The Florida Senate

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Committee on Environmental Preservation and Conservation

SELF CERTIFICATION AND ENVIRONMENTAL PERMITTING REQUIREMENTS

Issue Description

During the past two regular legislative sessions, proposals have been put forward that would allow certain licensed professions to self certify that certain activities impacting wetlands meet the permitting requirements necessary to receive an Environmental Resource Permit under chapter 373, Florida Statutes. Though the proposals have not been adopted, they represent additional measures under consideration to streamline the environmental permitting process. The most recent streamlining effort is the passage of legislation that modified delegation of permit decision making by the water management districts and established a specific method for local governments to seek authority to issue state permits.

Background

Wetland Resources in Florida

Florida has a complex and diverse landmass encompassing two distinct climate zones. The subtropical zone, often called the temperate zone, covers most of the peninsula. The tropical zone extends from south of Lake Okeechobee to the Florida Keys.[1] This leads to a great diversity of environments and plant and animal life. Florida is characterized by its water: surface, ground and precipitation. The state receives an average of over 54 inches of rainfall a year.[2] 2009 was no exception with most areas receiving near average levels. Florida also has 7,700 lakes, 50,000 miles of rivers and streams and over 700 springs, including the greatest concentration of first magnitude springs in the world.[3]

One of Florida's other key characteristics is its vast wetlands, including the Everglades, that cover the land. Wetlands are defined as being neither dry nor covered by open water but continually influenced by water. At times, wetlands may be dry for months or even years, or they may be covered with water the majority of the time only drying out for short periods.[4] They can be difficult to identify and delineate due to their varying nature.

History of Wetland Regulation in Florida

In the past, Floridians viewed wetlands as an impediment to development. They were considered worthless swamp that needed to be drained, filled and put to productive use. One of the main efforts in Florida to drain the swamps was the Central and Southern Florida Project's authorization in 1948.[5] The purpose of the project was to drain and manage seasonal flooding in the Everglades. Nationwide wholesale destruction of wetlands remained relatively unregulated until passage of the federal Clean Water Act (CWA) in 1972.[6] Florida's regulatory

[1] National Oceanic and Atmospheric Administration, *National Weather Service: JetStream - Online School for Weather*, http://www.srh.noaa.gov/jetstream/global/climate.htm (last visited Sep. 29, 2010).
[2] Department of Environmental Protection (DEP), *Florida Drought Conditions*, http://www.dep.state.fl.us/Drought/faq.htm#01 (last visited Sept. 29, 2010).
[3] Thomas M. Scott, et al., *Bulletin NO. 66, Springs of Florida* (2004), *available at* http://publicfiles.dep.state.fl.us/FGS/WEB/springs/introduction_and_acknowledgements.pdf (last visited Sept. 29, 2010).
[4] DEP, *Florida State of the Environment – Wetlands: A Guide to Living with Florida's Wetlands*, *available at* http://www.dep.state.fl.us/water/wetlands/docs/erp/fsewet.pdf (last visited Sep. 13, 2010).
[5] South Florida Water Management District, *Comprehensive Everglades Restoration Plan, Everglades: A Brief History*, http://www.evergladesplan.org/about/learn_everglades.aspx (last visited Sep. 14, 2010).
[6] U.S. Environmental Protection Agency (EPA), *Watershed Academy Web, Introduction to the Clean Water Act*, http://www.epa.gov/owow/watershed/wacademy/acad2000/cwa/ (last visited Sep 28, 2010).

framework consisted of the Wetlands Resource Permit (WRP) program, the Management and Storage of Surface Waters (MSSW) permit program and the Sovereign Submerged Lands program.[7]

The WRP program regulated dredging, filling and construction activities in, on or over waters of the state. It was originally authorized pursuant to the Warren S. Henderson Wetlands Protection Act in 1984, found in ss. 403.91 - 403.929, F.S.[8] Waters of the state included natural and artificial water bodies and contiguous wetlands to such water bodies but excluded isolated wetlands. The only impacts to isolated wetlands covered by the WRP program were those that affected endangered or threatened species related or tied to regulated wetlands impacts. The WRP program was further limited by excluding water quantity as part of the permit review process. Only water quality, fish and wildlife habit and other public interest factors were within its purview.[9]

The Northwest Florida Water Management District is the only water management district (WMD) remaining in Florida that still administers parts of the WRP program. On October 1, 2007, Phase I of the Environmental Resource Permit (ERP) program became effective in the Northwest Florida district. This phase focuses on activities that have the potential to generate stormwater runoff and looks at regulating the quality of runoff for all activities, and the quantity for those activities that exceed specific parameters.[10] Rule 62-346, F.A.C., for Phase 2 is in final development and scheduled for adoption and implementation on November 1, 2010. This phase adds environmental criteria, including regulation of dredging and filling in, on, or over connected and isolated wetlands and other surface waters to the Phase 1 rules governing stormwater management systems.[11] Adoption of this rule will complete the transition to the ERP program in this district.

The MSSW program was administered by the WMDs. The program regulated work on stormwater treatment systems, water attenuation systems, dams, impoundments, reservoirs, and other works, including agricultural and forestry-related activities. It was broader than the WRP program and covered water quality, water quantity and other environmental criteria for activities in uplands and wetlands, including isolated wetlands.

The Sovereign Submerged Lands program is still in operation today and is administered jointly with the ERP program and the Northwest Florida district's remaining WRP program. Sovereign submerged lands are owned by the state and held in Trust for its citizens.[12] Activities affecting those lands require permission from the state, which is called proprietary authorization.[13] Sovereign submerged land leases and easements are the most common form of authorization.

Current Wetland Regulation in Florida

Florida, through the Department of Environmental Protection (DEP, department) and the WMDs implements a state permitting process that is independent and in addition to the federal regulatory permitting programs. Wetland permits are handled either under part IV of chapter 373, F.S., the ERP program, or the WRP program, for those activities that occur in the Northwest Florida WMD until adoption and implementation of Phase 2.

Wetlands are defined by statute and administrative rule in Florida.

> [Wetlands are] areas that are inundated or saturated by surface water or ground water at a frequency and a duration sufficient to support, and under normal circumstances do support, a

[7] *Supra* note 4, at 7.
[8] DEP, *Environmental Resource Permitting (ERP) and Sovereign Submerged Lands (SSL) Rules*, http://www.dep.state.fl.us/water/wetlands/erp/wetperm.htm (last visited Sep. 23, 2010).
[9] *Supra* note 4, at 7.
[10] Northwest Florida Water Management District, *Environmental Resource Permits*, http://www.nwfwmd.state.fl.us/permits/permits-ERP.html (last visited Sep. 14, 2010).
[11] DEP, *Draft Rule Amendments of the ERP Program in the Northwest District*, http://www.dep.state.fl.us/water/wetlands/erp/rules/draft_nw.htm (last visited Sep. 28, 2010).
[12] Sovereign submerged lands are those lands that lie waterward of the ordinary high water line (fresh water) or mean high water line (tidal waters) beneath navigable waters. The state submerged land boundary extends three nautical miles (3.45 miles) into the Atlantic Ocean and three marine leagues (10.36 miles) into the Gulf of Mexico.
[13] *Supra* note 4, at 8.

> prevalence of vegetation typically adapted for life in saturated soils…Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas. *Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto* [emphasis added].[14]

However, the federal government, through the United States Army Corps of Engineers (Corps), developed a definition for wetlands in 1977 that differs from Florida's definition. The Corps uses its definition to apply the permit program of Section 404 of the CWA.[15] The definition reads, in part:

> [Wetlands are] areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.[16]

While defining wetlands can be complex, delineation of wetlands is a greater challenge. Rule 62-340.300, F.A.C., governs wetlands delineation in Florida. However, any changes to the methodology in this section do not become effective until Legislative ratification.[17] The section reads, in part:

> The landward extent (i.e., the boundary) of wetlands as defined in subsection 62-340.200(19), F.A.C., shall be determined by applying reasonable scientific judgment to evaluate the dominance of plant species, soils, and other hydrologic evidence of regular and periodic inundation and saturation as set forth below. In applying reasonable scientific judgment, all reliable information shall be evaluated in determining whether the area is a wetland as defined in subsection 62-340.200(19), F.A.C.

Trained professionals can identify and delineate wetlands from uplands by looking for unique traits found only in wetlands. Certain plants and plant adaptations, surface and subsurface soil characteristics and physical markings in the environment, such as water staining, are all indicators of wetlands.[18] The methodology and vegetation list outlined in rule 62-340.300, F.A.C., is used by all state and local government entities in Florida.[19] The federal government uses a different methodology and vegetation list for wetland delineation that may lead to significant deviations from state delineations.[20] Florida has identified slash pine (*pinus elliottii*) and gallberry (*ilex glabra*) as upland plant species, while the federal criteria considers them to be generally indicative of wetlands.[21] In 2006, the Florida Environmental Regulations Commission amended Florida's delineation criteria to consider both species as facultative or "invisible" when assessing vegetation, but the Legislature has yet to ratify the rule change.[22] A facultative species is not indicative of either wetland or upland and is not considered in the delineation methodology. Even if the Legislature were to ratify the amendment to the rule, the federal and state delineation methodologies would still be different. However, the real-world application of aligning the two methodologies would likely result in virtually identical delineations in nearly all cases.

Currently, for wetland activities that require both state and federal permits, the state and the Corps must delineate the wetland boundaries by their separate methods using their respective vegetative indices. Even though the

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[14] Fla. Stat. § 373.019(17) (2010) and Fla. Admin Code R. 62-340.200(19).
[15] 33 U.S.C. § 1344 (2010).
[16] EPA, *Wetland Regulatory Authority* (2004), *available at* http://water.epa.gov/grants_funding/wetlands/upload/2004_4_3-_wetlands_reg_authority_pr.pdf (last visited Sep. 14, 2010).
[17] Fla. Stat. § 373.421(1) (2010), and Fla. Stat. § 373.4211(26) (2010).
[18] *Supra* note 4, at 2.
[19] Rule 62-340, F.A.C., was ratified by the Florida legislature in 1994 as s. 373.4211, F.S., to ensure all statewide agencies could use this method.
[20] DEP, *Summary of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida* (2007), *available at* http://www.dep.state.fl.us/water/wetlands/docs/erp/overview.pdf (last visited Sep. 13, 2010).
[21] US Army Corps of Engineers, *National Wetland Plant List* (1996), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/plants/national.pdf (last visited Sep 28, 2010).
[22] This amendment was adopted on Feb. 23, 2006.

vegetative indices are different, in practice, most federal and state wetland delineations are similar to each other. Although, as stated above, there are isolated cases where large variations occur.[23] Since Florida's permit must be issued prior to the federal permit, and Florida's wetlands criteria are less inclusive than the federal criteria, the federal permit may be approved with additional permit conditions if the delineations differ significantly. However, under this scenario, the project will likely impact additional federal wetlands that require mitigation.

Wetland Mitigation in Florida

Section 373.414(18), F.S., directed the department and the WMDs, in cooperation with local governments and the relevant federal agencies, to develop a state-wide method to assess wetlands and determine the amount of mitigation required for regulatory permits. The Uniform Wetland Assessment Method (UMAM) rule went into effect on February 2, 2004.[24] The department was the only agency required to adopt the method by rule; however, it is now the sole means that all state and local government entities use to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters. It is also used to determine mitigation bank credits awarded and debited.[25]

Although UMAM is used by all state and local agencies, the state cannot require the Corps to use it. Nonetheless, the Corps' Jacksonville office conducted a study of UMAM and recommended that it be used for federal wetland regulatory purposes starting August 1, 2005. The Corps continues to use its time lag table rather than the state's time lag table for assessment purposes.[26] The time lag associated with mitigation means the period of time between when the wetland functions are lost at an impact site and when the mitigation site has achieved the outcome that was scored as part of the UMAM process.[27]

State Regulation in Peninsular Florida

In the jurisdiction encompassing all WMDs except for the Northwest Florida district, Florida's wetland program is regulated by the ERP program. It regulates virtually all alterations to the landscape, including all tidal and freshwater wetlands and other surface waters (including isolated wetlands also subject to Corps jurisdiction) and uplands. The ERP program regulates dredging and filling in wetlands and other surface waters, stormwater runoff quality and quantity, including runoff resulting from alterations of uplands, and direct, secondary and cumulative impacts.[28] The program regulates everything from construction of residential and commercial buildings in wetlands and uplands, dredging and filling in both wetlands and other surface waters (including maintenance dredging), construction of roads, and agricultural alterations that impede or divert the flow of surface waters.

Department issuance of an ERP also constitutes a water quality certification or waiver of such under section 401 of the CWA.[29] In addition, issuance of an ERP in coastal counties constitutes a finding of consistency under the Florida Coastal Zone Management Program under Section 307 of the federal Coastal Zone Management Act.[30] The ERP program is implemented jointly by the department and the four WMDs, in accordance with an operating agreement that identifies the respective division of responsibilities.[31]

In addition to meeting the permit conditions, all projects and activities must also meet the public interest balancing test.[32] The test is based on weighing the following criteria:[33]

- Whether the regulated activity will adversely affect public health, safety, or welfare, or the property of others;[34]

[23] *Supra* note 20, at 5.
[24] Fla. Admin Code R. 62-345.
[25] DEP, *Mitigation and Mitigation Banking*, http://www.dep.state.fl.us/water/wetlands/mitigation/umam.htm (last visited Sep. 28, 2010).
[26] *Id*.
[27] Fla. Admin Code R. 62-345.600(1).
[28] *Supra* note 20, at 8.
[29] 33 U.S.C. § 1341 (2010).
[30] 16 U.S.C. § 1456 (2010).
[31] *Supra* note 20, at 1.
[32] Fla. Stat. § 373.414(1)(a) (2010).
[33] *Supra* note 20, at 8.

- Whether the regulated activity will adversely affect the conservation of fish and wildlife, including endangered and threatened species, or their habitats;
- Whether the regulated activity will adversely affect navigation or the flow of water, or will cause harmful erosion or shoaling;
- Whether the regulated activity will adversely affect fishing or recreational values or marine productivity in the vicinity of the activity;
- Whether the regulated activity will be of a temporary or permanent nature;
- Whether the regulated activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061, F.S.; and
- The current condition and relative value of the functions being performed by areas affected by the proposed regulated activity.

State Regulation in the Northwest Florida Water Management District

In the Northwest Florida WMD only, the DEP and the WMD jointly administer the WRP program to regulate stormwater management systems. As stated earlier, the remaining components of the comprehensive Northwest ERP program, including regulation of isolated wetlands, are scheduled for adoption and implementation on November 1, 2010. Until the rules authorized under s. 373.4145(1)(b), F.S., become effective, the WRP program remains in effect. This program regulates dredging and filling in all tidal and freshwater wetlands and other surface waters that are connected (by one or more natural or artificial waters) to other bays, bayous, streams, rivers, lakes, estuaries, or the Gulf of Mexico. It does not regulate dredging or filling in isolated wetlands. Issuance of a wetland resource permit also constitutes a water quality certification or waiver thereto under section 401 of the CWA,[35] and a finding of consistency under the Florida Coastal Zone Management Program.[36] The regulated activity is also subject to the same public interest balancing test under the ERP program.[37]

Federal Permitting in Florida

For activities occurring in "waters of the United States" in Florida, including wetlands, the EPA and the Corps require compliance with and regulate activities under the authority of the Section 404 of the CWA.[38] Wetlands are also regulated under Section 10 of the federal Rivers and Harbors Act of 1899,[39] although the focus of this legislation is primarily maintaining navigable waters.[40] When a dredge and fill permit is required in addition to permits required by the state, it is issued independently from the DEP permit or the WMD permit and is reviewed by the Corps. However, the Corps' issuance of the permit is dependent on the applicant first receiving state water quality certification or waiver through the ERP or WRP programs under section 401 of the CWA. If the permitted activity is in a coastal county, the application must also have received a finding of consistency with the Florida Coastal Zone Management Program.[41]

In addition to permits issued under the CWA and the federal Rivers and Harbors Act, the Corps also administers the National Pollution Discharge Elimination System (NPDES) permit program. The Corps has delegated the authority to Florida to implement this program for stormwater systems, including municipal systems, certain industrial activities and construction activities. The WMDs do not have delegated authorization from the EPA to implement this program. The EPA has determined that the separate WMDs do not constitute a central state authority, and therefore, they do not have the state-wide consistency required for federal delegation of the NPDES permit program.

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[34] This part of the test considers only environmental factors, not economic or social factors.
[35] 33. U.S.C. § 1341 (2010).
[36] *Supra* note 20, at 1.
[37] *Supra* note 20, at 8.
[38] 33 U.S.C. §§ 1251-1387 (2010).
[39] 33 U.S.C. § 403 (2010).
[40] DEP, *Consolidation of State and Federal Wetland Permitting Programs, Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)* (2005).
[41] *Supra* note 20, at 2.

The Corps has also delegated to Florida the authority to issue federal dredge and fill permits under Section 404 of the CWA for certain activities. These are known as State Programmatic General Permits (SPGPs). Under this delegated authority, the department may issue state authorization for limited state exemptions and noticed general permits for shoreline stabilization, docks, boat ramps, and maintenance dredging that constitute federal authorization. Such authorization may be subject to additional specific federal conditions, however.[42] Permit applications are issued color codes. "Green" applications are those that meet all conditions of the SPGP and are processed as meeting the federal dredge and fill permit conditions as well. "Yellow" applications do not meet the federal conditions and are either returned to the state for additional processing with or without additional federal conditions or are retained by the Corps for processing.[43] The DEP has expressed interest in expanding the SPGP program for activity-specific categories, subject to acreage limitations. In addition to a closer alignment of state and federal wetland delineation methods, changes to statutes or rules must be made to address federal coordination and consultation requirements for threatened and endangered species.

State Delegation of Environmental Resource Permits to Local Governments

Local governments are entitled to request delegation authority from the DEP for a variety of programs, with the DEP's authority to approve those delegations based on Florida law. With respect to programs related to section 404 of the CWA, both wastewater and ERP programs may be delegated to local governments, but delegation is permissive, not mandated. The various delegations are periodically updated in rule 62-113, F.A.C.[44] Currently, only Broward County has a received an ERP program delegation, but the DEP is processing requests by Miami-Dade and Hillsborough Counties. In general, delegations are requested by larger local governments that have the resources to implement and oversee these complex permitting programs.

Self-Certification of Single-Family Dock Permitting in Florida

Self-certification of permit requirements is the process of the permitting agency allowing "applicants" to manage their own compliance for a given regulated activity. The regulating agency sets up the specific requirements of the permit, and if followed, "applicants" do not apply for permits in the traditional sense. They simply undertake the regulated activity and "self-certify" that they have complied with all conditions of the permit. The permitting of certain single-family docks in Florida is a bona fide self-certification program, although it is not available for single-family dock construction in all situations. The following conditions apply to the self-certification program for single-family docks:[45]

- The dock being constructed is the only dock on the parcel and is less than 500 square feet, or 160 square feet if located in an aquatic preserve.
- The dock will be constructed on or held in place by pilings.
- The process may only be used once per any individual single-family parcel of land as identified on the applicable county tax roles.
- No dredging is authorized by this process, other than that necessary to install pilings.
- The dock must not substantially impede the flow of water, cause water pollution or create a navigational hazard.
- The dock is used for recreational, noncommercial use.
- The process is applicable only where ownership of the upland property extends to the mean high or ordinary high water line.

The self-certification process cannot be used in the following situations:[46]

- Repairing or replacing an existing dock.
- When the dock will be within the Biscayne Bay, Lake Jackson, Boca Ciega Bay, Pinellas County Aquatic Preserves, or on Lake Talquin.

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[42] *Supra* note 20, at 12.
[43] *Id*.
[44] DEP, *Delegations, available at* http://www.dep.state.fl.us/legal/Rules/shared/62-113/62-113.pdf (last visited Sep. 29, 2010).
[45] DEP, *Self-Certification for Single-Family Docks*, http://appprod.dep.state.fl.us/erppa/erpsc.asp (last visited Sep. 14, 2010).
[46] *Id*.

- Construction of a dock in the Florida Keys.
- Construction of a dock on lands under the jurisdiction or management of the DEP Division of Recreation and Parks.
- When the dock will be located in a manatee "No Entry Zone" or "Motorboat Prohibited Zone" as specified in chapter 68C-22, F.A.C.
- Construction of a dock on an unbridged, undeveloped coastal island, an undeveloped coastal island segment, or undeveloped coastal barrier islands.
- When the dock will be located in an area where a conservation easement or restrictive covenant of record prohibits the activity.

Floating vessel platforms and floating boat lifts are not authorized by the self-certification program, but may qualify for other exemptions or other general permits.[47] In addition, piers are not authorized under this program.[48] If the dock does not qualify for self-certification, the applicant will have to go through the regular permitting process. The self-certification also includes a Corps authorization component. If the applicant's dock is qualified, this process will provide a written confirmation so that no further contact with the DEP is necessary. However, other authorization may be required from the applicant's local government or WMD.[49] If docks are found to be noncompliant with the requirements of the program, the DEP has the authority to require remediation, including removing those portions of the dock that are out of compliance.

The department's Division of Water Resource Management's Office of Submerged Lands & Environmental Resources (OSLER) tracks self-certification of single-family docks. From August 2005 to December 2009, 2,177 single-family dock self-certifications were issued. In contrast, 8,339 paper exemptions were issued during the same time period and tracked in the department's Permit Application (PA) tracking system. However, the PA system combines several dock related activities (single-family docks, dock repairs, boat lifts, boat ramps, etc.) into one category. Therefore, the current system cannot be used to adequately compare the number of self-certifications with similar paper authorizations. The OSLER is working on subcategories, coding and other methods to better track paper submissions in order to make relevant comparisons between the two permitting methods.[50]

Noncompliance with self-certification permit conditions is an issue. A total of 1,631 self-certifications were issued from August 2005 through December 2008. Of those, 388 were inspected by department staff for compliance with self-certification conditions. 262 sites had standing docks at the time of the inspection, while 126 did not. 73 (28%) of the constructed docks were built out of compliance with the self-certification authorization or did not qualify for self-certification. Of those, 45 were noncompliant with the self-certification conditions and any possible exemptions and would have needed a permit to be built. The other 28 did not qualify for the self-certification but would have likely qualified for other exemptions. The most common compliance issue was constructing a dock that was larger than allowed. The most common reasons for not qualifying for self-certification were installation of boat lifts and repairing or replacing docks. These are exempt activities but not currently covered by the self-certification program.[51] Unfortunately, a statistical analysis of noncompliance rates for the self-certification and paper permits methods cannot be performed, so it is unknown whether noncompliance issues are a function of the self-certification program or simply with construction of docks and related activities in general.

Self-Certification Programs in Other States

While many states claim to have self-certification or "e-permitting," only three, including Florida, actually have environmental self-certification permitting programs. Hawaii and Indiana have "hybrid" programs that streamline

[47] Fla. Stat. § 403.813(1)(s) (2010); Fla. Admin Code Rs. 62-312.823 and 62-341.42.
[48] *Supra* note 45.
[49] *Id*.
[50] E-mail from Cameron Cooper, Director of Legislative Affairs, DEP, to author (Sept. 29, 2010, 13:26 EDT) (on file with author).
[51] *Id*.

the review process for certain online permits. Many states provide downloadable online applications and online submittal of completed applications, forms and associated documentation.

New Hampshire

New Hampshire's Department of Environmental Services (DES) has one of the few self-certification programs in the country. The Small Quantity Generator (SQG) Self-Certification program requires SQGs in New Hampshire to review their hazardous waste management procedures, conduct a self-inspection of their facilities and certify compliance to DES every three years. SQGs that are not in compliance must develop a Corrective Action Plan, specifying how they plan to come into compliance within 90 days from the date the declaration is due. There are approximately 2,500 SQGs in New Hampshire. DES does not have the ability to inspect each one, and approximately one-third of all hazardous waste sites in New Hampshire are the result of mismanaged waste generated by SQGs. The program focuses on education and outreach to ensure compliance with the self-certification permit conditions.[52]

Texas

Like Florida and New Hampshire, Texas is the only other state with a self-certification program. The Texas Commission on Environmental Quality (Commission) administers a self-certification program for underground storage tanks (USTs). The program is an annual requirement for USTs containing motor fuel. The owner or operator must certify that the UST system is in compliance with technical standards and requirements for registration and financial assurance, and that all fees due to the Commission are paid. A current certificate of insurance (or other proof of financial assurance) must be submitted at the time of self-certification. Once the form is processed, the Commission will issue the owner or operator a fuel delivery certificate authorizing delivery of fuel. Receiving fuel without a current, valid fuel delivery certificate may result in fines and penalties. An important part of the self-certification process involves identifying each tank and affixing a permanent label on it to allow a physical match of the UST with the one listed on the self-certification form.[53]

Hawaii

The Hawaii Department of Health created an e-file system for its individual wastewater (IWS) permit, which includes septic tanks, cesspools and aerobic treatment units. The application is web-based and fees can be paid online using a credit card or e-check. A professional engineer, registered in Hawaii, is required to complete the application. The permit is subject to review prior to approval, and is therefore not a self-certifying permit.[54] However, the IWS website is the first e-permitting system the Department of Health has implemented and is the first step towards expanding online permitting in Hawaii.

Indiana

The Indiana Department of Environmental Management (IDEM) operates the Electronic Permitting/Regulatory Services Portal. The portal is designed to make it easier for customers to electronically submit notifications, applications and data directly to IDEM's database system. The goal is to eliminate potential data entry errors and increase efficiency. Currently, the portal has two environmental permitting services available: 401 Water Quality Certification and Rule 6 Storm Water Discharges certifications and exemptions. However, both services require a review before approval.[55]

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[52] New Hampshire Department of Environmental Services, *Overview: Hazardous Waste Small Quantity Generator Self-Certification Program*, http://des.nh.gov/organization/divisions/waste/hwcb/hwcs/sqgcp/categories/overview.htm (last visited Sep. 27, 2010).

[53] TCEQ Regulatory Guidance, *Petroleum Storage Tank Registration and Self-Certification – TCEQ publication RG-475d* (2009), *available at* http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/rg/rg-475d.html/at_download/file (last visited Sep. 27, 2010).

[54] Hawaiian Department of Health, *Wastewater Branch – IWS Filing*, http://wastewater.ehawaii.gov/wastewater/app/welcome.html (last visited Sep. 27, 2010).

[55] Indiana Department of Environmental Management, *myDEM – Electronic Permitting/Regulatory Services Portal*, http://www.ai.org/idem/5964.htm (last visited Sep. 27, 2010).

State and Federal Wetland Delineation Certification Programs

The Corps began a pilot wetland delineator certification program in 1993 in three districts: Baltimore, Maryland; Jacksonville, Florida; and Seattle, Washington.[56] Several Corps districts had informal programs that accepted and expedited wetland delineations from qualified contractors and consultants. The pilot project was an attempt to formalize the process and expedite wetland delineations from certified delineators. Delineations from uncertified contractors and consultants would be processed normally.[57] The pilot program certified wetland delineators after they passed a two-part exam based on the 1987 Corps of Engineers Wetland Delineation Manual. The test was created and administered by the Corps and adjusted for regional variations. The first part was a written test, the second was a field practicum. In all, the Corps provisionally certified 350 individuals who passed both parts.[58] However, the pilot program did not advance past the initial stages and is no longer operational.

There are four states who certify wetland delineators, Minnesota, New Hampshire, Virginia and Wisconsin, as well as a certificate program issued by the Society of Wetland Scientists. Of the four state programs, Virginia's is the oldest and most established, whereas Minnesota's is the newest. Wisconsin's program is still in the pilot phase. Generally, these certification programs address the states' need for accurate wetland delineations in order to streamline the permitting process, reduce permit application review backlogs and free up limited state resources.[59]

Findings and/or Conclusions

Only five states have any semblance of self-certification permitting programs, Florida, Hawaii, Indiana, New Hampshire and Texas; however, nearly all states have applications available online for download for some of their permits. A smaller number allows applicants to submit permits for review online, and an even smaller number have web-based applications that applicants can fill out and submit electronically. All states except Florida, New Hampshire and Texas require a review of applications prior to issuing permits, certifications or exemptions. The DEP maintains one of the most advanced, user-friendly websites of all the states.

Expansion of the state programmatic general permit could yield significant streamlining for permit applicants for activities regulated by both the state and federal governments. There are multiple amendments to statutes and rules that must occur in order to effect this change. In addition, the Corps and its coordinating agencies would have to support an expansion, negotiate the conditions of, and issue the state programmatic general permit to Florida.

A further impediment to streamlining the interaction between state and federal permitting and expansion of the SPGP program is the difference in wetland delineation between the federal and state methods. Slash pine and gallberry are the two species primarily responsible for the differences. The Florida Environmental Regulations Commission amended the rule in 2006. Legislative ratification is required for the amended rule to become effective. Additional amendments to the rule may be required to further align the two delineation methodologies.

The lack of certification for professionals responsible for state wetland delineations requires significant duplication of effort by the regulatory agencies in Florida to review them. Once a private party delineates a wetland boundary for the permit process, the department or the WMDs must then review the delineation and approve it or find it deficient. A certification for such professionals, with associated penalties for misconduct, could streamline this aspect of permit reviews. There is also the potential for cost savings to the department and WMDs in implementing such a program.

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[56] Department of Defense, Department of the Army Corps of Engineers, *Wetland Delineator Certification Program, Notice of Proposed Rule Making* (1995), *available at* http://www.wetlands.com/coe/coewdcp1.htm (last visited Sep. 14, 2010).
[57] *Id*.
[58] *Id*.
[59] Stetson, Leah, *State Wetland Delineator Certification Programs* (2007), Wetland News, June-July 2007, *available at* http://www.aswm.org/swp/certification/certification0607.pdf (last visited Sep 28, 2010).

Department staff has found a significant number of docks certified under its single-family dock self-certification program to be noncompliant with the self-certification conditions . The most common compliance issue is docks constructed that exceed the size limitations set by the department for the program. Self-certification programs can effectively streamline the permitting process; however, they require adequate oversight by regulating agencies and enforceable penalties and fines for noncompliance.

Options and/or Recommendations

First, the DEP should continue to pursue online or electronic filing and document handling for its environmental permitting programs in order to streamline the application process, including jointly administered ERP programs with the WMDs.

Second, the DEP, in conjunction with the WMDs, should identify any obstacles to implementing the next steps outlined in the September 30, 2005, *Consolidation of State and Federal Permitting Programs* report. The department should determine how best to proceed with the state's federal partners and private stakeholders to expand the state programmatic general permit program.

Third, the department should evaluate the merits of a wetland delineator certification program. In this regard, the DEP must have the authority to set the minimum qualifications and proficiencies an individual must possess to perform delineations that receive expedited review.

Additionally, the DEP should evaluate whether or not the rules for wetland delineation should be more closely aligned with the Corps' delineation methods and criteria, notwithstanding the existing amended rule that has not been ratified. If the department determines that the federal and state methodology require further alignment, it should establish the necessary steps and identify potential barriers to effecting the rule change and subsequent Legislative ratification.

Last, the department should consider expanding the types of activities it allows for self-certification. Activities should be limited to those where noncompliance of the self-certification conditions would not cause harm to the environment or endanger the health, safety or welfare of the public. If DEP adds new activities to its existing self-certification permitting program, penalties and fines for noncompliance of the permit conditions must be developed and enforced. Such penalties and fines may include monetary fines, forfeiture of surety bonds, suspension of licenses and revocation of licenses.