

Practice Update

New Water Law Will Affect Everyone Who Uses Water in Florida

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On January 14, 2016, the officers of the Legislature presented CS/CS/SB 552 to Governor Scott for signature. More famously known as the “Water Bill,” this 134-page page marvel of compromise proves that it is still possible to pass controversial legislation in Florida today, even if it takes two years to do so. And, indeed, there is something in the law of interest to every homeowner, land developer, institutional user, farmer, utility, governmental unit and environmentalist, including plans for the allocation of limited water resources, development of new water projects, protection of Florida springs and regulation of discharges to impaired waters.

Origins

To understand the Water Bill, one needs to know the origin of much of it. Simply put, significant portions of Florida do not have enough water reserves from traditional groundwater sources to sustain continued growth. This dilemma has sparked the need to promote or even require development of alternative water supplies and to adopt additional limitations on withdrawals from traditional groundwater sources. Alternative water supplies include innovative solutions that do not involve withdrawal of water from traditional groundwater sources. Such solutions include implementation of

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graywater, stormwater and brackish water projects to augment existing sources.

In addition to the threat of diminishing water supplies, continued concern for Florida's premier springs brought about the creation of a new regulatory category to afford them special protection, together with associated development limitations and remediation plans. Additional protections have also been afforded to help remediate impaired water bodies throughout the state, but particularly the ecosystems in south Florida.

Finally, the Bill addresses the multiple existing programs for protection of the South Florida natural environment, some quite outdated, to clarify who's on first and what's on second by creating lead agency responsibility for various regulatory programs and identifying Basin Management Action Plans (BMAPs) as the definitive tool for problem solving and regulation to protect/restore impaired waters.

Key Elements

Set forth below is a compilation of the key provisions of the Bill:

Effective Date

- If signed by the governor (and there is every indication that he will), the law will take effect July 1, 2016.

Springs Protection and Minimum Flows and Minimum Water Levels for Florida Waters

- A new protected class of waters is created: the Outstanding Florida Spring (OFS). OFSs include all historic first magnitude springs and their associated spring runs and the following: De Leon, Peacock, Poe, Rock, Wekiwa and Gemini Springs, and their spring runs. If a minimum flow or minimum water level (MFL) has not been

adopted for an OFS by July 2017 (2026 in Northwest Florida), emergency rulemaking will be used to adopt this protection. The MFL is the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area. Recovery and prevention strategies will also be adopted for any OFS not meeting the adopted MFL. (For those familiar with the import of this nuance: rules adopted for this purpose are not subject to the requirement that rules be ratified by the Legislature if they do not pass the adverse impact/regulatory costs criteria of the Administrative Procedures Act.)

- The Department of Environmental Protection (FDEP) is made responsible for designating priority focus areas (areas where the aquifer is generally most vulnerable to pollutant inputs) for each OFS. Priority focus areas set the stage for prohibitions and protections under the new law.
- Maintaining or restoring MFLs is a concern for all waters, not just the OFSs. In fact, the Bill provides that whenever an MFL is adopted or revised for any water body that falls below or is projected to fall below the MFL within 20 years, a recovery and prevention strategy (development of alternative water supplies or other actions) will have to be developed simultaneously.
- By July 1, 2016, FDEP must begin assessment of every OFS for which an impairment determination has not yet been made under existing law. Concurrent with adoption of a total maximum daily (pollutant) load (TMDL) for the OFS, a BMAP shall be developed with a nutrient TMDL. (A TMDL is the load that a water body can assimilate without violation of water quality standards.) Where nitrogen pollution from onsite sewage treatment and disposal systems constitutes at least 20% of the nonpoint source nitrogen pollution or where remediation is necessary to achieve the TMDL, the BMAPs will include onsite sewage treatment and disposal system remediation plans. Local governments

will be required to adopt a model fertilizer use ordinance unless one is already in place.

- OFS BMAPs must include identification of each point source (discrete conveyance such as a pipe) or category of nonpoint sources (such as stormwater), including urban and sports turf and agricultural fertilizers, onsite sewage treatment and disposal systems (such as septic tanks), sewage treatment plants, animal wastes and stormwater facilities. An estimated allocation of pollutant load must be provided for each point source or category of nonpoint sources with target dates for achieving the TMDL. While this may sound like everyone will have a right to continue to pollute as previously authorized, there is no guarantee that the allocation will not result in a reduction of allowed discharge. In fact, the latter is most likely the case where an OFS is presently impaired by nutrient pollution. It is recognized in the Bill that onsite sewage treatment systems may need to be corrected or connected to central sewage systems in priority focus areas. Subject to available funding, the cost may be provided.
- Activities prohibited within a priority focus area are: New domestic wastewater facilities with permitted capacities above 100,000 gallons per day (unless they meet advanced waste treatment standards); new onsite sewage treatment and disposal systems on lots of less than 1 acre, if in conflict with a remediation plan; new hazardous waste facilities; land application of domestic wastewater biosolids not in accordance with an FDEP approved plan; new agriculture operations that do not implement best management practices (BMPs) or other necessary measures.

Pilot Water Projects

- Development of alternative water supplies for water-starved areas is encouraged through provision for pilot projects to be undertaken by the three largest water management districts: St.

Johns, South Florida (SFWMD) and Southwest Florida. However, the Districts are precluded from distributing or selling water to the project participants. This assures those presently in the business of distributing or selling water that the districts will not become their competitors and encourages a partnering of those users and self-suppliers with the districts in these projects.

Central Florida Water Initiative

- The ongoing collaborative work of stakeholders and regulating agencies known as the Central Florida Water Initiative (CFWI) is recognized and affirmed. The CFWI is directed to adopt a single, multidistrict regional water supply plan, including needed recovery or prevention strategies and a list of water supply development or resource projects; provide a single hydrologic planning model; and develop uniform rules (that define harm, provide a consistent process for permit review, establish conservation goals for consumptive use permits and provide conservation goals consistent with the regional water supply plan, including a goal for residential per capita water use for each consumptive use permit). Rulemaking must be initiated by the end of this year. However, as an aside, much work has already been done in these topic areas, including adoption of the regional water supply plan, and activity will continue to surge forward in the coming months.

Regulation of Water Supply

- Any new consumptive use permit or renewal that authorizes withdrawals of 100,000 gallons or more per day from a well with a diameter of 8 or more inches will be monitored for water usage.
- Preferred water supply sources may be identified for users for whom access to new water supplies is not technically or financially feasible.

- It is not inconceivable that existing permits will be reassessed in the future for “over-allocation.” In such case, the legislation states that no allocation will be modified where water use was reduced due to implementation of water conservation measures. Specific examples are provided for agricultural uses.
- Water farming (water storage or water recharge for pay) is encouraged by affording priority consideration to public-private partnerships that store or treat water on private lands to improve water quality and assist with water supply or minimize nutrient loads and maximize conservation. Water farming became a useful tool when it was recognized that Florida discharges much of its freshwater to the ocean. This tool became particularly important as waters from the Kissimmee River and Lake Okeechobee were discharged to the ocean through the St. Lucie Estuary and concerns were raised that these discharges could cause imbalances to salinity of estuarine waters.

South Florida Environmental Programs

- Various existing environmental programs are brought under the umbrella of the Lake Okeechobee Watershed Protection Program and the Lake Okeechobee BMAP is identified as the program element designed to achieve the TMDL for the Lake. The Lake Okeechobee Basin encompasses not just the areas around the lake but travels up the Kissimmee River as well. The legislation requires development of milestones toward achieving the TMDL for the lake. Because the Bill identifies the BMAP as the means of achieving reductions in nutrient pollution, it requires SFWMD to amend the outdated Chapter 40E-61, F. A. C., to make it consistent with the Water Bill. The Rule will now provide for a monitoring program for those who opt to show compliance through monitoring instead of implementation of BMPs.

- Lead agencies are designated as follows for the implementation of the Lake Okeechobee programs: SFWMD – hydrologic improvements; Department of Agriculture and Consumer Services – agricultural practices; and FDEP – water quality protection.
- In addition to regional projects, much of the implementation of the BMAP will come from implementation of BMPs, both for agricultural and non-agricultural sources of stormwater runoff. Rulemaking can be expected for the adoption of non-agricultural, non-point source BMPs, as there has already been rulemaking to adopt agricultural BMPs. The legislation provides that where water quality problems are detected for nonagricultural nonpoint sources despite the appropriate implementation of adopted BMPs, FDEP and the District shall institute a reevaluation of practices and the rules will be revised to require implementation of the modified practices within a reasonable time period. Might this involve retrofitting of existing urban stormwater systems? Stay tuned.
- Programs similar to the Lake Okeechobee plans are provided for the Caloosahatchee River Watershed and the St. Lucie River Watershed. Existing programs are realigned to make them consistent with their corresponding BMAPs.
- In a tidbit for the regulated community, the existing doubling up of permitting for the outfalls structures around Lake Okeechobee was dropped by FDEP. SFWMD will continue to obtain a permit from FDEP for its own outfalls.

Enforcement

Provision for enforcement and verification of BMAPs and management strategies was provided in a new section providing that BMAPs are enforceable pursuant to DEP's currently existing suite of enforcement options from warning notices to criminal fines.

Other BMAP Changes

- Each new or revised BMAP in the state will now include appropriate management strategies available through existing water quality protection programs to achieve the TMDL, which may provide for phased implementation; a description of BMPs adopted by rule; a list of projects in priority ranking with cost estimates and completion dates; the source and amount of financial assistance; and the estimated load reduction from each project.

Additional Items of Interest

- A database of conservation lands suitable for public access and recreation will be made available electronically to the public.
- Self-suppliers (those who produce their own water) will join local governments, government-owned and privately owned utilities as entities qualifying for technical assistance with water resource development.
- The water management district annual reports to the legislature will include specifics about water quality and water quantity projects intended to implement BMAPs with priority rankings, cost, source, benefit and level of impairment of the water body involved.
- Water management districts are directed to promote expanded cost-share criteria for additional conservation practices, such as soil and moisture sensors and other irrigation improvements, water-saving equipment, water-saving household fixtures and software technologies that can achieve verifiable water conservation.
- FDEP must adopt a water quality classification to protect surface waters used for treated potable water supply. The criteria will be the same as those presently in use for Class III waters.
- FDEP must establish standards for the collection and analysis of water quantity, water quality and related data.

Akerman has assembled a team of lawyers and public policy professionals, experienced in regulatory and environmental matters, to meet the increasing water resource challenges facing our clients.

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