

Council Substitute for House Bill No. 547

An act relating to water pollution control; amending s. 403.067, F.S.; providing requirements for basin management action plans; allowing such plans to take into account the benefits of pollutant load reduction achieved by point or nonpoint sources, where appropriate; requiring that the Department of Environmental Protection adopt all or part of any such plan, or any amendment thereto, by secretarial order as provided by state law; providing that the provisions of the department's rule relating to the equitable abatement of pollutants into surface waters may not be applied to water bodies or water body segments for which a basin management plan that takes into account future or new expanded activities or discharges has been adopted; authorizing water quality protection programs to include the trading of water quality credits; authorizing the department to adopt rules related to the trading of water quality credits; requiring that such rulemaking include certain provisions; specifying that a water quality credit trading pilot project be limited to the Lower St. Johns River Basin as a pilot project; requiring that the department provide the Legislature with an annual report regarding the effectiveness of the pilot project; providing report requirements; providing that the department may authorize and establish specific requirements for water quality credit trading as part of the Lower St. Johns River Basin adopted basin management action plan; correcting cross-references to conform to changes made by the act; amending s. 403.088, F.S.; authorizing the department to revise a water pollution operation permit under certain circumstances; authorizing the department to issue, renew, or reissue such a permit if a water quality credit trade meets the requirements of 403.067, F.S.; requiring that revised permits be accompanied by an order establishing a schedule for achieving compliance with all permit conditions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsections (7) and (8) of section 403.067, Florida Statutes, are amended, present subsections (9) through (12) are renumbered as sections (11) through (14), respectively, and new subsections (8) and (10) are added to that section, to read:

403.067 Establishment and implementation of total maximum daily loads.—

(7) DEVELOPMENT OF BASIN MANAGEMENT PLANS AND IMPLEMENTATION OF TOTAL MAXIMUM DAILY LOADS.—

(a) Basin management action plans.—

1. In developing and implementing the total maximum daily load for a water body, the department, or the department in conjunction with a water

management district, may develop a basin management action plan that addresses some or all of the watersheds and basins tributary to the water body. Such a plan must shall integrate the appropriate management strategies available to the state through existing water quality protection programs to achieve the total maximum daily loads and may provide for phased implementation of these management strategies to promote timely, cost-effective actions as provided for in s. 403.151. The plan must shall establish a schedule for implementing the management strategies, establish a basis for evaluating the plan's effectiveness, and identify feasible funding strategies for implementing the plan's management strategies. The management strategies may include regional treatment systems or other public works, where appropriate, and, in the basin listed in subsection (10) for which a basin management action plan has been adopted, voluntary trading of water quality credits to achieve the needed pollutant load reductions.

2. A basin management action plan must shall equitably allocate, pursuant to paragraph (6)(b), pollutant reductions to individual basins, as a whole to all basins, or to each identified point source or category of nonpoint sources, as appropriate. For nonpoint sources for which best management practices have been adopted, the initial requirement specified by the plan must shall be those practices developed pursuant to paragraph (c). Where appropriate, the plan may take into account the benefits of provide pollutant load reduction achieved by point or nonpoint sources credits to dischargers that have implemented management strategies to reduce pollutant loads, including best management practices, prior to the development of the basin management action plan. The plan must shall also identify the mechanisms that will address ~~by which~~ potential future increases in pollutant loading ~~will be addressed~~.

3. The basin management action planning process is intended to involve the broadest possible range of interested parties, with the objective of encouraging the greatest amount of cooperation and consensus possible. In developing a basin management action plan, the department shall assure that key stakeholders, including, but not limited to, applicable local governments, water management districts, the Department of Agriculture and Consumer Services, other appropriate state agencies, local soil and water conservation districts, environmental groups, regulated interests, and affected pollution sources, are invited to participate in the process. The department shall hold at least one public meeting in the vicinity of the watershed or basin to discuss and receive comments during the planning process and shall otherwise encourage public participation to the greatest practicable extent. Notice of the public meeting must shall be published in a newspaper of general circulation in each county in which the watershed or basin lies not less than 5 days nor more than 15 days before the public meeting. A basin management action plan shall not supplant or otherwise alter any assessment made under subsection (3) or subsection (4) or any calculation or initial allocation.

4. The department shall adopt all or any part of a basin management action plan and any amendment to such plan by secretarial order pursuant to chapter 120 to implement the provisions of this section.

5. The basin management action plan ~~must shall~~ include milestones for implementation and water quality improvement, and an associated water quality monitoring component sufficient to evaluate whether reasonable progress in pollutant load reductions is being achieved over time. An assessment of progress toward these milestones shall be conducted every 5 years, and revisions to the plan shall be made as appropriate. Revisions to the basin management action plan shall be made by the department in cooperation with basin stakeholders. Revisions to the management strategies required for nonpoint sources ~~must shall~~ follow the procedures set forth in subparagraph (c)4. Revised basin management action plans ~~must shall~~ be adopted pursuant to subparagraph 4.

6. In accordance with procedures adopted by rule under paragraph (9)(c), basin management action plans may allow point or nonpoint sources that will achieve greater pollutant reductions than required by an adopted total maximum load or wasteload allocation to generate, register, and trade water quality credits for the excess reductions to enable other sources to achieve their allocation; however, the generation of water quality credits does not remove the obligation of a source or activity to meet applicable technology requirements or adopted best management practices. Such plans must allow trading between NPDES permittees, and trading that may or may not involve NPDES permittees, where the generation or use of the credits involve an entity or activity not subject to department water discharge permits whose owner voluntarily elects to obtain department authorization for the generation and sale of credits.

7. The provisions of the department's rule relating to the equitable abatement of pollutants into surface waters shall not be applied to water bodies or water body segments for which a basin management plan that takes into account future new or expanded activities or discharges has been adopted under this section.

(b) Total maximum daily load implementation.—

1. The department shall be the lead agency in coordinating the implementation of the total maximum daily loads through existing water quality protection programs. Application of a total maximum daily load by a water management district ~~must shall~~ be consistent with this section and shall not require the issuance of an order or a separate action pursuant to s. 120.536(1) or s. 120.54 for the adoption of the calculation and allocation previously established by the department. Such programs may include, but are not limited to:

a. Permitting and other existing regulatory programs, including water-quality-based effluent limitations;

b. Nonregulatory and incentive-based programs, including best management practices, cost sharing, waste minimization, pollution prevention, agreements established pursuant to s. 403.061(21), and public education;

c. Other water quality management and restoration activities, for example surface water improvement and management plans approved by water

management districts or basin management action plans developed pursuant to this subsection;

d. Trading of water quality credits ~~Pollutant trading~~ or other equitable economically based agreements;

e. Public works including capital facilities; or

f. Land acquisition.

2. For a basin management action plan adopted pursuant to paragraph (a) subparagraph (a)4, any management strategies and pollutant reduction requirements associated with a pollutant of concern for which a total maximum daily load has been developed, including effluent limits set forth for a discharger subject to NPDES permitting, if any, must shall be included in a timely manner in subsequent NPDES permits or permit modifications for that discharger. The department shall not impose limits or conditions implementing an adopted total maximum daily load in an NPDES permit until the permit expires, the discharge is modified, or the permit is reopened pursuant to an adopted basin management action plan.

a. Absent a detailed allocation, total maximum daily loads shall be implemented through NPDES permit conditions that provide for ~~afford~~ a compliance schedule. In such instances, a facility's NPDES permit must shall allow time for the issuance of an order adopting the basin management action plan. The time allowed for the issuance of an order adopting the plan shall not exceed 5 years. Upon issuance of an order adopting the plan, the permit must shall be reopened or renewed, as necessary, and permit conditions consistent with the plan must shall be established. Notwithstanding the other provisions of this subparagraph, upon request by a NPDES permittee, the department as part of a permit issuance, renewal, or modification may establish individual allocations prior to the adoption of a basin management action plan.

b. For holders of NPDES municipal separate storm sewer system permits and other stormwater sources, implementation of a total maximum daily load or basin management action plan must shall be achieved, to the maximum extent practicable, through the use of best management practices or other management measures.

c. The basin management action plan does not relieve the discharger from any requirement to obtain, renew, or modify an NPDES permit or to abide by other requirements of the permit.

d. Management strategies set forth in a basin management action plan to be implemented by a discharger subject to permitting by the department must shall be completed pursuant to the schedule set forth in the basin management action plan. This implementation schedule may extend beyond the 5-year term of an NPDES permit.

e. Management strategies and pollution reduction requirements set forth in a basin management action plan for a specific pollutant of concern shall not be subject to challenge under chapter 120 at the time they are incorpo-

rated, in an identical form, into a subsequent NPDES permit or permit modification.

f. For nonagricultural pollutant sources not subject to NPDES permitting but permitted pursuant to other state, regional, or local water quality programs, the pollutant reduction actions adopted in a basin management action plan shall be implemented to the maximum extent practicable as part of those permitting programs.

g. A nonpoint source discharger included in a basin management action plan ~~must shall~~ demonstrate compliance with the pollutant reductions established ~~under pursuant to~~ subsection (6) by either implementing the appropriate best management practices established pursuant to paragraph (c) or conducting water quality monitoring prescribed by the department or a water management district. A nonpoint source discharger may, in accordance with department rules, supplement the implementation of best-management practices with water quality credit trades in order to demonstrate compliance with the pollutant reductions established under subsection (6).

h. A nonpoint source discharger included in a basin management action plan may be subject to enforcement action by the department or a water management district based upon a failure to implement the responsibilities set forth in sub-subparagraph g.

i. A landowner, discharger, or other responsible person who is implementing applicable management strategies specified in an adopted basin management action plan shall not be required by permit, enforcement action, or otherwise to implement additional management strategies to reduce pollutant loads to attain the pollutant reductions established pursuant to subsection (6) and shall be deemed to be in compliance with this section. This subparagraph does not limit the authority of the department to amend a basin management action plan as specified in subparagraph (a)5.

(c) Best management practices.—

1. The department, in cooperation with the water management districts and other interested parties, as appropriate, may develop suitable interim measures, best management practices, or other measures necessary to achieve the level of pollution reduction established by the department for nonagricultural nonpoint pollutant sources in allocations developed pursuant to subsection (6) and this subsection. These practices and measures may be adopted by rule by the department and the water management districts ~~pursuant to ss. 120.536(1) and 120.54~~, and, where adopted by rule, shall be implemented by those parties responsible for nonagricultural nonpoint source pollution.

2. The Department of Agriculture and Consumer Services may develop and adopt by rule pursuant to ss. 120.536(1) and 120.54 suitable interim measures, best management practices, or other measures necessary to achieve the level of pollution reduction established by the department for agricultural pollutant sources in allocations developed pursuant to subsection (6) and this subsection or for programs implemented pursuant to para-

graph (13)(b) ~~(11)(b)~~. These practices and measures may be implemented by those parties responsible for agricultural pollutant sources and the department, the water management districts, and the Department of Agriculture and Consumer Services shall assist with implementation. In the process of developing and adopting rules for interim measures, best management practices, or other measures, the Department of Agriculture and Consumer Services shall consult with the department, the Department of Health, the water management districts, representatives from affected farming groups, and environmental group representatives. Such rules must ~~shall~~ also incorporate provisions for a notice of intent to implement the practices and a system to assure the implementation of the practices, including recordkeeping requirements.

3. Where interim measures, best management practices, or other measures are adopted by rule, the effectiveness of such practices in achieving the levels of pollution reduction established in allocations developed by the department pursuant to subsection (6) and this subsection or in programs implemented pursuant to paragraph (13)(b) must ~~(11)(b) shall~~ be verified at representative sites by the department. The department shall use best professional judgment in making the initial verification that the best management practices are reasonably expected to be effective and, where applicable, must ~~shall~~ notify the appropriate water management district or the Department of Agriculture and Consumer Services of its initial verification before ~~prior to~~ the adoption of a rule proposed pursuant to this paragraph. Implementation, in accordance with rules adopted under this paragraph, of practices that have been initially verified to be effective, or verified to be effective by monitoring at representative sites, by the department, shall provide a presumption of compliance with state water quality standards and release from the provisions of s. 376.307(5) for those pollutants addressed by the practices, and the department is not authorized to institute proceedings against the owner of the source of pollution to recover costs or damages associated with the contamination of surface water or groundwater caused by those pollutants. Research projects funded by the department, a water management district, or the Department of Agriculture and Consumer Services to develop or demonstrate interim measures or best management practices shall be granted a presumption of compliance with state water quality standards and a release from the provisions of s. 376.307(5). The presumption of compliance and release is ~~shall be~~ limited to the research site and only for those pollutants addressed by the interim measures or best management practices. Eligibility for the presumption of compliance and release is ~~shall be~~ limited to research projects on sites where the owner or operator of the research site and the department, a water management district, or the Department of Agriculture and Consumer Services have entered into a contract or other agreement that, at a minimum, specifies the research objectives, the cost-share responsibilities of the parties, and a schedule that details the beginning and ending dates of the project.

4. Where water quality problems are demonstrated, despite the appropriate implementation, operation, and maintenance of best management practices and other measures required by ~~according to~~ rules adopted under this paragraph, the department, a water management district, or the Department of Agriculture and Consumer Services, in consultation with the

department, shall institute a reevaluation of the best management practice or other measure. Should the reevaluation determine that the best management practice or other measure requires modification, the department, a water management district, or the Department of Agriculture and Consumer Services, as appropriate, shall revise the rule to require implementation of the modified practice within a reasonable time period as specified in the rule.

5. Agricultural records relating to processes or methods of production, costs of production, profits, or other financial information held by the Department of Agriculture and Consumer Services pursuant to subparagraphs 3. and 4. or pursuant to any rule adopted pursuant to subparagraph 2. are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Upon request, records made confidential and exempt pursuant to this subparagraph shall be released to the department or any water management district provided that the confidentiality specified by this subparagraph for such records is maintained.

6. The provisions of subparagraphs 1. and 2. ~~do shall~~ not preclude the department or water management district from requiring compliance with water quality standards or with current best management practice requirements set forth in any applicable regulatory program authorized by law for the purpose of protecting water quality. Additionally, subparagraphs 1. and 2. are applicable only to the extent that they do not conflict with any rules adopted by the department that are necessary to maintain a federally delegated or approved program.

(8) WATER QUALITY CREDIT TRADING.—

(a) Water quality credit trading must be consistent with federal law and regulation.

(b) Water quality credit trading must be implemented through permits, including water quality credit trading permits, other authorizations, or other legally binding agreements as established by department rule.

(c) The department shall establish the pollutant load-reduction value of water quality credits and shall be responsible for authorizing their use.

(d) A person that acquires water quality credits (“buyer”) shall timely submit to the department an affidavit, signed by the buyer and the credit generator (“seller”), disclosing the term of acquisition, number of credits, unit credit price paid, and any state funding received for the facilities or activities that generate the credits. The department shall not participate in the establishment of credit prices.

(e) Sellers of water quality credits are responsible for achieving the load reductions on which the credits are based and complying with the terms of the department authorization and any trading agreements into which they may have entered.

(f) Buyers of water quality credits are responsible for complying with the terms of the department water discharge permit.

(g) The department shall take appropriate action to address the failure of a credit seller to fulfill its obligations, including, as necessary, deeming the seller's credits invalid if the seller cannot achieve the load reductions on which the credits were based in a reasonable time. If the department determines duly acquired water quality credits to be invalid, in whole or in part, thereby causing the credit buyer to be unable to timely meet its pollutant-reduction obligations under this section, the department shall issue an order establishing the actions required of the buyer to meet its obligations by alternative means and a reasonable schedule for completing the actions. The invalidation of credits shall not itself constitute a violation of the buyer's water discharge permit.

~~(9)(8)~~ RULES.—The department is authorized to adopt rules pursuant to ss. 120.536(1) and 120.54 for:

(a) ~~Delisting water bodies or water body segments from the list developed under subsection (4) pursuant to the guidance under subsection (5);~~

(b) ~~Administering Administration~~ of funds to implement the total maximum daily load and basin management action planning programs;

(c) ~~Water quality credit Procedures for pollutant trading among the pollutant sources to a water body or water body segment. By September 1, 2008, rulemaking must be initiated which provides for the following, including a mechanism for the issuance and tracking of pollutant credits. Such procedures may be implemented through permits or other authorizations and must be legally binding. Prior to adopting rules for pollutant trading under this paragraph, and no later than November 30, 2006, the Department of Environmental Protection shall submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives containing recommendations on such rules, including the proposed basis for equitable economically based agreements and the tracking and accounting of pollution credits or other similar mechanisms. Such recommendations shall be developed in cooperation with a technical advisory committee that includes experts in pollutant trading and representatives of potentially affected parties;~~

1. The process to be used to determine how credits are generated, quantified, and validated.

2. A publicly accessible water quality credit trading registry that tracks water quality credits, trading activities, and prices paid for credits.

3. Limitations on the availability and use of water quality credits, including a list of eligible pollutants or parameters and minimum water quality requirements and, where appropriate, adjustments to reflect best-management practice performance uncertainties and water-segment-specific location factors.

4. The timing and duration of credits and allowance for credit transferability.

5. Mechanisms for determining and ensuring compliance with trading procedures, including recordkeeping, monitoring, reporting, and inspections.

At the time of publication of the draft rules on water quality credit trading, the department shall submit a copy to the United States Environmental Protection Agency for review.

(d) The total maximum daily load calculation in accordance with paragraph (6)(a) immediately upon the effective date of this act, for those eight water segments within Lake Okeechobee proper as submitted to the United States Environmental Protection Agency pursuant to subsection (2),~~and~~

(e) Implementation of other specific provisions.

(10) Water quality credit trading shall be limited to the Lower St. Johns River Basin, as defined by the department, as a pilot project. The department may authorize water quality credit trading and establish specific requirements for trading in the adopted basin management action plan for the Lower St. Johns River Basin prior to the adoption of rules under paragraph (9)(c) in order to effectively implement the pilot project. Entities that participate in water quality credit trades shall timely report to the department the prices for credits, how the prices were determined, and any state funding received for the facilities or activities that generated the credits. The department shall not participate in the establishment of credit prices. No later than 24 months after adoption of the basin management action plan for the Lower St. Johns River, the department shall submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the effectiveness of the pilot project, including the following information:

(a) A summary of how water quality credit trading was implemented, including the number of pounds of pollutants traded.

(b) A description of the individual trades and estimated pollutant load reductions that are expected to result from each trade.

(c) A description of any conditions placed on trades.

(d) Prices associated with the trades, as reported by the traders.

(e) A recommendation as to whether other areas of the state would benefit from water quality credit trading and, if so, an identification of the statutory changes necessary to expand the scope of trading.

Section 2. Paragraphs (e) and (f) of subsection (2) of section 403.088, Florida Statutes, are amended to read:

403.088 Water pollution operation permits; conditions.—

(2)

(e) However, if the discharge will not meet permit conditions or applicable statutes and rules, the department may issue, renew, revise, or reissue the operation permit if:

1. The applicant is constructing, installing, or placing into operation, or has submitted plans and a reasonable schedule for constructing, installing, or placing into operation, an approved pollution abatement facility or alternative waste disposal system;

2. The applicant needs permission to pollute the waters within the state for a period of time necessary to complete research, planning, construction, installation, or operation of an approved and acceptable pollution abatement facility or alternative waste disposal system;

3. There is no present, reasonable, alternative means of disposing of the waste other than by discharging it into the waters of the state;

4. The granting of an operation permit will be in the public interest; ~~or~~

5. The discharge will not be unreasonably destructive to the quality of the receiving waters; ~~or~~.

6. A water quality credit trade that meets the requirements of s. 403.067.

(f) A permit issued, renewed, or reissued pursuant to paragraph (e) shall be accompanied by an order establishing a schedule for achieving compliance with all permit conditions. Such permit may require compliance with the accompanying order.

Section 3. This act shall take effect July 1, 2008.

Approved by the Governor June 17, 2008.

Filed in Office Secretary of State June 17, 2008.