any change to the regulatory costs of the rule as expressed in the April 8, 2014 SERC.

Department's Response to Paul Still's November 24, 2014 Lower Cost Regulatory Alternative

The November 24, 2014 LCRA submitted by Dr. Still is included as Attachment I to this Addendum. Dr. Still's proposal consists of two separate options, each of which are addressed below.

I. The first Lower Cost Regulatory Alternative proposed by Dr. Still is to not adopt the proposed Rule 62-42.300, F.A.C. This option was proposed in Dr. Still's LCRA

submitted on March 20, 2014 and is rejected for the same reasons as provided in the April 8, 2014 SERC (Appendix B-1).

II. The second Lower Cost Regulatory Alternative proposed by Dr. Still includes edits to the proposed rules that he states will "eliminate vague language and the questionable methods used in the Noticed 62-42.300 F.A.C., and reduced the impact of the rule on small business and other applicants."

A lower cost regulatory proposal must substantially accomplish the objective of the law being implemented and a proposed rule may not be an enlargement or contravention on the law being implemented. It must also actually provide for a lower regulatory cost.

This proposed option includes several technical changes to the approach to establishing the minimum flows, to correct what Dr. Still considers to be inappropriate technical methods used. These changes include:

- Setting minimum levels rather than minimum flows.
- Tying the proposed minimum levels to only a three year period of record and eliminating the use of flow duration curves.
- Setting a minimum level at a second gage on the Lower Santa Fe River rather than a gage on the Ichetucknee River.
- Eliminating the proposed spring minimum flows.

The technical methods used to establish the MFLs, as well as Dr. Still's concerns with these methods, were a part of the Administrative Hearing on the proposed rule. The Administrative Law Judge found that Dr. Still failed to prove that the minimum flows proposed by the Department's rule are not based on the best available information, as required by s. 373.042, F.S. In any event, it is not appropriate to address the technical merits of Dr. Still's proposal in a SERC. Dr. Still's proposal fails to explain how these changes, even if appropriate, would provide for a lower regulatory cost, with one exception. Dr. Still indicates that the proposal would reduce cost to the Suwannee River Water Management Districts associated with "managing the flow duration curves and correcting them for Suwannee River tailwater effects". The cost savings is not considered to be significant and would not affect the staffing levels of the Suwannee River Water Management District. For the reasons stated above, these changes are rejected.

The proposed alternative eliminates establishing high level minimum flows (or levels, in the submitter's proposal) as high flows and levels are "primarily the result of surface flows and no surface water withdrawals are anticipated in the next five years." In addition, Dr. Still states that setting high level MFLs "could impede some of the most cost effective potential aquifer recharge projects". Elimination of minimum high flows was also proposed in in Dr. Still's LCRA submitted on March 20, 2014 and is rejected for the same reasons as provided in the April 8, 2014 SERC (Appendix B-1).

Finally, the proposed alternative eliminates the regulatory recovery strategies, stating that, if needed, such strategies could be developed later as part of the water supply planning process and subsequently added to Rule 62-42, F.A.C. The absence of the regulatory recovery strategies would not substantially accomplish the objective of the law, which requires that when a waterbody is below an MFL, a recovery strategy be expeditiously implemented. *See* 373.0421, F.S. Further, Rule 62-42.373, F.A.C., requires that when establishing an MFL, if the water body is below the MFL, the recovery strategy shall be adopted simultaneously. Finally, removing the recovery strategy provisions may actually increase regulatory costs, as an applicant would not have clear a path forward to receive a permit or provide for offsets if a proposed withdrawal was projected to impact an adopted MFL. For the reasons stated above, these changes are rejected.

Conclusion

Based on the foregoing, the Department rejects the LCRA in its entirety.

Attachment 1

Proposal to the Florida Department of Environmental Protection for a Lower Cost Regulatory Alternative to CHAPTER 62-42.300 MINIMUM FLOWS AND LEVELS November 7, 2014, Notice of Change

Paul Still

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1. On November 7, 2014, the Florida Department of Environmental Protection (FDEP) published a Notice of Change for 62-42.300 F.A.C. No notice of a Statement of Estimated Regulatory Costs (SERC) for 62-42.300 F.A.C. has been received.
2. The alternative language presented in this proposal is in response to the November 7, 2014 rule change.
3. Paul Still owns 117 acres of land on the west side of Lake Sampson in Bradford County that is managed for timber production. He would have to meet the requirements set out in the Florida Department of Environmental Protection (DEP) proposed rule 62-42.300 F.A.C. when he applied for a Water Use Permit. He plans to file an application for a Water Use Permit in the next 60 days.
4. Paul Still pays taxes assessed by the SRWMD and is therefore affected by any activity that is paid for by those taxes.

Paul Still uses the Santa Fe for recreation. The effectiveness of the proposed MFLs and their associated costs will impact Paul Still's use of the Santa Fe River.

5. This proposal has two options for lower regulatory costs for the Notice FDEP rule 62-

42.300, F.A.C. The first proposal is for a do not adopt option. The second proposal eliminates vague language and the questionable methods used in the Noticed 62-42.300 F.A.C, and reduces the impact of the rule on small businesses and other applicants.

Do Not Adopt Option

6. FAC 40-B-2.301(2)(g)4 protects all water bodies including the MFL water bodies from harm. Adopting an MFL for the water bodies to protect them from significant harm is not required immediately. Rain events have brought groundwater levels and river flows up which lessens the need for immediate adoption of the Lower Santa Fe MFLs.

7. The period of record used to establish the MFLs and to evaluate the current status of the rivers should be extended from the end date of 2010 used in the current MFL Technical Documents to the end of water year 2014.

8. The SRWMD has already begun projects listed in the Recovery Strategy. The DEP claim that the MFL needs to be adopted or implementation of the recovery plan will be delayed does not seem to be supported by the facts.

9. It is also noted that the SRWMD has delayed development of the Lower Santa Fe MFLs for over five years. It is clear that timely development of the Lower Santa Fe MFLs has not been a concern for the SRWMD or the DEP in the past.

10. Delaying the rule until a rule can be developed that would avoid an administrative challenge may result in a rule taking effect sooner that than would occur as a result of the Administrative Hearing process.

11. The Do Not Adopt option avoids the costs associated with an Administrative Hearing for the Noticed rule and the SERC for the Noticed Rule. The cost associated

with an Administrative Hearing to both DEP and the SRWMD is significant and would likely be over $200,000. This cost must be paid for with tax payer funds and should be considered part of the regulatory cost.

12. Regulations require the applicant provide the supporting information for a Water Use Permit application. In the SRWMD staff members develop the supporting information for most Water Use Permit applicants. This regulatory cost is thus born by all individuals including Paul Still who pay taxes assessed by the SRWMD. The Do Not Adopt options reduces staff time need to review permits for compliance with the MFLs.

13. The SRWMD and DEP have failed to demonstrate that the proposed MFLs will in fact provide any additional protection of MFL water bodies that is not being provided by the current permitting standards. The Do Not Adopt option is thus as effective as the proposed rule in protecting the rivers and springs addressed in the proposed MFLs.

14. If the Do Not Adopt option is not selected Paul Still provides the following rule language for a lower cost alternative. The LCRA rule language also addresses problems with the 62-42.300 F.A.C language.

Attachment 1

Paul Still's Proposed Rule Language for the LCRA 62-42.300, F.A.C.

62-42.300 Minimum Flows and Levels

The Department hereby establishes the following minimum flows and levels in accordance with section 373.042, F.S.

(1) Lower Santa Fe: The minimum surface water level in feet (survey datum NGVD1929) for the Lower Santa Fe are set at two river gages identified as USGS Gage 02322500 Santa Fe River Near Fort White, FLA and USGS Gage 02322800 Santa Fe River NR Hildreth FLA. The levels at each gage are provided below:

(a) The minimum surface water level for the Lower Santa Fe at USGS Gage 02322500 Santa Fe River Near Fort White, FLA:

1. 22.58 feet for 25 percent of the preceding 1,095 days of recorded levels;

2. 21.97 feet for 50 percent of the preceding 1,095 days of recorded levels;

3. 21.61 feet for 75 percent of the preceding 1,095 days of recorded levels;

4. 21.58 feet for 90 percent of the preceding 1,095 days of recorded levels;

(b) The minimum surface water at USGS Gage 02322800 Santa Fe River NR Hildreth FLA:

1. 7.50 feet for 90 percent of the preceding 1,095 days of recorded levels;

Rulemaking Authority 373.026(7), 373.036(1)(d), 373.043, 373.171 FS. Law Implemented 373.023, 373.026, 373.033, 373.036(1)(d), 373.0391, 373.0395, 373.042, 373.046, 373.0831, 373.086, 373.103, 373.106, 373.171, 373.175, 373.185, 373.1961, 373.223, 373.246, 373.250, 373.418, 373.451, 373.453, 403.0615(3), 403.064, 403.0891 FS., Ch. 2002-296, s. 38, Laws of Florida. History New

Supporting Information for Major Changes in Rule Language and their Impact on Regulatory Cost

15. The above language sets the MFLs. Only after the MFLs have been set can it be determined if the MFLs are being met and if a prevention or recovery strategy is required. Should a prevention or recovery strategy be required it would be developed as part of the Water Supply Planning process and any regulatory parts of the strategy adopted as part of a different rule in 62-42, F.A.C.

16. Only limited cost reduction information is presented with this proposal because no SERC has been produced for the November 7, 2014, 62-42.300 F.A.C. Without that SERC it is difficult to document the lower costs associated with this proposal.

17. FS 120.541(1) (a) appears to place the responsibility of preparing a SERC with regulatory costs on DEP and not the submitter of the lower cost regulatory alternative.

18. The flows in the proposed November 7, 2014, 62-42.300 F.A.C. have been converted to levels. This was done by taking the flow in the November 7, 2014, 62-42.300 and selecting the level that matched that flow when the gage had little tailwater impact from the Suwannee River. This conversion is necessary because of the tailwater impacts from the Suwannee River. The flow and level data for the period from 1947 to 2013 indicates the lowest flow at the Fort White gage was 342 cfs. At that flow the Santa Fe River was at 26.2 feet and above flood stage. The second lowest flow was 446 cfs but the river was at only 21.34 feet. Almost the same flow occurred when the river level differed by almost 5 feet.

19. While a flow duration curve shows flows, these flows are not associated with the river levels that were used to evaluate the metrics used to set the MFLs. Converting the MFLs from flows to levels corrects the errors introduced by using flows.

20. The MFLs for flows above 1,768 cubic feet per second were not converted to a level because flows above 1,768 cubic feet per second (cfs) are primarily the result of surface flows and no surface water withdrawals are anticipated in the next 5 years. The data supporting the setting of the MFLs above 1,768 cfs are very weak. It should be noted that the levels in the LCRA 62-42 allow for out of bank flows and provide flows to the river floodplain.

21. Setting high level MFLs could impede some of the most cost effective potential aquifer recharge projects that use ditch blocks to enhance wetland storage and increase aquifer recharge. This is a technique the SRWMD is using in areas between the Suwannee River and the Gulf Coast. This approach has been shown to be very cost effective.

22. Since the SERC did not evaluate the costs associated with recharge projects no estimate can be provided for the reduction in cost provided by this change. The Recovery Strategy for the Lower Santa Fe and Ichetucknee Rivers and Priority Springs Minimum Flows and Levels placed a cost estimate of over $10,000,000 for these projects. The wetland storage projects would cost significantly less than $10,000,000.

23. The proposed method for setting the MFLs eliminates the need to use flow duration curves and is based on data already being collected. This reduces the cost associated with managing the flow duration curves and correcting them for Suwannee River tailwater effects. It also simplifies the method used to determine if the MFLs are being met.

24. The LCRA MFL language replaces the Ichetucknee River at U.S. Highway 27 gage with the USGS Gage 02322800 Santa Fe River NR Hildreth FLA.

25. The flow data for the Highway 27 gage used in the Noticed 62-42.300 F.A.C were not all from actual gage readings. The Flow data was generated using methods that did not

take into account the complex interactions between the Santa Fe River and the Suwannee River. The Highway 129 gage has a much longer record so artificially generating flows or levels can be eliminated or greatly reduced. The Highway 129 includes the flow from the Ichetucknee River and its springs so it performs the same function as the Ichetucknee River at U.S. Highway 27 gage in the Noticed 62-42.300 F.A.C. The levels for the Highway 129 gage were set to include the flows from the Ichetucknee River and the additional flows from springs between the Ichetucknee River and the Highway 129 gage.

26. The LCRA 62-42.300 F.A.C eliminates the Noticed 62-42.300(1)(c) F.A.C. The Noticed FAC 62-42.300(1)(c) F.A.C. does not provide any unique protection to the priority springs since the flow required for the springs is exactly the same as the flow for the Lower Santa Fe River. The Noticed 62-42.200(1)(c) F.A.C. only gives the elusion that the springs are being protected and delays setting the needed individual spring MFLs for an indefinite period.

27. The language in 62-42.300(1)(d) F.A.C. and 62-42.300(1)(d) F.A.C is removed. This solves the problem of two subjects in a rule. As noted above once a Prevention or Recovery Strategy is developed as part of the water supply planning process the regulatory parts of the strategy would be added to 62-42 F.A.C.

Paul Still
Paul Still 11/24/2014
The above typed name is to be considered a signature

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB RORS 15-04 Ratification of Department of Environmental Protection Rules (relating to liners and leachate collection systems for construction and demolition debris disposal facilities)
SPONSOR(S): Rulemaking Oversight & Repeal Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee		Stranburg	Rubottom

SUMMARY ANALYSIS

On January 26, 2015, the Florida Department of Environmental Protection (FDEP) filed for adoption amendments to Rule 62-701.730, F.A.C., "Construction and Demolition Debris Disposal and Recycling." The solid waste rule requires liners and leachate collection systems for new or expanding construction and demolition debris facilities that are not able to demonstrate a liner is not needed.

The Statement of Estimated Regulatory Cost (SERC) estimates Rule 62.701.730 to have an impact in excess of $1 million over 5 years. A rule meeting that threshold cannot become effective unless ratified by the Legislature.[1]

PCB RORS 15-04 ratifies Rule 62-701.730, authorizing the rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

[1] Section 120.541(3), F.S.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[2] Rulemaking authority is delegated by the Legislature[3] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[4] a rule. Agencies do not have discretion whether to engage in rulemaking.[5] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[6] The grant of rulemaking authority itself need not be detailed.[7] The specific 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.[8]

An agency begins the formal rulemaking process by filing a notice of the proposed rule.[9] The notice is published by the Department of State in the Florida Administrative Register[10] and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.[11]

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.[12] Next is the likely adverse impact on business competitiveness,[13] productivity, or innovation.[14] Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.[15] If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed $1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature.[16]

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[2] 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).
[3] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).
[4] Section 120.52(17), F.S.
[5] Section 120.54(1)(a), F.S.
[6] Sections 120.52(8) & 120.536(1), F.S.
[7] *Save the Manatee Club, Inc.,* supra at 599.
[8] *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).
[9] Section 120.54(3)(a)1, F.S.
[10] Section 120.55(1)(b)2, F.S.
[11] Section 120.541(2)(a), F.S.
[12] Section 120.541(2)(a)1., F.S.
[13] This factor includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.
[14] Section 120.541(2)(a) 2., F.S.
[15] Section 120.541(2)(a) 3., F.S.
[16] Section 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[17] A rule must be filed for adoption before it may go into effect[18] and cannot be filed for adoption until completion of the rulemaking process.[19] As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Solid Waste Management permitting by Florida Department of Environmental Protection

The Florida Department of Environmental Protection (FDEP) began permitting of solid waste disposal facilities in 1989.[20] Prior to 2010, chapter 403, Florida Statutes, did not require the use of liners or leachate collection systems for most facilities. Liners or collection systems were only required if FDPE could demonstrate that it reasonably expects that a lack of liners or collection systems would result in violations of ground water standards and criteria.[21]

In 2010, the Legislature amended s. 403.707(9)(b), F.S., to require liners and leachate collection systems at disposal units that did not have a department permit authorizing construction or operation prior to July 1, 2010.[22] A disposal unit may be excepted from the liner and collection system requirement if the owner or operator demonstrates, based upon types of waste received, the methods for controlling types of waste disposed of, the proximity of the groundwater and surface water, and the results of the hydrogeological and geotechnical investigations, that the facility is not expected to result in violations of the groundwater standards and criteria if built without a liner.[23]

Adoption of Rules

In February 2014, FDEP initiated rulemaking on construction and demolition debris disposal and recycling. On January 26, 2015, FDEP filed for adoption Rule 62-701.730, F.A.C., titled "Construction and Demolition Debris Disposal and Recycling." The amendments to the rule relate to standards for liners and leachate collection systems for construction and demolition debris disposal facilities. This rule requires legislative ratification based on SERCs[24] estimating an impact in excess of $1 million over 5 years.

Impact of Rules

Rule 62-701.730, F.A.C., implemented statutory authority for FDEP to establish standards for permitting facilities that collect solid waste from construction and demolition projects.[25] The statute was amended in 2010[26] to require liners and leachate collection systems at individual disposal units and lateral expansions of existing disposal units that had not received a FDEP permit authorizing construction or operation prior to July 1, 2010.

The rule as amended by FDEP requires liners and leachate collection systems for new or expansion of existing construction and demolition debris disposal facilities that are not able to demonstrate that a liner is not needed. The rule is estimated to have a recurring annual cost of $828,854 for construction

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[17] Section 120.54(3)(e)6, F.S. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.
[18] Section 120.54(3)(e)6, F.S.
[19] Section 120.54(3)(e), F.S.
[20] Section 403.707, F.S. (1989).
[21] Rule 64-701.730(4)(a), F.A.C. (2012).
[22] Ch. 2010-205, LOF
[23] Section 403.707(9)(b), F.S.
[24] Copies of the SERCs prepared on the rule ratified by the bill are in the possession of the staff of the Regulatory Oversight & Repeal Subcommittee and are expected to be provided in published meeting materials when the PCB is noticed for consideration.
[25] Section 403.707(9), F.S.
[26] Ch. 2010-205, LOF.

and demolition debris facilities to maintain the qualifications required by the rule. The projected costs of the rule for the first five years of implementation exceed $4,000,000.

Effect of Proposed Changes

The bill ratifies Rule 62-701.730, allowing the rule to become effective.

B. SECTION DIRECTORY:

Section 1: Ratifies Rule 62-701.730, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. The bill expressly limits ratification to the effectiveness of the rule. The bill directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill creates no additional source of state revenues.

2. Expenditures:

   The bill itself requires no state expenditures. The SERC estimates the department will expend $104.24 per inspection for each facility covered by the rule twice a year under the rule. The SERC also estimates the department will spend $535.20 annually in reviewing applications for new construction and demolition debris disposal facilities.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill appears to have no impact on local government revenues.

2. Expenditures:

   The bill does not impose additional expenditures on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill itself does not directly impact the private sector. Any resulting economic impacts are due to the substantive policy of the rule as addressed in the SERC for the rule. The SERC describes the rule's economic impact to be $828,854 per new facility incurred by an estimated 2 permittees operating solid waste management facilities in the first five years of implementation. The impact would be expected to also affect the construction and demolition industries that use such facilities by raising the cost and/or limiting access to the facilities.

D. FISCAL COMMENTS:

The economic impacts projected in the statement of estimated regulatory costs would result from the application and enforcement of the liner and leachate collection system requirements.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties and municipalities.

2. Other:

No other constitutional issues are presented by the bill.

B. RULE-MAKING AUTHORITY:

The bill meets the final statutory requirement for DEP to exercise its rulemaking authority implementing liner and leachate collection system standards for construction and demolition debris disposal facilities. No additional rulemaking authority is required.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

1 A bill to be entitled
2 An act relating to ratification of Department of
3 Environmental Protection rules; ratifying specified
4 rules relating to liners and leachate collection
5 systems for construction and demolition debris
6 disposal facilities, for the sole and exclusive
7 purpose of satisfying any condition on effectiveness
8 pursuant to s. 120.541(3), F.S., which requires
9 ratification of any rule meeting any specified
10 thresholds of likely adverse impact or increase in
11 regulatory costs; providing applicability; providing
12 an effective date.
13
14 Be It Enacted by the Legislature of the State of Florida:
15
16 Section 1. (1) The following rule is ratified for the sole
17 and exclusive purpose of satisfying any condition on
18 effectiveness imposed under s. 120.541(3), Florida Statutes:
19 Rule 62-701.730, Florida Administrative Code, entitled
20 "Construction and Demolition Debris Disposal and Recycling," as
21 filed for adoption with the Department of State pursuant to the
22 certification package dated January 30, 2015.
23 (2) This act serves no other purpose and shall not be
24 codified in the Florida Statutes. After this act becomes law,
25 its enactment and effective dates shall be noted in the Florida
26 Administrative Code or the Florida Administrative Register, or

27 both, as appropriate. This act does not alter rulemaking
28 authority delegated by prior law, does not constitute
29 legislative preemption of or exception to any provision of law
30 governing adoption or enforcement of the rules cited, and is
31 intended to preserve the status of any cited rule as a rule
32 under chapter 120, Florida Statutes. This act does not cure any
33 rulemaking defect or preempt any challenge based on a lack of
34 authority or a violation of the legal requirements governing the
35 adoption of any rule cited.
36 Section 2. This act shall take effect upon becoming a law.

SERC EVALUATIONS FOR PHASE II CHANGES TO CHAPTER 62-701, F.A.C.

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Florida Department of Environmental Protection
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1.0 BACKGROUND

The Florida Department of Environmental Protection (Department) has been working on revisions to its solid waste rule, Chapter 62-701, Florida Administrative Code (F.A.C.) since 2003. On August 12, 2012, the Phase I changes to this chapter became effective. At that time, the Department began working on Phase II changes to the rule to primarily address two new amendments to the Florida Statutes (F.S.): (1) the requirement for construction and demolition (C&D) debris disposal facilities to have liners and leachate control systems in certain cases (section 403.707(9)(b), F.S.); and, (2) the requirement that C&D debris be processed prior to disposal if it is economically feasible to do so (section 403.707(9)(g), F.S.). In addition, after completion of a landfill permitting hearing addressing the potential for sinkholes to form under a proposed landfill, the Department decided revisions to the language for evaluating sinkholes were needed in the chapter.

To address these matters, and other technical changes to the chapter, the Department prepared draft revised language for Phase II and held rule workshops on November 8, 2013 and March 14, 2014. Based on the comments received at those workshops and the draft language that is now being proposed for the Phase II changes to the chapter, the Department has determined that amendments to four of the rules in the chapter will increase costs to the regulated community. Consequently, the Department must evaluate if these changes will require a Statement of Estimated Regulatory Costs[1] (SERC) as required by section 120.541, F.S. The four rules that will be impacted are:

- Rule 62-701.410, F.A.C. – Hydrogeological and Geotechnical Investigation Requirements;
- Rule 62-701.500, F.A.C. – Landfill Operation Requirements;
- Rule 62-701.630, F.A.C. – Financial Assurance; and,
- Rule 62-701.730, F.A.C. – Construction and Demolition Debris Disposal and Recyclcing.

The purpose of this document is to analyze the costs associated with proposed changes to each of these rules and make a recommendation if a SERC is required for them.

2.0 RULE 62-701.410, F.A.C.

The changes proposed in this rule are clarifications of the existing provisions of the requirements for conducting hydrogeological and geotechnical investigations at sites proposed as waste disposal facilities. Based on comments received during the rulemaking process, the Department decided to focus on clarifying the process required in conducting these investigations rather than adding more prescriptive requirements for them. The

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[1] The law requires a SERC be prepared if the proposed rule is an adverse impact to small business or is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate within 1 year after the implementation of the rule. In addition, ratification of the rule by the Legislature is required if the costs are likely to be in excess of $1 million in the aggregate within 5 years after the implementation of the rule.

changes proposed to clarify the process for evaluating sinkhole potential at a site may result in extra work being performed and thus increase the indirect costs for applicants seeking solid waste disposal facility permits in karst areas of the state. The Department has estimated that a hypothetical increase in these costs per disposal facility is:

Cost/facility = (80 hours)($200/hour) = $16,000 per facility

Currently there are 42 active Class I landfill, 36 active Class III landfills and 70 active C&D debris facilities in the state for a total of 148 active disposal facilities. Expansions of existing disposal facilities only occur when additional air space for disposal is needed. Historically, a new disposal facility is only proposed approximately once every two years in Florida. It is reasonable to assume this cost increase will affect approximately five facilities per year. Thus, the estimated annual increase in costs for this change to the rule is:

Annual Costs = ($16,000/facility)(5 facilities/year) = $80,000 per year.

It is concluded that this rule change is not expected to require a SERC.

3.0 RULE 62-701.500, F.A.C.

The changes proposed in this rule that are likely to increase costs are contained in paragraphs 62-701.500(4)(a), F.A.C. and 62-701.500(4)(c), F.A.C. They address additional indirect costs associated with: (1) identifying the "county of origin" for wastes received at a landfill; and, (2) submitting annual reports if dedicated loads of C&D debris are received at the landfill. Currently there are 42 active Class I landfill and 36 active Class III landfills, for a total number of 78 active landfills.

3.1 <u>County of Origin Costs</u>

Landfills already are required to report their waste quantities to the Department. Adding the county of origin will add a small increase to the indirect costs for reporting but will help the Department more accurately calculate the individual county recycling rates. Typically the larger landfills may receive out-of-county waste but not the smaller ones. Landfills receiving out-of-county wastes will already have records of the amounts from their weigh tickets. The Department conservatively estimates one third of the landfills will have to do this extra reporting. This will result in a possible increase in cost per landfill of:

Cost/landfill = (8 hours)($25/hour) = $200 per landfill

Assuming one third of the landfills will have this additional cost for reporting the county of origin, the estimated increase in annual costs is:

Annual Costs = ($200/facility)(1/3)(78 landfills) = $5,200 per year

3.2 Reports for Dedicated Loads of C&D Costs

Landfills that knowingly receive dedicated loads of C&D debris will have to complete a C&D debris annual report form for the amounts of C&D debris received and submit this information to the Department by February 1st of each year. This form will increase the indirect costs for landfills but will also help the Department more accurately calculate the individual county recycling rates.

To estimate these increased costs, the Department assumes:

Cost/landfill = (8 hours)($25/hour) = $200 per landfill

Assuming all of landfills will have this additional cost for reporting dedicated loads of C&D debris, the estimated increase in annual costs is:

Annual Costs = ($200/landfill)(78 landfills) = $15,600 per year

Therefore the total estimated increase in annual indirect costs per year is:

Total Annual Costs = $5,200/year + $15,600/year = $20,800/year

It is concluded that this rule change is not expected to require a SERC.

4.0 RULE 62-701.630, F.A.C.

The changes proposed in this rule that are likely to increase costs are contained in paragraph 62-701.630(6)(e), F.A.C. It addresses additional indirect costs to applicants that use insurance policies as proof of financial assurance for closure and long-term care of their solid waste facilities. In those cases this new rule will require these applicants to also establish and maintain a standby trust fund. Should the Department need to use the insurance policy to properly close a facility, then this new provision will require money equal to the face amount of the insurance policy be placed in the standby trust fund for use by the Department. This will allow the Department access to the money for establishing contracts with vendors to properly close the facility.

Currently, a total of 65 solid waste management facilities in Florida use insurance policies to meet their financial assurance requirements. The cost of establishing and maintaining a standby trust fund averages approximately $500 per year per fund. Therefore, the estimated annual costs for this new rule requirement are:

Annual Costs = ($500/year)(65 facilities) = $32,500 per year

It is concluded that this rule change is not expected to require a SERC.

5.0 RULE 62-701.730, F.A.C.

The changes proposed in this rule that are likely to increase costs are the result of a change in 2010 to section 403.707(9)(b), F.S., that reads as follows:

> The department shall require liners and leachate collection systems at individual disposal units and lateral expansions of existing disposal units that have not received a department permit authorizing construction or operation prior to July 1, 2010, unless the owner or operator demonstrates, based upon the types of waste received, the methods for controlling types of waste disposed of, the proximity of the groundwater and surface water, and the results of the hydrogeological and geotechnical investigations, that the facility is not expected to result in violations of the groundwater standards and criteria if built without a liner.

The Department is adding language in paragraph 62-701.730(6)(a), F.A.C., to implement this new law. This new requirement will significantly increase the direct costs of C&D debris disposal facilities that are not already allowed to operate without a liner and leachate collection system or that are unable to provide a demonstration that a liner and leachate collection system is not required.

There are additional requirements, other than just a liner and leachate collection system, associated with this new law that will increase costs and must be considered. If leachate is collected in a liner, then it also must be managed. Further, when the C&D debris disposal facility closes, then a barrier layer other than two feet of soil must be considered and provisions must be made for managing gas generated at the closed facility when the biodegradable wastes decompose. The Department has added the following new language to the rule to address these additional requirements.

- Paragraph 62-701.730(6)(c), F.A.C., to require storage tanks or leachate impoundments for managing the collected leachate.
- Paragraph 62-701.730(9)(b), F.A.C., to require a barrier layer at closure with a permeability less than or equal to the permeability of the liner system.
- Paragraph 62-701.730(9)(c), F.A.C., to require a gas venting system to reduce pressures inside the C&D debris disposal facility after closure.

To estimate this increase in direct costs, the Department has analyzed potential costs associated with: (1) the liner system and associated components; (2) the closure system and associated components; and, (3) the management of leachate. Each of these estimated costs are presented below.

5.1 Costs of Liner System and Associated Components

To estimate the direct costs for a liner and associated components at a C&D debris disposal facility, the Department used the following assumptions for a typical facility.

- Disposal area of 20 acres in a square geometry.
- Liner system consisting of the following components from top down:
    - 12-inch thick protective sand layer;
    - 12-inch thick drainage sand layer with a hydraulic conductivity of 1×10^{-3} cm/s or less;
    - 60-mil HDPE single geomembrane liner on sloped areas to the leachate collection trenches and a 60-mil HDPE geomembrane underlain by a GCL in the leachate collection trenches and sumps; and,
    - Compacted subgrade.
- Leachate collected in HDPE laterals constructed in trenches, wrapped in gravel and a geotextile, that drain by gravity to a leachate lift station.
- Two 20,000 gallon leachate storage tanks.
- One leachate truck loading station.

Using the assumptions above, the Department estimated the direct liner construction and associated component costs for this C&D debris disposal facility to be $3,179,975. The details for these costs are shown in TABLE 1.

5.2 Costs of Closure and Associated Components

To estimate the direct costs for closure and associated components at a C&D debris disposal facility, the Department used the following assumptions for a typical facility.

- The disposal facility has a maximum elevation of 100 feet above grade, with outsides slopes of 3 feet horizontal to 1 foot vertical (3:1), and benches at 40 feet and 80 feet above grade.
- The barrier layer design consists of the following from top down:
    - Grass sod on side slopes, and grass seed and mulch on the top;
    - 24-inch thick soil cover/drainage layer;
    - 60-mil HDPE geomembrane barrier layer; and,
    - 6-inch thick soil bedding layer.
- 6-inch diameter gas vents at a frequency of two vents per acre.
- 8 downdrain inlet structures at the benches with 18-inch diameter polyethylene downdrain pipes and energy dissipaters at the discharge point.

Using the assumptions above, the Department estimated the direct closure and associated component costs for this C&D debris disposal facility to be $2,458,663. The details for these costs are shown in TABLE 2.

5.3 Costs of Leachate Management

To estimate the direct costs for leachate management at a C&D debris disposal facility, the Department used the following assumptions for a typical facility.

- The 20-acre C&D debris disposal facility at a maximum elevation of 100 feet above grade and 3:1 side slopes has a disposal volume of approximately 1,337,228 yd^3.
- C&D debris is received by the facility at disposal rate of 650 tons/day during the active life of the facility.
- The waste is compacted to an in-place density of 1400 lb/yd^3 and the facility is operated 5.5 days per week. At the disposal rate of 650 tons/day, this results in an active life for the facility of 5 years.
- The facility is closed after the 5 years of operation. The long-term care period begins after closure and lasts for 5 years.
- The disposal cost for the leachate is $0.06 per gallon.
- Leachate generation rates range from 1,500 gal/acre/day during Year 1 to 150 gal/acre/day during Year 10 as shown in TABLE 3.

Using the assumptions above, the Department estimated the direct leachate management costs for this C&D debris disposal facility to be $2,649,900 over the 10-year period. The details for these costs are shown in TABLE 3.

5.4 Total Estimated Liner Costs at C&D Debris Facilities

Based on the calculations above, the estimated extra direct costs over a 10-year life for a 20-acre C&D debris disposal facility that is required to install a liner system is summarized as follows:

Liner and Associated Components =	$3,179,975
Closure and Associated Components =	$2,458,663
Leachate Management =	$2,649,900
Total Lifetime Costs =	$8,288,538
Average Lifetime Costs/Year =	$828,854

Assuming, conservatively, that only one 20-acre C&D debris facility is required to meet these new liner requirements every five years, then the approximate costs in the aggregate per year and every five years is shown in TABLE 4.

It is clear from this analysis and the data shown in TABLE 4 that the new rule for liners at C&D debris facilities, including the additional components associated with it, will require a SERC and will also require Legislative ratification in order for it to become effective.

6.0 CONCLUSION

Based on the analysis presented in this document, it appears that a SERC will not be required for the proposed changes that increase costs in Rules 62-701.410, F.A.C., 62-701.500, F.A.C., or 62-701.630, F.A.C. However, both a SERC and Legislative ratification will be required for the proposed changes in Rule 62-701.730, F.A.C. addressing liners for C&D debris disposal facilities.

TABLE 1. C&D Debris Liner and Associated Component Costs

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT PRICE, $	TOTAL, $
1	**GENERAL**				
	Mobilization & Demobilization Costs	1	LS	150,000.00	150,000.00
	Surveying Costs	1	LS	20,000.00	20,000.00
	SUBTOTAL ITEM #1				170,000.00
2	**LINER SYSTEM CONSTRUCTION**				
	Subgrade Preparation	871,200	SF	0.50	435,600.00
	6-inch bedding layer	16,133	CY	5.00	80,665.00
	GCL below Geomembrane in LCS trenches and sump	9,152	SY	3.00	27,456.00
	60-mil HDPE Geomembrane	871,200	SF	0.62	540,144.00
	SUBTOTAL ITEM #2				1,083,865.00
3	**LEACHATE COLLECTION SYSTEM**				
	Perforated 6-inch HDPE Lateral Pipe	10,500	LF	20.00	210,000.00
	Perforated 8-inch HDPE Header Pipe	885	LF	34.00	30,090.00
	Non-perforated 8-inch HDPE Header Pipe	70	LF	30.00	2,100.00
	Solid 6-inch HDPE Clean Out Pipe	520	LF	22.00	11,440.00
	Woven Geotextile	20,220	SY	1.30	26,286.00
	Ballast Rock	1,905	CY	60.00	114,300.00
	12-inch Drainage Sand Layer	32,267	CY	15.00	484,005.00
	12-inch Protective Sand Layer	32,267	CY	11.00	354,937.00
	Leachate Lift Station, Vault & Controls	1	LS	60,000.00	60,000.00
	20,000 Gal. Leachate Storage Tank	2	LS	80,000.00	160,000.00
	Pressure Clean Leachate Lines	11,975	LF	1.10	13,172.50
	Leachate Truck Loading Station	1	LS	45,000.00	45,000.00
	SUBTOTAL ITEM #3				1,511,330.50
4	**ENGINEERING & CQA COSTS**				
	Eng. Permitting & Design (~7% of Const.)	1	LS	193,563.69	193,563.69
	Const. Services & CQA (~8% of Const.)	1	LS	221,215.64	221,215.64
	SUBTOTAL ITEM #4				414,779.33
	TOTAL CONSTRUCTION COSTS				**$3,179,975**
	COST PER ACRE				**$158,999**

TABLE 2. C&D Debris Closure and Associated Component Costs

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT PRICE, $	TOTAL, $
1	**GENERAL**				
	Mobilization & Demobilization Costs	1	LS	75,000.00	75,000.00
	Surveying Costs	1	LS	20,000.00	20,000.00
	SUBTOTAL ITEM #1				95,000.00
2	**FINAL COVER CONSTRUCTION**				
	6-inch Bedding Layer	17,244	CY	11.00	189,684.00
	60-mil HDPE Geomembrane	931,155	SF	0.62	577,316.10
	24-inch Thick Soil Cover Layer	68,974	CY	11.00	758,714.00
	6-inch Gas Vents (2 per acre)	1,400	LF	125.00	175,000.00
	Bench Construction	3,932	LF	5.00	19,660.00
	Downdrain Inlet Structures	8	EA	500.00	4,000.00
	18-inch PE Downdrain Pipe	2,000	LF	55.00	110,000.00
	Downcomer Energy Dissipators	8	EA	750.00	6,000.00
	Grass Sod on Side Slopes	100,915	SY	2.00	201,830.00
	Grass Seed and Mulch on Top	2,547	SY	0.30	764.10
	SUBTOTAL ITEM #2				2,042,968.20
3	**ENGINEERING & CQA COSTS**				
	Eng. Permitting & Design (~7% of Const.)	1	LS	149,657.77	149,657.77
	Const. Services & CQA (~8% of Const.)	1	LS	171,037.46	171,037.46
	SUBTOTAL ITEM #3				320,695.23
	TOTAL CONSTRUCTION COSTS				**$2,458,663**
	COST PER ACRE				**$122,933**

TABLE 3. Leachate Disposal Costs for One C&D Debris Facility

Description	Leachate, gpad	Leachate, gal/yr	Total, $/yr
Operation			
Year 1	1500	10950000	$657,000
Year 2	1500	10950000	$657,000
Year 3	750	5475000	$328,500
Year 4	500	3650000	$219,000
Year 5	400	2920000	$175,200
5 Yr Subtotal =		33,945,000	$2,036,700
Closure			
Year 6	400	2920000	$175,200
Year 7	350	2555000	$153,300
Year 8	300	2190000	$131,400
Year 9	200	1460000	$87,600
Year 10	150	1095000	$65,700
5 Yr Subtotal =		10,220,000	$613,200
10 Yr Total costs =		44,165,000	$2,649,900
Average per Yr =		4,416,500	$264,990

TABLE 4. Leachate Disposal Costs for One C&D Facility Every Five Years

Year	Cost Description	Facility 1 Cost, $/yr	Facility 2 Cost, $/yr	Facility 3 Cost, $/yr	Grand Total, $	5 Year Cum Total, $
1	Liner construction	$3,179,975			$3,179,975	$3,179,975
2	Leachate disposal	$657,000			$657,000	$3,836,975
3	Leachate disposal	$657,000			$657,000	$4,493,975
4	Leachate disposal	$328,500			$328,500	$4,822,475
5	Leachate disposal	$219,000			$219,000	$5,041,475
6	Leachate disposal & liner const.	$175,200	$3,179,975		$3,355,175	$3,355,175
7	Closure & leachate disposal	$2,633,863	$657,000		$3,290,863	$6,646,038
8	Leachate disposal	$153,300	$657,000		$810,300	$7,456,338
9	Leachate disposal	$131,400	$328,500		$459,900	$7,916,238
10	Leachate disposal	$87,600	$219,000		$306,600	$8,222,838
11	Leachate disposal & liner const.	$65,700	$175,200	$3,179,975	$3,420,875	$3,420,875
12	Closure & leachate disposal		$2,633,863	$657,000	$3,290,863	$6,711,738
13	Leachate disposal		$153,300	$657,000	$810,300	$7,522,038
14	Leachate disposal		$131,400	$328,500	$459,900	$7,981,938
15	Leachate disposal		$87,600	$219,000	$306,600	$8,288,538
16	Leachate disposal		$65,700	$175,200	$240,900	$240,900
17	Closure & leachate disposal			$2,633,863	$2,633,863	$2,874,763
18	Leachate disposal			$153,300	$153,300	$3,028,063
19	Leachate disposal			$131,400	$131,400	$3,159,463
20	Leachate disposal			$87,600	$87,600	$3,247,063
21	Leachate disposal			$65,700	$65,700	