

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Environmental Preservation and Conservation

BILL: CS/SB 1176

INTRODUCER: Environmental Preservation and Conservation Committee and Senator Diaz de la Portilla

SUBJECT: Dredge and Fill Activities

DATE: January 27, 2016 **REVISED:** _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|---------------|
| 1. | Istler | Rogers | EP | Fav/CS |
| 2. | | | AGG | |
| 3. | | | AP | |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 1176 authorizes the Department of Environmental Protection (DEP) to implement a voluntary state programmatic general permit for all dredge and fill activities impacting 10 acres or less of wetlands or other surface waters, subject to agreement with the United States Army Corps of Engineers, if the general permit is at least as protective of the environment and natural resources as existing state law under part IV of chapter 373, F.S., and federal law under the Clean Water Act and the Rivers and Harbors Act of 1899. Additionally, the bill requires that a person seeking to use a statewide programmatic general permit consent to applicable federal wetland jurisdiction criteria.

II. Present Situation:

Dredging means excavation in wetlands or other surface waters or excavation in uplands that creates wetlands or other surface waters.¹ Filling means deposition of any material in wetlands or other surface waters.² Dirt, sand, gravel, rocks, shell, pilings, mulch, and concrete are all considered fill if they are placed in a wetland or other surface water. Dredging and filling activities are regulated by local governments, the water management districts, the Florida Department of Environmental Protection (DEP), and the U.S. Army Corps of Engineers (Corps).

¹ Section 373.403(13), F.S.

² Section 373.403(14), F.S.

Federal Regulation: Section 10 and Section 404 Permitting

Section 10 of the Rivers and Harbors Act of 1899 (Section 10), regulates virtually all work in, over, and under waters listed as navigable waters of the United States.³ Examples of projects requiring Section 10 permits include beach nourishment, boat ramps, breakwaters, dredging, filling, mooring buoys, piers, and construction of marina facilities. Additionally, Section 404 of the Clean Water Act governs activities in wetlands and regulates the discharge of “dredged or fill” material into the waters of the United States.⁴

Section 404 establishes a program for permits for the discharge of dredged or fill material into the navigable waters, including wetlands, at specified disposal sites. Activities that are regulated under this program include fill for development, water resource projects, infrastructure development, and mining projects. The Corps has been responsible for regulating activities in navigable waters ways through the granting of permits since the passage of the Rivers and Harbors Act of 1899.⁵ Section 404 of the CWA broadened the Corps authority over “dredging and filling” in the waters of the United States, including many wetlands.⁶ The Corps administers the permits under the U.S. Environmental Protection Agency (EPA) established guidelines, and subject to an EPA veto on a case-by-case basis.⁷

The basic premise of the permitting program is that no discharge of dredged or fill material may be permitted if:

- A practicable alternative exists that is less damaging to the aquatic environment; or
- The nation’s waters would be significantly degraded.⁸

An individual permit is required for potentially significant impacts. Individual permits are reviewed by the Corps, who evaluates applications under a public interest review, as well as the environmental criteria set forth by the EPA.⁹ Under the guidelines no discharge of dredged or fill material may be permitted if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences.¹⁰ Practicable alternatives, include, but are not limited to:

- Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters.
- Discharges or dredged or fill material at other locations in waters of the United States or ocean waters.¹¹

³ See 33 U.S.C. s. 403 (2012).

⁴ See 33 U.S.C. s. 1344 (2012).

⁵ DEP, *Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)*, pg. 2 (Sept. 30, 2005) available at http://www.aswm.org/pdf_lib/consolidation_program.pdf.

⁶ *Id.*

⁷ O.A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1255 (1995) available at <http://digitalcommons.law.umaryland.edu/mlr/vol54/iss4/6/>.

⁸ EPA, *Section 404 Permitting Program*, <http://www.epa.gov/cwa-404/section-404-permit-program> (last visited Jan. 23, 2016).

⁹ *Id.*

¹⁰ 40 C.F.R. §404(b)(1).

¹¹ *Id.*

An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.¹²

State Assumption

The CWA authorizes the EPA to issue general permits on a state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if determined that the activities in such category:

- Are similar in nature;
- Will cause only minimal adverse environmental effects when performed separately; and
- Will have only minimal cumulative adverse effects on the environment.¹³

General permits are not available for waters that are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto.¹⁴ This exception prohibits general permits for what are termed “Phase I waters”, the traditional navigable waters of the United States and adjacent wetlands.¹⁵ Therefore, state assumption under Section 404 does not affect the Corps responsibilities to regulate the navigable waters under Section 10.

To administer its own individual and general permit program, a state must submit an application to the EPA, which includes a complete description of the program it proposes to administer and establish under state law.¹⁶ In addition, the application must include a statement testifying that the laws of the state provide for adequate authority to carry out the described program.¹⁷ The EPA then conducts a rigorous assessment of the state’s program and ensures that it is no less stringent than the federal program.¹⁸ If the EPA authorizes the state to “assume” control over the federal Section 404 permit program, then an applicant would only need to get a state permit for dredged or fill material discharges in certain waters. Any general permit issued is only valid for a period of up to five years.¹⁹

Two states, Michigan and New Jersey, have assumed administration of the federal permit program.²⁰ Other states have reviewed the possibility of assuming Section 404 permitting but have expressed reasons for not pursuing assumption such as lack of funding, limit of program administration to "non-navigable waters," concerns regarding Federal requirements and oversight, availability of alternative mechanisms for state wetlands protection, and the

¹² 40 C.F.R. §404(b)(2).

¹³ 33 U.S.C. s. 1344(e).

¹⁴ 33 U.S.C. s. 1344(g).

¹⁵ Houck at 1255.

¹⁶ 33 U.S.C. s. 1344(g).

¹⁷ *Id.*

¹⁸ David Evans, *Clean Water Act §404 Assumption: What is it, how does it work, and what are the benefits?*, Vol. 31, No.3 National Wetlands Newsletter, pg. 18 (May-June 2009) available at http://www.aswm.org/pdf_lib/evans_2009.pdf.

¹⁹ 33 U.S.C. s. 1344(h)(1)(A)(ii).

²⁰ O.A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1268 (1995).

controversial nature of regulation of wetlands and other aquatic resources.²¹ Additionally, the Endangered Species Act poses challenges for state assumption. To be granted assumption a state would have to have an equivalent level of protection as under the Endangered Species Act for listed species.²²

In 2005, the Florida Legislature directed the DEP to develop a strategy to consolidate, to the maximum extent practicable, federal and state wetland permitting and secure complete authority over dredge and fill activities impacting 10 acres or less of wetlands and other surface waters, including navigable waters, through the environmental resource permitting.²³ Most of the waters in Florida are Phase I waters and are not eligible for assumption.²⁴ The report concluded that complete assumption of the federal program would require changes to federal and Florida law and recommended that the Legislature consult with the Congressional delegation on opportunities to amend the federal regulations to make assumption more viable.²⁵

General Permits

As an alternative to state assumption, the CWA was amended in 1977 to authorize the Corps to issue general permits that:

- Are similar in nature;
- Cause only minimal adverse environmental effects when performed separately;
- Conform to the Section 404(b)(1) guidelines;
- Set forth specific requirements and standards for authorized activities; and
- Terminate within five years.²⁶

A category of general permits was set forth by Corps regulations called programmatic permits.²⁷ The St. Johns River Water Management Program was issued a Programmatic General Permit (PGP) on behalf of the Corps for certain types of projects with minor impacts to wetlands or surface waters.²⁸ The scope of the PGP is limited to residential, commercial, or institutional projects with up to three acres of impacts to low quality or urbanized non-tidal wetlands of the following four types:

- Wetlands in pine plantations with raised beds in production over twenty years;
- Herbaceous wetlands in improved pasture;
- Wetlands on parcels bordered by at least 75 percent development; or

²¹ EPA, *State or Tribal Assumption of the Section 404 Permit Program*, <http://www.epa.gov/cwa-404/state-or-tribal-assumption-section-404-permit-program> (last visited Jan. 23, 2016).

²² Leah Stetson, Association of State Wetlands Managers, Inc. (ASWM), *State Programmatic General Permits (A Cautionary Tale to Enhance Dialogue)*, pg. 5 (April-May 2008), available at http://www.aswm.org/pdf_lib/spgps_0508.pdf.

²³ Ch. 2005-273, s. 3, Laws of Fla.

²⁴ DEP, *Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)*, pg. 2, 8 (Sept. 30, 2005).

²⁵ *Id.* at 3.

²⁶ 33 U.S.C. s. 1344(e).

²⁷ O.A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1282 (1995).

²⁸ Department of the Army, *Programmatic General Permit SAJ-111*, pg. 1 (Oct. 31, 2014) available at http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/permitting/general_permits/PGP/Signed%20SAJ-111.pdf.

- Wetlands covered by greater than 80 percent invasive exotic vegetation.²⁹

The Corps combined the concepts of a general permit (for “similar” and “minimal activities”), with a programmatic permit (for “duplicative” state programs) and created a State Programmatic General Permit (SPGP).³⁰ Under a SPGP, the designated state agency issues permits on behalf of the federal government for projects of a defined and limited impact. A SPGP is designed to streamline the permitting process by eliminating duplication of efforts between the Corps and states, while obeying state and federal wetland laws and regulations. Each SPGP is reviewed and reissued every five years by the Corps district with input from other federal agencies, the state, and the public.³¹

Unlike under complete assumption, under an SPGP program the state or agency is authorized to issue federal permits, which means federal resource agency coordination requirements remain. The state or agency reviews the application and makes the initial determination of the level of impact of the proposed permit. Because projects authorized under the SPGP are limited to minimal individual and cumulative impacts, the complexity and physical size of projects are limited as well.³² Typical wetland impacts allowed in SPGPs range from 5,000 square feet to one acre.³³

Section 373.4144, F.S., authorizes the DEP and water management districts to implement a voluntary state programmatic general permit for all dredge and fill activities impacting three acres or less of wetlands or other surface waters, including navigable waters, subject to agreement with the Corps, if the general permit is at least as protective of the environment and natural resources as existing state law under part IV of chapter 373, F.S., and federal law under the Clean Water Act and the Rivers and Harbors Act of 1899.

Florida was issued a pilot state programmatic general permit (SPGP I) in 1994 which was limited to four categories of activities, including docks, piers and marinas; shoreline stabilization; boat ramps; and maintenance dredging, in only the counties of Duval, Nassau, Clay, and St. Johns. The permit was expanded in 1996 to include the rest of the DEP’s Northeast District (SPGP-II) and to the areas of the other districts, except for Northwest Florida and Monroe County, in 1997 (SPGP-III). SPGP III was an expanded version that covered additional types of activities but was later scaled back to the original four project categories.³⁴

SPGP-IV was issued in 2006 by the Corps. The permit covered docks, piers, and marinas; shore stabilization; boat ramps; and maintenance and dredging. SPGP-IV was revised in 2011 for use throughout the entire state, except for Monroe County and other specified areas. SPGP IV-R1 covers the following categories of work:

- Shoreline stabilization;

²⁹ *Id.* at 1, 2.

³⁰ Houck at 1283.

³¹ Leah Stetson, Association of State Wetlands Managers, Inc. (ASWM), *State Programmatic General Permits (A Cautionary Tale to Enhance Dialogue)*, pg. 2 (April-May 2008).

³² DEP, *Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)*, pg. 5 (Sept. 30, 2005).

³³ *Id.*

³⁴ ASWM at 5.

- Boat ramps and boat launch areas;
- Docks, piers, associated facilities, and other minor piling-supported structures; and
- Maintenance dredging of canals and channels (including removal of organic detrital material from freshwater lakes and rivers).³⁵

The DEP reviews a permit application for the type of work covered under SPGP IV-R1.³⁶ The agreement specifies under what circumstances a project is considered green, yellow, or red. If the permit meets all of the conditions of the SPGP program it is processed as “green” in which case issuance of the permit by the DEP constitutes verification of qualification for the corresponding federal permit. “Yellow” projects require additional federal review. The Corps meets with the appropriate federal agencies and a combined federal position on the permit is taken.³⁷ The position may state that all concerns have been addressed and the project is now considered “green” and the DEP is authorized to issue the permit; that special conditions may be applied; or that the Corps elects to evaluate the project separately.³⁸ If a project has the potential to adversely impact a federally-listed threatened or endangered species or its designated critical habitat then it is considered “red.” If the project is “red” then the DEP and the Corps review the project separately and separate permits are issued.³⁹

In August 2015, the Corps published a draft of the proposed SPGP V.⁴⁰ The permit would add a fifth category of work to include “transient activities (removal of derelict vessels, scientific devices, upland to upland directional drilling, and geotechnical investigations)” to the list of covered categories.⁴¹ Additionally, the proposed draft would require projects for shoreline stabilization, boat ramps or launches, or dock, piers, or associated facilities that are proposed “anywhere between the shoreline and federally maintained channel, turning basin, etc., of a port or inlet” to be considered “red,” and, therefore, such projects would require a the Corps to review the project separately.⁴²

Wetlands Delineation

Under Florida law, wetlands are defined as those areas that are inundated or saturated by service water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils.⁴³ The DEP in coordination with the water management districts created a statewide methodology for the delineation of the extent of wetlands.⁴⁴ Section 373.4211, F.S., provides

³⁵ U.S. Army Corps of Engineers, *State Programmatic General Permit (SPGP IV-R1) State of Florida*, pg. 1 (July 25, 2011) available at http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/permitting/general_permits/SPGP/SPGP_IV_Permit_Instrument.pdf.

³⁶ SPGP IV-R1 at 1.

³⁷ *Id.* at 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ U.S. Corps of Army Engineers, *Draft of Proposed State Programmatic General Permit (SPGP-V)*, available at <http://www.saj.usace.army.mil/Missions/Regulatory/PublicNotices/tabid/6072/Article/613604/spgp-v-saj-2015-02575.aspx>.

⁴¹ *Id.* at 1.

⁴² *Id.* at 7, 9, and 12.

⁴³ Section 373.019, F.S.

⁴⁴ Chapter 62-340, F.A.C.

ratification of the statewide delineation rule. All state, local, and regional governments in Florida delineate wetlands in accordance with the state methodology.⁴⁵ Under federal law, wetland boundaries are delineated using the U.S. Army Corps of Engineers 1987 wetland delineation manual adopted in coordination with the Environmental Protection Agency.⁴⁶ For most projects, the use of the federal delineation method and the state delineation method result in similar wetland boundaries.⁴⁷ However, the primary area of difference between the state and federal methodologies is in the indicator status of certain plants and social conditions.⁴⁸

III. Effect of Proposed Changes:

CS/SB 1176 amends s. 373.4144, F.S., to increase the acreage threshold within which the Department of Environmental Protection (DEP) is authorized to implement a voluntary state programmatic general permit (SPGP) for all dredge and fill activities pursuant to an agreement with the United States Army Corps of Engineers. The bill would authorize the DEP to seek an SPGP program covering dredge and fill activities impacting 10 acres or less of wetlands or other surface waters, including navigable waters.

The bill requires an applicant seeking to use a statewide programmatic general permit to consent to the applicable federal wetland jurisdiction criteria that is authorized by regulations implementing Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act for the limited purpose of implementing the state programmatic general permit.

The bill authorizes the DEP to pursue delegation or assumption of the federal permitting program regulating the discharge of dredged or fill material and removes the requirement that assumption encompass all dredge and fill activities in, on, or over jurisdictional wetlands or waters, including navigable waters, within the state.

The bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁴⁵ DEP, *Homeowner's Guide to Wetlands*, pg. 6 (July 2002), http://www.dep.state.fl.us/water/wetlands/docs/erp/wetland_guide.pdf.

⁴⁶ EPA, *Section 404 of the Clean Water Act: How Wetlands are Defined and Identified*, <http://www.epa.gov/cwa-404/section-404-clean-water-act-how-wetlands-are-defined-and-identified> (last visited Jan. 23, 2016).

⁴⁷ DEP at 6.

⁴⁸ *Id.* at 8.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

If the State Programmatic General Permit (SPGP) program is expanded to include dredge and fill activities impacting 10 acres or less of wetlands or other surface waters, additional costs incurred by permit applicants may be reduced as a result of the streamlined permitting process.

C. Government Sector Impact:

If the Department of Environmental Protection (DEP) seeks expansion of its current SPGP program and is successful, the DEP would incur additional costs as more resources would be needed to administer an expanded SPGP program.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 373.4144 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Environmental Preservation and Conservation on January 27, 2016:

The CS removes the requirement that the delegation or assumption encompass all dredge and fill activities in, on, or over jurisdictional wetlands or waters, including navigable waters, within the state.

B. Amendments:

None.