



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |  |   |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

The bill provides for additional regulation for phosphogypsum stack management.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### **Cumulative Impacts**

S. 373.413, F.S., provides criteria to be applied to all ERP permit applications, whether the project is in uplands, or surface waters and wetlands. S. 373.414, F.S., provides additional criteria to be applied when the proposed project includes activities within surface waters and wetlands.

S. 373.414(6), F.S., provides that reclamation of mined lands approved under Ch. 378 satisfies the mitigation requirements of the ERP program (Part IV of Ch. 373) if the reclamation maintains or improves the water quality and the function of biological systems present at the site prior to mining.

S. 373.414(8), F.S., provides for a review of cumulative impacts to surface waters and wetlands of activities proposed by an applicant for an ERP permit. This review requires an analysis of the proposed impact along with existing projects, projects under construction, projects for which a permit has been requested, and reasonably expected future projects within the same *drainage basin* as the proposed impact. Drainage basins are specified in rule by each WMD pursuant to s. 373.403 (9), F.S.,. In some of the WMDs rules, drainage basins are defined to be the same as a watershed, while in others a watershed is a smaller subdivision of a drainage basin. If mitigation that fully offsets the impacts is conducted within the same drainage basin as the proposed impact, then the cumulative impact review will be considered satisfied.

##### **Nonmandatory Lands Reclamation Trust Fund**

A \$50 million reserve exists in the Nonmandatory Lands Reclamation Trust Fund that is authorized for use by DEP to reclaim lands mined after July 1, 1975 (mandatory lands) if a company ceases mining and reclamation before all disturbed lands are reclaimed. These funds may be used for abatement of an imminent hazard from a phosphogypsum stack system, or for closure of an abandoned phosphogypsum stack system. One half of the interest from this reserve is available to DEP for management of reclaimed or preserved phosphate lands, and one half is available for the operation of the NPDES and dam safety program as it relates to the regulation of phosphate mining and processing facilities.

## **Financial Responsibility**

In the ERP program under Part IV of Ch. 373, when required mitigation will cost over \$25,000, an applicant is required to provide financial responsibility for the cost of mitigation in the form of a bond or letter of credit.

In the mining reclamation program under Ch. 378, no financial responsibility is required for the required reclamation if the permittee stays in compliance with the required rate of reclamation established by rule.

In the permitting program regulating the construction and operation of phosphogypsum stack systems under Ch. 403.4154, F.S., the applicant is required by Rule 62-673.640, Florida Administrative Code (FAC), to provide financial responsibility for the cost of stack system closure. The applicant may use a variety of financial instruments, or meet a financial test. Currently, all permittees have used the financial test to meet these provisions. In the past, only the cost of physical closure of the stack and long term maintenance was included in the cost estimates for stack closure, and not treatment and disposal of the process water in the stack.

DEP is authorized to impose a lien on the real property underlying a phosphogypsum stack that is causing an imminent hazard, the real property underlying an abandoned phosphogypsum stack system, and other real property or assets associated with a fertilizer production facility equal to the amount required to be expended from the NMLTF for the above purposes. However, this lien does not have priority over any prior perfected lien.

In 2001, Mulberry Corporation filed for bankruptcy. Mulberry Corporation abandoned the phosphogypsum stack systems at two of its subsidiaries (Mulberry Phosphates, Inc., and Piney Point Phosphates, Inc.), and DEP and a state court appointed receiver have been managing the sites for environmental security and ultimate closure of the systems. To date, approximately \$35 million has been expended from the NMLRTF on these sites, and an additional \$129 million is estimated as needed to complete closure.

As a result of the above situation with Mulberry Corporation, the Legislature directed DEP, by January 31, 2003, to conduct a review of the existing financial responsibility provisions for phosphogypsum stack system construction and operation contained in Rule 62-673, FAC and subsequently to take any actions needed to ensure that the rules minimize risk to the environment and public health and safety from the business failure of a stack system (see s. 403.4154, F.S.). DEP has completed this review and is currently working on draft revisions to the financial responsibility provisions of the rule.

## **Effect of proposed changes**

### **Cumulative Impacts**

The bill changes the title of s. 373.414, F.S., from “additional criteria for activities within surface waters and wetlands” to “additional criteria for activities within watersheds”. This change could be interpreted to mean that these additional criteria would be applied to activities within uplands, not just those within surface waters and wetlands.

The bill changes the cumulative impact review such that the proposed impacts are considered in conjunction with existing and proposed projects within a *drainage basin* (no change), but the reasonably anticipated future projects to be considered are those within the *watershed*, which may be a smaller area than a drainage basin in some cases.

The bill also changes “drainage basin” to “watershed” in the mitigation provision related to cumulative impacts. Therefore, providing mitigation within the same drainage basin, but not within the same watershed, would not automatically satisfy the cumulative impact review criteria, and would require that a cumulative impact analysis be done that was not previously required. This may result in more determinations that a project has a cumulative impact within a watershed such that the project cannot be

permitted, or that the proposed mitigation outside the watershed but within the same basin is not acceptable. This may discourage the use of large, regionally significant mitigation sites, such as mitigation banks, that may be more environmentally sustainable over the long term.

For reclamation approved under Ch. 378, F.S., to serve as appropriate ERP mitigation, an applicant must demonstrate that the cumulative impacts of the changes in water flows and levels from mining activities, phosphogypsum stack systems and reclamation activities will not adversely affect "surface water, ground water, wetland, upland, aquatic and estuarine habitats, and listed species and other natural features within the watershed" within the same watershed. The bill results, in expanding the scope of the cumulative impact assessment beyond the current DEP analysis which reviews cumulative impacts to the functions of surface waters and wetlands. The bill requires that ERP applicants for mining within the Peace River Watershed conduct a cumulative impact study including existing, permitted and prospective mines.

The bill eliminates the \$50 million reserve within the NMLRTF, and makes reclamation of abandoned lands, abatement of imminent hazard, and closure of an abandoned phosphogypsum stack authorized uses of the fund. Liens imposed by the Department to cover the cost of these emergency expenditures are given priority over all other liens.

The bill requires by August 1, 2003, surety bonds to be posted to cover the cost of all land reclamation and phosphogypsum stack system closure including the cost of disposing of all water. Future mines and phosphogypsum stack systems will require the posting of a surety bond before they receive permits. This would create a higher financial standard for new phosphate operations that would greatly minimize the risk from these facilities.

The anticipated DEP rulemaking regarding phosphogypsum stack system financial responsibility would no longer be required.

#### C. SECTION DIRECTORY:

Section 1. Re-titles and amends s. 373.414, F.S., to provide for additional criteria related to cumulative impacts for phosphate mining.

Section 2. Amends s. 378.035, F.S., to revise uses of funds from the NMLRTF.

Section 3. Amends s. 403.4154, F.S., to address financial responsibility requirements for mining and phosphogypsum stack systems.

Section 4. Amends s. 403.4155, F.S., to remove rule review authority for phosphogypsum management.

Section 5. Provides that provisions are severable in the event any are held invalid.

Section 6. Provides for the act take effect becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Non-recurring Effects: The bill does not change the revenue stream into the NMLRTF nor does it appropriate additional funds from that fund.

Recurring Effects: Except as limited by the legislative appropriations process, the DEP would no longer be limited to an arbitrary ceiling amount of funds from the NMLRTF it can use to abate an imminent hazard from a stack system, close an abandoned system, or reclaim lands abandoned by a mining company (all eligible activities of the NMLRTF). In addition, if liens are imposed by DEP for the amount expended from NMLRTF, there is a better chance that the fund can be reimbursed, as the DEP lien would have priority over all other liens. The amount of all such expenditures is contingent and indeterminate. Future uses of the fund for these purposes, beyond the existing Mulberry/Piney Point situation, cannot be predicted. However, no such situation exists or is apparent at this time.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Direct Private Sector Costs: Additional costs will be experienced by mining ERP permit applicants to conduct expanded cumulative impact analyses. These costs depend on site-specific circumstances and cannot be predicted. Companies will be required to post surety bonds for the full cost of stack closure. As stack closure is a long-term significant cost, the cost to post a surety bond for the full amount will be burdensome and, in the case of existing stack systems, could lead to business failure.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not affect municipal or county governments.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

In attempting to strengthen the permitting standards for mining, the bill makes significant changes to the permitting criteria for all ERP applications that are not expected to be beneficial to the program. Specifically, changing the scope of only certain portions of the cumulative impact review from drainage basins to watersheds is expected to add significant confusion and complication to the review, without adding environmental benefits. Making this change in the mitigation provision may hinder the DEP's efforts to promote mitigation that is regionally significant and has greater long term sustainability, such as mitigation banks. Lastly, the bill may need to amend additional provisions that provide for the use from the interest of the \$50 million reserve.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**