

FINAL BILL ANALYSIS

BILL #: CS/CS/HB 421

FINAL HOUSE FLOOR ACTION:
108 Y's 7 N's

SPONSOR: Rep. Bemby

GOVERNOR'S ACTION: Approved

COMPANION BILLS: CS/CS/SB 1174

SUMMARY ANALYSIS

CS/CS/HB 421 passed the House on May 2, 2011, and subsequently passed the Senate on May 4, 2011. The bill was approved by the Governor on June 17, 2011, chapter 2011-165, Laws of Florida, and takes effect on July 1, 2011. The bill addresses issues relating to agricultural-related exemptions to water management requirements.

Florida law has afforded an agricultural exemption to bona fide farm operators since the mid-1980s in regard to obtaining a permit from the water management districts (WMDs) for altering the topography of any tract of land as long as the alteration is not for the sole or predominant purpose of impounding or obstructing surface waters. The bill revises the current agricultural exemption from water resource permitting requirements to specify that certain agricultural activities may impede or divert the flow of surface waters or adversely impact wetlands, as long as it is not the sole or predominant purpose of the agricultural activity or alteration. The bill also specifies that the exemption applies to lands classified as agricultural and to activities requiring an environmental resource permit. The exemption does not apply to any activities previously authorized by an environmental resource permit, a management and storage of surface water permit, or a dredge and fill permit. The exemption has retroactive application to July 1, 1984.

The bill allows the WMD or a landowner to request a determination from the Department of Agriculture and Consumer Services (department) when a dispute regarding an exemption occurs. The bill further states that the determination by the department is binding. The bill authorizes the department and the WMDs to enter into a new memorandum of understanding (MOU), or amend an existing MOU, to propose procedures by which the department will undertake the review and determination process. The department is given rule-making authority to implement these processes.

The bill provides that mitigation to offset any adverse effects caused by agricultural activities that occurred before the conversion to a nonagricultural use is not required if the activities occurred in the last 4 years preceding the conversion.

And lastly, the bill amends the definition of agricultural activities to include: cultivating, fallowing, leveling, and implementation of best management practices adopted by the department or the United States Department of Agriculture's Natural Resources Conservation Service practice standards. The bill specifies that such activities constitute "agricultural activities" provided the activities are not for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

Based on the provisions that allow landowners, as well as the WMDs, to request a determination, and that change the nonbinding determination to a binding determination, there is a potential for a significant increase in workload for the department. According to the department, however, the increased workload can be absorbed within the existing resources. The bill does not appear to have a fiscal impact on local governments. The fiscal impact is potentially positive for agriculture, as some agricultural operations that have been required to apply for and obtain a surface water permit (e.g., citrus, row crops) in the past may now be exempt from this requirement.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Section 1

Present Situation

In 1984, the Legislature passed the Warren S. Henderson Wetlands Protection Act¹ (act), which was the first concerted effort at protecting and managing wetlands in the state. Among other things, the legislation established a permitting system for dredge and fill permits. The act also provided an exemption from the permitting process for “normal and necessary” agriculture and forestry operations. The act placed agricultural operations under the control of the water management districts (WMDs) rather than under the jurisdiction of the then-Department of Natural Resources (DNR).

In 1993, during the reorganization of the DNR into the Department of Environmental Protection (DEP), the Wetlands Protection Act was repealed, with the exception of s. 403.927, F.S. Section 403.927, F.S., provides that “agricultural activities”² are not subject to specific discharge permits, except that DEP may require a stormwater permit or discharge permit at the point of discharge from an agricultural water management system.

Current law³ also allows persons engaged in certain agriculture occupations⁴ to alter the topography of any tract of land without obtaining an environmental resource permit from a WMD. However, the current exemption states that the alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

In 2009, a large agricultural company filed suit⁵ against one of the WMDs in regard to the agricultural exemption in s. 373.406(2), F.S. The WMD alleged the defendant had constructed numerous drainage ditches on its property without first obtaining required permits from the district. The defendant claimed the construction fell under the exemption afforded through s. 373.406 (2), F.S., since the ditches were consistent with the practice of agricultural activities and not for the “...sole or predominant purpose of impounding or obstructing surface waters...” The court ruled in favor of the WMD, stating that the provisions in s. 403.927, F.S., virtually eliminate the agricultural exemption in s. 373.406(2), F.S., as it applies to alterations impacting wetlands.

Effect of Proposed Changes

The bill revises the agricultural exemption from water resource permitting requirements in current law to specify that certain agricultural activities may impede or divert the flow of surface waters or adversely impact wetlands, as long as it is not the sole or predominant purpose of the

¹ Section 1, ch. 84-79, L.O.F.

² “Agricultural activities” includes all necessary farming and forestry operations which are normal and customary for the area, such as site preparation, clearing, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting, harvesting, construction of access roads, and placement of bridges and culverts, provided such operations do not impede or divert the flow of surface waters.

³ Section 373.406(2), F.S.

⁴ Agriculture, silviculture, floriculture and horticulture.

⁵ *A. Duda and Sons, Inc. v. St. Johns River Water Management District*, 17 So. 3d 738 (Fla. 5th DCA 2009) (Duda I) and 22 So.3d 622 (Fla. 5th DCA 2009) (Duda II)

said activity or alteration. The bill also specifies that the exemption applies to lands classified as agricultural and to activities requiring an environmental resource permit. The exemption does not apply to any activities previously authorized by an environmental resource permit, a management and storage of surface water permit, or a dredge and fill permit. The exemption has retroactive application to July 1, 1984.

Section 2

Present Situation

In 2006, the Legislature enacted legislation⁶ that required the Department of Agriculture and Consumer Services (department) and the WMDs to enter into a memorandum of understanding (MOU) authorizing the department to assist the WMDs, at their request, in determining whether an existing or proposed activity qualifies for the agricultural exemption in s. 373.406(2), F.S. Currently, the determination issued by the department is nonbinding, meaning the WMDs are not required to comply with the department's determination.

The department states that, on average, one or two requests for a determination are received per year. The department conducts a site visit, technical support materials are reviewed and a written non-binding conclusion is sent back to the appropriate WMD.

Effect of Proposed Legislation

The bill allows the WMD or a landowner to request a determination from the department when a dispute regarding the applicability of the agricultural exemption in s. 373.406(2), F.S., occurs. The bill further states that the department has exclusive authority to make a binding determination.

The bill authorizes the department and the WMDs to enter into a new MOU, or amend an existing MOU, to propose procedures by which the department will undertake the review and determination process. The department is given rule-making authority to implement these processes.

Section 3

Present Situation

Section 403.027, F.S., provides that agricultural activities and agricultural water management systems are authorized and are not subject to certain pollution discharge permitting requirements in s. 403.087, F.S.

Section 403.927(3), F.S., provides that if land served by a water management system is converted to a use other than an agricultural use, the water management system, or the portion of the system which serves that land, will be subject to the provisions of Chapter 403, F.S.

Section 403.927(4), F.S., defines "agricultural activities" to include all necessary farming and forestry operations which are normal and customary for the area, such as site preparation, cleaning, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting,

⁶ Chapter 2006-255, L.O.F.

harvesting, construction of access roads, and placement of bridges and culverts, provided such operations do not impede or divert the flow of surface waters.

Effect of Proposed Legislation

The bill amends s. 403.927(3), F.S., to provide that mitigation to offset any adverse effects caused by agricultural activities that occurred before the conversion to a non-agricultural use is not required if the activities occurred in the last 4 years preceding the conversion.

The bill amends the definition of “agricultural activities” in s. 403.927(4), F.S., to include cultivating, fallowing, leveling, and implementation of best management practices adopted by the department or the United States Department of Agriculture’s Natural Resources Conservation Service practice standards. The bill specifies that such activities constitute “agricultural activities” provided that the activities are not for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

Section 4

The bill takes effect on July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

Indeterminate (See Fiscal Comments)

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The fiscal impact is potentially positive for agriculture, as some agricultural operations that have been required to apply for and obtain a surface water permit (e.g., citrus, row crops) in the past may now be exempt from this requirement.

D. FISCAL COMMENTS:

Based on the provisions that allow landowners, as well as the WMDs, to request a determination, and that change the nonbinding determination to a binding determination, there

is a potential for a significant increase in workload for the department. According to the department, however, the increased workload can be absorbed within the existing resources.