

A Retrospective Analysis – The Impact of Florida’s 2016 Water Law On Restoration of Florida’s Springs

By Bob Palmer - September 2017

I. Introduction

SB 552, which contained the “Florida Springs and Aquifer Protection Act”, became law in January 2016. The bill was hailed by its sponsors as a major step forward in the restoration of Florida’s springs. Many springs advocates, including the Florida Springs Council, were less sanguine, as indicated in a December 2015 FSC press release issued a month before an unchanged SB 552 was enacted:

“There are some springs-related provisions in the bill which are worthy of support. Overall, however, FSC does not believe that the pending water bills would restore Florida’s beleaguered springs in the foreseeable future, and we would therefore only support the bills if significant amendments were adopted on the House and Senate floors. The principal problem with the pending bills is that they rely on acceleration of existing tools – BMAPs and MFLs – which have repeatedly proven to be ineffective in restoring springs. Not a single degraded 1st-magnitude spring is on track to be restored to health with a BMAP or MFL. We need new approaches. The amendments which we are recommending offer some of these new approaches.”

Has SB 552 lived up to its promise? Has it fostered helpful solutions? Will it accelerate restoration of springs? Were FSC’s criticisms prescient or were they over-blown? This memo will examine key provisions of SB 552 and evaluate how they’ve played out, nearly two years after its enactment.

II. SB 552 – Some Potentially Positive Provisions

1. **Emergency and Accelerated Minimum Flows and Levels**

Description: A new provision of law (373.402(2), F.S.) provides that the State shall use emergency rulemaking authority to adopt emergency MFLs by July 1, 2017 (or 2026 for three NFWFMD springs) for 30 Outstanding Florida Springs (OFSs).

Assessment: MFLs for 17 OFSs were already in place when the law was enacted. Three other OFSs are located in the NFWFMD. The 2017 deadline, therefore, applied to ten OFSs, and the State has met that deadline for all ten. Permanent rules were adopted in 2017 for four OFSs (Alexander, Gemini, Silver, Silver Glen), while six are under emergency rule, awaiting approval of three permanent rules¹. The Silver Springs emergency MFL was unsuccessfully challenged by the St. Johns Riverkeeper and the permanent rule went unchallenged. Once the

¹ The three permanent MFL rules will cover Rainbow, Kings Bay/Crystal River, and the Suwannee Springs (Falmouth, Lafayette Blue, Troy, Peacock)

Rainbow permanent rule is approved, it will probably be challenged by the Rainbow Conservation Coalition.

The relevant metric for assessing this provision, of course, is whether accelerated MFLs are effective MFLs. Environmental advocates would say no, arguing that these accelerated MFLs are more geared toward protecting groundwater withdrawals than protecting the environment. It may be several years before we will know whether these accelerated MFLs will in fact restore flows to OFSs, whether deemed “significantly harmed” or not.

2. Recovery or Prevention Strategy for MFLs – Phased Implementation

Description: A new provision of law (373.805 F.S.) mandates that any recovery or prevention strategy must contain an implementation plan designed to achieve the adopted MFL within 20 years. It also requires development of a schedule establishing 5-year, 10-year, and 15-year targets for achieving the adopted MFLs.

Assessment: While this provision does provide valuable metrics for restoration, there is no corrective (e.g. required water reservations or cessation of water permitting) for failure to meet either interim or final goals. Further, there are no guidelines for the amount of reductions targeted in each phase, and some recovery strategies have been phased in very slowly. For example, in the 2014 challenge to the Santa Fe/Ichetucknee MFL, Judge Canter ruled that it was acceptable for an initial five-year phase to yield no improvement in flows or levels. A fuller evaluation of this provision will be possible when the first five-year milestones are reached.

3. Harmful to the Water Resources

Description: A new subsection 373.219(3) provides that for OFSs, FDEP shall adopt uniform rules for issuing water-use permits which prevent groundwater withdrawals that are “harmful to the water resources” and adopt by rule a uniform definition of the term “harmful to the water resources”

Assessment: The jury is out on this provision because the rule remains under development, with at least one additional workshop to be scheduled. In the failed 2014 springs bill, the standard which would trigger an MFL violation was toughened from “significant harm” to “harm”. That change was not included in the 2016 legislation. Instead, SB 552 contained 373.219(3) – described by the bill’s sponsors as equivalent to the 2014 provision changing “significant harm” to “harm”. However, depending upon the language in the final rule, 373.219(3) may have little or no effect on water-permitting, and it will certainly not change the MFL evaluation process.

4. Priority Focus Areas

Description: A new section 373.802, F.S. defines “priority focus area” as the area or areas of a springshed where the Floridan Aquifer is generally most vulnerable to pollutant inputs and where there is a known connectivity between groundwater pathways and an OFS. PFAs are to be delineated in BMAPs.

Assessment: The notion of “known connectivity” is concerning because detailed connectivity between groundwater and springs is often unknown, which could result in geographically limited PFAs. However, to date, there have been no serious concerns expressed about PFA delineation. That situation could change since most BMAPs are still under development in advance of the July 2018 deadline.

5. Accelerated Basin Management Action Plans (BMAPs)

Description: A new provision of law (373.807, F.S.) accelerates development of BMAPs for all impaired OFSs and lists required elements of the BMAPs. The new section mandates that each BMAP contain an implementation plan designed to achieve the TMDL within 20 years and requires development of a schedule establishing 5-year, 10-year, and 15-year targets for achieving the TMDL.

Assessment: Twenty-four of the 30 OFSs are impaired, and FDEP is on track to complete 14 BMAPs encompassing these 24 springs by July 2018. It's too early to assess whether these BMAPs will speed up restoration. Early indications (e.g. the draft Suwannee BMAP) suggest that these BMAPs may accurately described nitrogen sources, but time will tell whether the political will exists to carry through what needs to be done to reduce these nitrogen inputs.

The 20-year timeline could be a helpful requirement but, as with the 20-year MFL deadlines, there is no corrective (e.g. fertilizer taxes or mandated septic hook-ups) for failure to meet either interim or final goals. One interesting feature of draft BMAPs to date is that FDEP's targeted nitrogen reductions at each milestone seem to be quite aggressive – for example a 30 percent reduction after five years appears to be the default option.

6. Septics

Description: A new provision of law (373.807(3), F.S.) directs FDEP to develop a septic remediation plan whenever septic within a priority focus area are found to contribute at least 20 percent of nonpoint source nitrogen pollution. The plan shall be adopted as part of the BMAP no later than the first 5-year milestone. FDEP is authorized to fund remediation projects subject to general appropriations.

Assessment: We may have to wait five years to see how this provision plays out and whether funding will be made available. With current technology, the cost of fully implementing this provision is prohibitive. Of the 14 BMAPs for OFSs, we project that 7-10 will require a septic remediation plan once nitrogen-source analysis is completed.

7. Fertilizer Ordinances

Description: A new provision of law (373.807(2), F.S.) directs each local government with an OFS spring inside its boundaries to adopt an urban fertilizer ordinance pursuant to s. 403.9337.

Assessment: Lawn fertilizer reductions necessary to meet BMAP targets will exceed 70 percent in some OFSs. The model ordinance minimally required by this section is not likely to have much of an impact in those instances.

8. Prohibited Activities

Description: A new provision of law (373.811, F.S.) lists five prohibited activities within a priority focus area.

Assessment: Prohibitions related to several activities were weakened from original drafts of the bill. For example, new septic systems are prohibited on lots of less than 1 acre, but only if the new system conflicts with the septic remediation plan incorporated into a BMAP. Likewise, land application of Class A or Class B sewage sludge is allowed if its application is in accordance with a FDEP-approved nutrient management plan. Other problematic activities in PFAs are not listed as prohibited (e.g. industrial wastewater facilities, CAFOs).

9. Metering Permitted Water Usage

Description: Subsection (6) was added to section 373.223, F.S., stipulating that consumptive use permits authorizing withdrawals of 100,000 gallons or more per day from a well of eight inches or more shall be monitored by a water management district, with at least annual reporting.

Assessment: The provision was weakened from Sen. Soto's original concept. All users of 100,000 gallons/day should be metered, reporting should be more frequent, and cost should be borne by the user,

10. Reporting

Description: Two new provisions of law (403.0675, F.S. and 403.928, F.S.) create two new annual reports. The first provision requires FDEP to report on: (1) the status of BMAPs, TMDLs, MFLs, restoration plans, and relevant projects; (2) in cases where milestones are not met, an explanation plus solutions; and (3) agricultural BMP implementation, including response rates; site inspections and methods to verify compliance with BMPs pursuant to BMAPs. The second provision authorizes reports by the Office of Economic and Demographic Research on expenditures for water supply and water quality, as well as an estimate of future expenditures needed to comply with federal and state laws and regulations on these matters. The report should also identify gaps between projected revenues and expenditures.

Assessment: The first 403.0675 report must be completed by July 2018. FDEP did publish a report in December 2016 ("Progress Report: Select First Magnitude Springs and Springs of Regional Significance") which is a helpful source of information on MFL and BMAP status. The requirements for the 403.928 report are ambitious and FDEP has only issued an incomplete, interim report. A full response to the legislative mandate may be years away because OEDR is struggling with interpreting the phrase "necessary to comply with federal and state laws". The report may ultimately prove to be helpful but what might be even more useful would be an independent assessment of the health of springs. Is the health of OFSs improving or getting worse? Why aren't long-standing MFLs working? What are sustainable levels of groundwater withdrawals in each WMD? Are the groundwater models used by WMDs reliable? Will septic remediation ever be affordable? Is any spring on the path to recovery?

III. SB 552 - Potentially Negative Provisions

Critics of SB 552 identified several provisions which they characterized as weakening existing law, including these three:

- Recovery and Prevention Strategies may not depend solely on water-shortage restrictions – 373.0421(2)(b), F.S.
- Any water-use permit denial based on an MFL triggers an automatic review by FDEP of the relevant water supply plan – 373.0421(4), F.S.
- If a water-use permittee uses less water than permitted due to water conservation measures beyond those required in the permit, the permitted allocation may not be modified during the term of the permit – 373.227(5), F.S.

IV. SB 552 – Missed Opportunities

During the 2015-2016 legislative sessions, the Florida Springs Council developed and lobbied for a number of amendments to the omnibus water bill. Only one of these amendments –

a weakened version of FSC's water-metering amendment – was ultimately included in SB 552. The ideas listed below represent missed opportunities to include provisions that would have accelerated restoration of springs.

- Apply the “significant harm” standard to MFLs.
- Each water management districts should estimate a maximum sustainable groundwater withdrawal for that district.
- Authorize FDEP and the WMDs to reserve water for the protection of OFSs.
- Analyses of permit applications and MFLs should include assessments of uncertainty.
- Authorize an independent study of water fees.
- Increase fees on fertilizer sales.
- Within 2 years of BMAP adoption, all agricultural operations must adopt BMPs.
- Exclude CAFOs from OFSs.
- Authorize “responsible management entities” for septics remediation.
- Establish a Florida Springs Advisory Council.
- Name a “Restoration Focus Spring” to be restored within 15 years.
- Mandate peer-review procedures for all groundwater models used in regulation or planning.
- Determine if fully implemented BMPs would enable the TMDL to be met; if not, institute rule-making for advanced BMPs.
- If karstic conditions make certain agricultural operations inconsistent with springs protection, DEP/FDACS should partner to fund conservation easements or crop conversion.
- Fund an alternative North Central FL groundwater model, with appropriate peer-review.
- Authorize aggressive water conservation planning, based on 2008 planning by the SJRWMD.

V. Conclusions

It is still far too early to give a definitive grade to SB 552. As discussed above, the thrust of the legislation was not to provide State regulatory agencies will new tools, but to accelerate the use of existing tools, especially MFLs and BMAPs. The success or failure of the law will depend upon whether these tools are used more effectively than they have been in the past. Much will depend on the scientific rigor with which groundwater and environmental models are developed, on summoning the political will to deal effectively with the hard choices that will have to be made, and on providing robust funding levels in general appropriations bills.

SB 552 – How has it worked out?