

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1123

Environmental Permitting

SPONSOR(S): Williams

TIED BILLS:

IDEN./SIM. BILLS: SB 2016

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Agriculture & Natural Resources Policy Committee	18 Y, 0 N, As CS	Kliner	Reese
2) General Government Policy Council		Kliner	Hamby
3) Natural Resources Appropriations Committee			
4) Full Appropriations Council on General Government & Health Care			
5)			

SUMMARY ANALYSIS

The bill states that it is the Legislature’s intent to facilitate the coordination between state and federal agencies responsible for environmental permitting to eliminate, where possible, duplication of permitting caused by overlapping regulations for activities that affect wetlands and waters of the United States. The bill authorizes the Department of Environmental Protection (DEP) to seek to obtain authorization by the U.S. Army Corps of Engineers (COE) to develop an expanded state programmatic general permit, or regional permits for activities that will cause only minimal adverse environmental effects. In exchange for that authorization the state will add slash pine and gallberry to the state list of facultative species to more closely align the state and federal wetland delineation. The DEP is required to report annually to the legislature on its efforts to achieve efficiencies in permitting through the above referenced actions.

The bill authorizes the DEP and water management districts to implement a state programmatic general permit (SPGP) for dredge and fill activities affecting up to 5 acres if the COE agrees and if the general permit is at least as protective of the environment and natural resources as existing state law. The bill provides for a conditional ratification of the DEP’s vegetative index for wetlands delineation, dependent upon the alignment of the state and federal delineation. The bill preserves declaratory statements made by the DEP pursuant to s. 403.914, F.S., 1984 Supplement, or by the DEP or a water management district regarding delineation methods in response to a petition filed on or before the effective date of the SPGP.

The bill directs the DEP and water management districts to compare their rules regarding mitigation to the mitigation rules of the COE and the Environmental Protection Agency (EPA) and to: (a) identify inconsistent or contradictory provisions; (b) recommend revisions to DEP or district rules to reduce redundant or duplicative requirements; and, (c) recommend ways of increasing the geographic size of drainage basins and regional watersheds to better facilitate or reflect a watershed approach to mitigation. Unless directed otherwise by state law, the DEP and the districts shall amend their rules to eliminate inconsistent or contradictory provisions, reduce redundant or duplicative requirements, and increase the geographic size of drainage basins and regional watersheds. The DEP and the districts are required, by January 1, 2010, to submit to the Governor and the Legislature, a consolidated report regarding the above mitigation requirements and identifying any state law which prevents them from amending their rules to accomplish the objectives of this section.

According to the DEP the fiscal impact is indeterminate pending actual adoption of a revised SPGP, but any increased costs should be offset by permit streamlining.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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DATE: 3/25/2009

HOUSE PRINCIPLES

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Regulation of Florida's wetlands starts with the federal government. The federal wetland regulatory program is administered under two federal laws. The first is Section 10 of the Rivers and Harbors Act of 1899. This Act prohibits the construction of any bridge, dam, dike, or causeway over or in navigable waterways of the United States without Congressional approval. Structures authorized by state legislatures may be built if the affected navigable waters are completely within one state, provided the plan is first approved by the Chief of Engineers and the Secretary of the Army. The Act also prohibits the building of wharfs, piers, jetties, and other structures without approval.

The second law is the Clean Water Act. In 1972, Congress substantially amended the Federal Water Pollution Control Act and initiated the Clean Water Act (CWA). Section 404 of the CWA is the foundation for federal regulation of some activities that occur in or near the nation's wetlands. The regulatory plan is intended to control discharge from dredge or fill materials into wetlands and other water bodies throughout the U.S.

Under section 404 of the CWA and section 10 of the Rivers and Harbors Act, the COE and the EPA share responsibility for implementing a permitting program for dredging and filling wetland areas.

For the most part, the use of federal and state methods results in similar wetland boundaries. There are two exceptions. The first is the federal plant list. It shows slash pine and gallberry as wetland indicator plants. The Florida plant list shows these two plants as upland indicators, although the DEP argues that biologically, the plants should be neutral and not indicate wetlands or uplands. The second exception is that the state's methodology relies on the Federal Natural Resources Conservation Service soils manual and the federal methodology does not in certain circumstances (ex: the use of "high organics" in the surface horizon to indicate wetlands). As a result, a strict application of the federal methodology delineates the wetland boundary "higher" in some pine flatwoods and improved pasture than does the state methodology.¹

¹ On February 23, 2006, Florida's Environmental Regulation Commission approved an amendment to the DEP's wetland delineation rule. According to DEP, this rule change was in response to legislative direction in HB 759 in the 2005

Effect of Proposed Changes

The bill states that it is the Legislature's intent to facilitate the coordination between state and federal agencies responsible for environmental permitting to eliminate, where possible, duplication of permitting caused by overlapping regulations for activities that affect wetlands and waters of the United States. The bill authorizes the DEP to seek to obtain authorization by the COE to develop an expanded state programmatic general permit, or regional permits for activities that will cause only minimal adverse environmental effects. In exchange for that authorization, the state will add slash pine and gallberry to the state list of facultative species to more closely align the state and federal wetland delineation. The DEP is required to report annually to the legislature on its efforts to achieve efficiencies in permitting through the above referenced actions.

The bill provides for a conditional ratification of DEP's amendment to the wetland delineation rule and preserves declaratory statements made by the DEP pursuant to s. 403.914, F.S., 1984 Supplement, or by the DEP or a water management district regarding delineation methods in response to a petition filed on or before the effective date of the SPGP, and grants the following exemptions:

- Agricultural lands and silvicultural lands affected by conversion of non-wetland pine flatwoods as defined by the rule change;
- Permits that were field-verified or approved by the permitting agency prior to implementation of the methodology; and
- A modification of an existing permit unless the modification is a substantial modification,

The bill directs the DEP and water management districts to compare rules regarding mitigation to the mitigation rules of the COE and the EPA and to: (a) identify inconsistent or contradictory provisions; (b) recommend revisions to DEP or district rules to reduce redundant or duplicative requirements; and, (c) recommend ways of increasing the geographic size of drainage basins and regional watersheds to better facilitate or reflect a watershed approach to mitigation. Unless directed otherwise by state law, the DEP and the districts shall amend their rules to eliminate inconsistent or contradictory provisions, reduce redundant or duplicative requirements, and increase the geographic size of drainage basins and regional watersheds. By January 1, 2010, the DEP and the districts are required to submit to the Governor and to the Chairs of the environmental committees for the House of Representatives and the Senate, a consolidated report regarding the above mitigation requirements and identifying any state law which prevents them from amending their rules to accomplish the objectives of this section.

B. SECTION DIRECTORY:

Section 1 amends s. 373.4144, F.S., providing legislative intent; revising provisions requiring the DEP to develop and utilize a mechanism consolidating federal and state wetland permitting programs; authorizing implementation of a state programmatic general permit or regional general permits by the department and water management districts; requiring the DEP and water management districts to compare state mitigation rules with federal mitigation rules and providing recommendations; requiring the DEP and the district to submit a report by January 1, 2010.

Section 2 amends subsection (19) of section 373.4211, F.S., providing for conditional ratification of the state vegetative index, preserving declaratory statements made by the DEP, and providing certain exceptions.

Session, to streamline State and Federal permitting programs and was included in the department's October 3, 2005 report to the Legislature required by HB 759. The rule amendment changes the status of gallberry and slash pine from being indicators of upland areas to being neutral. Under chapter 373, F.S., the rule amendment does not become effective until formally ratified by the Florida Legislature. The Legislature has not ratified the rule amendment.

Section 3 provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Part D, FISCAL COMMENTS

2. Expenditures:

See Part D, FISCAL COMMENTS

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See Part D, FISCAL COMMENTS

2. Expenditures:

See Part D, FISCAL COMMENTS

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Costs to the private sector are indeterminate pending actual adoption of a revised SPGP but any increased costs should be offset by permit streamlining.

Benefits would occur for those projects meeting the criteria of an expanded SPGP, i.e. applicants would only need a permit from the state. Also, if watershed plans could be developed, this could possibly give applicants more mitigation options. Ratification of the slash pine and gallberry amendment contingent on formal alignment of the federal and state delineation methods will not provide any private sector benefit as it is not likely to occur due to federal opposition. Direct ratification on the other hand will provide the real world cost savings to the private sector of reducing surveying costs and consultant field time not just for the SPGP but all projects in the state.

D. FISCAL COMMENTS:

According to DEP staff, there is no fiscal impact associated with granting the DEP authority to enter into an SPGP with the COE and, in fact, the DEP has already done so. To the extent, as the legislation suggests, a future SPGP requires that applicants using the SPGP accept the more landward of the federal or state wetland line and be subject to any federal review criteria not included in state law, there will be additional staff costs associated with training on those additional requirements. Since the federal method is much more complex and requires more detailed book keeping these costs could be significant. Establishing which wetland line is more landward can involve a great deal of additional field work. Setting the federal wetland line is further complicated by recent U.S. Supreme Court decisions that have complicated determining what wetland areas are subject to federal jurisdiction. However, to date making that distinction has not been a requirement of the SPGP issued to the state of Florida.

Review of the federal and state mitigation requirements can be accomplished with existing staff. Pending that review it's not possible to estimate the costs associated with resolving inconsistencies although it should be emphasized that both the federal and state rules have built in flexibility that allows selection of the best onsite or offsite mitigation option on a project by project.

Any impact associated with ratification of the gallberry and slash pine amendments to rule 62-340.450(3), F.A.C., should the federal and state wetlands methodologies become aligned, is expected to be minimal.

The DEP would include any additional or new requirements into its regular training programs but at this stage the extent of additional costs cannot be determined and may be significant, at least initially, and upon each revision or update of the SPGP could result in additional requirements such as additional dichotomous keys for analysis. Therefore, each revision could result in additional staff expenses in both training and implementation of the SPGP. Further, since the federal delineation method has been subject to many slight revisions over the years, costs for recurring staff training will be required on any future change.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None noted.

B. RULE-MAKING AUTHORITY:

The bill directs the DEP and the water management districts to amend their rules to eliminate inconsistent or contradictory provisions, reduce redundant or duplicative requirements, and increase the geographic size of drainage basins and regional watersheds “to better facilitate or reflect a watershed approach to mitigation.”

On March 31, 2008, the EPA and the U.S. Army Corps of Engineers issued revised regulations governing compensatory mitigation for authorized impacts to wetlands, streams, and other waters of the U.S. under Section 404 of the Clean Water Act. According to the EPA website, these revisions are designed to improve the effectiveness of compensatory mitigation to replace lost aquatic resource functions and area, expand public participation in compensatory mitigation decision making, and increase the efficiency and predictability of the mitigation project review process. It is noted that the federal and state approach to mitigation follows a similar sequence of (a) avoidance of impacts, (b) minimization of impacts, and (c) compensation for unavoidable, adverse impacts. There are still fundamental differences between the federal and state approach to mitigation that may obstruct rule alignment. For example, in determining mitigation credits, the federal approach is expressed in units of measure (e.g., acres, linear feet), which do not adequately account for wetland functions and values, which is the state’s approach.²

In regard to the bill’s rules comparison exercise; it is unclear whether the DEP and the districts must amend inconsistent or contradictory provisions as between themselves, or collectively as between the federal rules, or both. It is unclear to what extent redundant or duplicative requirements should be reduced, and again, whether the duplicative rules under comparison are those within districts and the DEP, state rules versus federal rules, or both. Some duplication of regulation may be necessary, to the extent that the state exercises authority delegated to it by the federal government.

² <http://www.epa.gov/wetlandsmitigation/#facts> . Federal Register / Vol. 73, No. 70 / Thursday, April 10, 2008 / Rules and Regulations, page 19659.

In regard to the directive that water management districts increase the geographic size of drainage basins; according to the Commission for Environmental Cooperation³, the two watershed draining areas in the state (Atlantic Ocean/Seaboard and the Gulf of Mexico/Seaboard)⁴ are extensions of watershed basins whose origins extend far beyond the Florida state line. Notwithstanding the jurisdictional boundary of the state, it is unclear to what extent the five water management districts could act without legislative authority as their own jurisdictional boundaries are provided in statute.⁵

C. DRAFTING ISSUES OR OTHER COMMENTS:

Staff was informed that the COE is taking the lead in revising the regional and national wetland plant lists, including the Southeast List (now Atlantic and Gulf Coastal Plain). This represents an opportunity for changes to the indicator status of plants on the Southeast List, including gallberry and slash pine. If the two species are given the appropriate neutral classification, then the federal and state delineation will be closer in regard to wetland indicator plant species. Ratification of the two species by the Legislature would enable the DEP to approach the COE for increased SGPG authority.

The bill provides for a conditional ratification of the DEP's vegetative index for wetlands delineation. If the state and federal wetland delineation was affected by the changes to the federal plant list, the Legislature would still need to officially ratify the administrative rule.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 17, 2009, the Agriculture and Natural Resources Committee adopted one amendment offered by the bill's sponsor. The amendment tied the ratification of the vegetative index to the federal delegation of a 5 acre statewide programmatic general permit authorization.

³ The Commission for Environmental Cooperation (CEC) is an international organization created by Canada, Mexico and the United States under the North American Agreement on Environmental Cooperation (NAAEC). The CEC was established to address regional environmental concerns, help prevent potential trade and environmental conflicts, and to promote the effective enforcement of environmental law. http://www.cec.org/who_we_are/index.cfm?varlan=english

⁴ See, <http://www.cec.org/naatlas/img/NA-Watersheds.gif>

⁵ Section 373.069 , F.S.