

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 957 Environmental Permitting  
**SPONSOR(S):** Environment & Natural Resources; Williams  
**TIED BILLS:** **IDEN./SIM. BILLS:**

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DIRECTOR	REFERENCE	ACTION	ANALYST	STAFF
	1) <u>Committee on Environmental Protection</u>	<u>6 Y, 2 N</u>	<u>Kliner</u>	<u>Kliner</u>
	2) <u>Environment &amp; Natural Resources Council</u>	<u>9 Y, 3 N, As CS</u>	<u>Kliner</u>	<u>Hamby</u>
	3) <u>Policy &amp; Budget Council</u>	<u></u>	<u>Davila</u>	<u>Hansen</u>
	4) <u></u>	<u></u>	<u></u>	<u></u>
	5) <u></u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

CS/HB 957 authorizes the Department of Environmental Protection (DEP) to seek to obtain authorization by the U.S. Army Corps of Engineers 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 would add *slash pine* and *gallberry* to the state list of facultative species to more closely align the state and federal wetland delineation. The DEP would report annually to the legislature on its efforts to achieve efficiencies in permitting through the above referenced actions.

The bill authorizes DEP to implement a state programmatic general permit (SPGP) for activities affecting up to 5 acres, if the Army Corps of Engineers (COE) agrees. The bill provides that if DEP obtains the 5-acre SPGP then the DEP would use the landward most delineation of the state/federal wetland delineation line and use United States Department of Agriculture, Natural Resource Conservation Service's National Cooperative Soil Survey data.<sup>1</sup> An applicant that seeks the statewide programmatic general permit consents to applicable substantive federal wetland regulatory criteria.

The bill provides for a conditional ratification of the DEP's vegetative index for wetlands delineation, preserves declaratory statements made by the DEP pursuant to s. 403.914, 1984 Supplement to the Florida Statutes 1983, 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 various exemptions.

The bill requires the DEP to provide written notice to an applicant when the agency denies the applicant's permit, and to provide a citation of legal authority for the denial.

The bill requires that a local government enact or enforce a wetland regulatory program only through delegation of the state environmental resource permit program pursuant to s. 403.182, F.S.

The fiscal impact to state government is indeterminate.

The bill takes effect upon becoming a law.

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<sup>1</sup> <http://soils.usda.gov/>

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government:** The bill provides that if DEP obtains the 5-acre SPGP then the DEP would use the landward most delineation of the state/federal wetland delineation line and use United States Department of Agriculture, Natural Resource Conservation Service's National Cooperative Soil Survey data. DEP staff will be responsible for knowing both lines in each circumstance. The effect would be to reduce duplicative permitting of wetlands and to expand the areas subject to permitting.

In addition, local governments would be permitted to enact or enforce wetland regulatory programs only through delegation of the state environmental resource permit program pursuant to s. 403.182, F.S.

#### B. EFFECT OF PROPOSED CHANGES:

##### Current Situation

- **Federal Dredge and Fill Regulation:**

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), regulates virtually all work in, over, and under waters listed as "Navigable Waters of the United States". Navigable Waters of the United States are those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past or may be susceptible to use to transport interstate or foreign commerce. These are waters that are navigable in the traditional sense where permits are required for certain activities pursuant to Section 10 of the Rivers and Harbors Act. Some typical examples of projects requiring Section 10 permits include beach nourishment, boat ramps, breakwaters, dredging, filling, or discharging material, groins and jetties, mooring buoys, piers, placement of rock riprap for wave protection or stream bank stabilization, boat hoists pilings, and construction of marina facilities.

In conjunction with Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act is the federal act which governs activities in wetlands and regulates the discharge of "dredged or fill" material into the "Waters of the United States" and is intended to minimize adverse impacts by preventing the unnecessary loss of wetlands and other sensitive aquatic areas. Waters of the United States is a broader term than Navigable Waters of the United States. Included are adjacent wetlands and tributaries to Navigable Waters of the United States. These are the waters where permits are required for the discharge of dredge or fill material pursuant to Section 404 of the Clean Water Act.

The Corps of Engineers is responsible for regulating activities by others in navigable waterways through the granting of permits since passage of the Rivers & Harbors Act of 1899. Passage of the Clean Water Act in 1972 greatly broadened their role by giving the Corps of Engineers authority over "dredging and filling" in the waters of the United States, including many wetlands. There are two types of Section 404 permits issued by the Corps of Engineers, individual and general permits. Activities in wetlands that involve more than minimal impacts require an individual permit. Within Section 404 general permits, there are two types of general permits, regional permits and nationwide permits. In both cases, these types of permits are issued when the proposed activities are minor in scope with minimal projected impacts.

- **State of Florida Dredge and Fill Regulation**

The DEP is the state agency which regulates “dredging and filling” activities in wetlands and other surface waters in order to protect the environment. In addition to DEP, “dredging and filling” is also regulated by the Corps of Engineers, the Florida Water Management Districts, counties and municipalities.

The term "filling" includes the placement or depositing of any material that is placed in wetlands or other surface waters. Dirt, sand, gravel, rocks, shell, pilings, and concrete are all considered fill if placed in wetlands. The term "dredging" refers to any type of excavation conducted in wetlands or other surface waters. Dredging includes digging, pulling up vegetation by the roots, leaving vehicular ruts, or any other activity that disturbs the soil.

Alteration of wetlands and other surface waters may have a detrimental impact on the environment. Such impacts can extend beyond the limits of the work site, affecting other public or private property. Polluted waters can be conveyed off-site through connecting water bodies. The elimination or degradation of wetlands causes a reduction of beneficial functions provided by the wetlands. The DEP, Environmental Resource Permit Program, regulates activities involving the alteration of surface water flows. This includes new activities in uplands that generate storm water runoff from upland construction, as well as “dredging and filling” in wetlands and other surface waters.

Environmental Resource Permit applications are processed by either DEP or one of the state's water management districts in accordance with the division of responsibilities specified in operating agreements between DEP and the water management districts. Section 120.60(3), F.S., requires state agencies to state with particularity the grounds for the denial of a license. This applies for a permit as well.

DEP and the Corps of Engineers have streamlined processing of state and federal regulatory permits under a state programmatic general permit. The state programmatic general permit avoids duplication of permitting between the Corps of Engineers and DEP for minor works located in waters of the U.S., including navigable waters. The state programmatic general permit allows DEP to approve the applicable federal permit during the review of an environmental resource permit for certain minor activities including shoreline stabilization, boat ramps, docks and piers, and maintenance dredging, as well as for activities that qualify for regulatory exemptions and general permits, subject to conditions.

In the 2005 Legislative Session, s. 373.4143, F.S., was created directing DEP to develop a strategy for consolidating or streamlining the state and federal programs to the extent possible. DEP developed the strategy, identified the problems, and made a number of recommendations which were submitted in a formal report to the legislature and the Governor's Office.

- **Wetland Delineation Rules**

Federal wetland boundaries are delineated (a.k.a. drawn) under the Federal Clean Water Act and other Federal statutes utilizing the U.S. Army Corps of Engineers 1987 wetland delineation manual adopted under the oversight of Environmental Protection Agency. The State of Florida and its political subdivisions delineate wetland boundaries under the provisions of ch. 62-340, F.A.C., as ratified by the Florida Legislature in sections 373.421 and .4211, F.S. As a practical matter for most projects use of the Federal and State methods results in similar wetland boundaries. However, the Federal plant list shows slash pine and galberry as wetland indicator plants while the State plant list shows these two plants as upland indicators. Some biologists believe these species should be "neutral" (e.g. not indicate wetlands or uplands). In addition, the State methodology relies on the Federal Natural Resources Conservation Service (formerly Soil Conservation Service) soils manual while 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.

### **Effect of Proposed Changes**

The bill states 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 Regulation (DEP) to seek to obtain authorization by the U.S. Army Corps of engineers 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 would add slash pine and gallberry to the state list of facultative species to more closely align the state and federal wetland delineation. The DEP would report annually to the legislature on its efforts to achieve efficiencies in permitting through the above referenced actions.

The bill authorizes DEP to implement a state programmatic general permit (SPGP) for activities affecting up to 5 acres, if the Army Corps of Engineers (COE) agrees. The bill provides that if DEP obtains the 5-acre SPGP then the DEP would use the landward most delineation of the state/federal wetland delineation line and use United States Department of Agriculture, Natural Resource Conservation Service's National Cooperative Soil Survey data. An applicant that seeks the statewide programmatic general permit consents to applicable substantive federal wetland regulatory criteria.

The bill provides for a conditional ratification of the DEP's vegetative index for wetlands delineation, directs the DEP to adequately train staff regarding implementation of the methodology, preserves declaratory statements made by the DEP pursuant to s. 403.914 1984 Supplement, F.S., 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
- a modification of an existing permit unless the modification is a substantial modification,
- a permit application, including dredge and fill as well as mining permits, pending on or before the effective date of the SPGP, from the changes in the rule.

The bill requires the DEP to provide written notice to an applicant when the agency denies the applicant's permit, and to provide a citation of legal authority for the denial.

The bill requires that a local government enact or enforce a wetland regulatory program only through delegation of the state environmental resource permit program pursuant to s. 403.182, F.S.

### **C. SECTION DIRECTORY:**

**Section 1** amends s. 373.4144, F.S., providing legislative intent; revising provisions requiring 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 for certain dredge and fill activities.

**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 exemptions.

**Section 3** adds a new subsection (5) to s. 161.041, F.S., requiring DEP, when denying a permit, to provide written notice to the applicant that includes the legal authority (rule or statute) for the permit denial.

**Section 4** amends subsection (2) of s. 373.4141, F.S., requiring DEP, when denying a permit, to provide written notice to the applicant that includes the legal authority (rule or statute) for the permit denial.

**Section 5** amends subsection (2) of s. 403.087, F.S., requiring DEP, when denying a permit, to provide written notice to the applicant and to provide the legal authority (rule or statute) for the permit denial.

**Section 6** adds a new subsection (4) to s. 373.441, F.S., requiring local governments to seek delegation of the state environmental resource permit program prior to enacting or enforcing wetland regulatory programs.

**Section 7** directs the Division of Statutory Revision to substitute the date on which this act takes effect for the phrase "the effective date of this act" whenever it occurs in the provisions of s. 373.4211, F.S., as amended by this act.

**Section 8** provides an effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:  
Indeterminate.
2. Expenditures:  
Indeterminate.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:  
Indeterminate.
2. Expenditures:  
Indeterminate.

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

Entities seeking permits that impact the environment may see a reduction in costs associated with the permitting process if local governments are permitted to enact or enforce wetland regulatory programs only through delegation of those programs by the state.

### **D. FISCAL COMMENTS:**

None

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

Not applicable because this bill does not appear to: require cities or counties to spend funds or take actions requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

##### **2. Other:**

None

#### **B. RULE-MAKING AUTHORITY:**

None

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

The bill requires that a local government enact or enforce a wetland regulatory program only through delegation of the state environmental resource permit program pursuant to s. 403.182, F.S. Staff recommends that the statutory citation be amended to s. 373.441, F.S.

#### **D. STATEMENT OF THE SPONSOR**

No statement submitted

### **IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

The differences between the bill as originally filed and the CS version are as follows: The CS version requires the DEP to provide citation to legal authority for the denial of a permit in three sections of law:

- Creating a new subsection (5) to s. 161.041 FS – permit program for beach and shores;
- Amending subsection (2) of s. 373.4141, FS - re: permits for surface waters and wetlands; and,
- Amending subsection (2) of 403.087, FS - environmental permitting statutes

In addition, the CS version directs the DEP to only take action regarding the state programmatic general permit contemplated by the bill provided the conditions are at least as protective of the environment and natural resources as existing state law and federal law under the Clean Water Act and the Rivers and Harbors Act.

Finally, the CS version provides that no local government shall enact or enforce a wetland regulatory program except through delegation of the state environmental resource permit program pursuant to s. 403.182, F.S.