

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 Appropriations Subcommittee on the Environment and Natural Resources

BILL: SB 1402

INTRODUCER: Senators Simmons and Galvano

SUBJECT: State Assumption of Federal Section 404 Dredge and Fill Permitting Authority

DATE: February 13, 2018

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|----------------|------------|-----------------------------|
| 1. | <u>Mitchell</u> | <u>Rogers</u> | <u>EP</u> | Favorable |
| 2. | <u>Reagan</u> | <u>Betta</u> | <u>AEN</u> | Recommend: Favorable |
| 3. | _____ | _____ | <u>AP</u> | _____ |

I. Summary:

SB 1402 provides the Department of Environmental Protection (DEP) with the power and authority to assume the dredge and fill permitting program established in section 404 of the federal Clean Water Act with the intent that the DEP assume and implement the program in conjunction with the state's environmental resource permitting program established in ch. 373, F.S. Specifically, the bill:

- Authorizes the DEP to adopt by rule any federal requirements, criteria, or regulations necessary to obtain assumption of the program and provides that any such rules adopted may not become effective or otherwise enforceable until the U.S. Environmental Protection Agency has approved the state's assumption application;
- Provides that state laws which conflict with the federal requirements necessary to obtain assumption of the section 404 permitting program do not apply to state-administered section 404 permits;
- Provides that a state-administered section 404 permit is not required for activities exempted from regulation in certain federal law and rule provisions and that certain state statutory exemptions from permitting requirements do not apply to state-administered section 404 permits;
- Provides that the DEP must grant or deny an application for a state-administered section 404 permit within the time allowed for permit review under federal rules and that the DEP is specifically exempted from the time limitations provided in state statute for its decisions on applications for state-administered section 404 permits;
- Requires that all state-administered section 404 permits be issued for a period of no more than five years and makes other provisions for the reissuance of permits, including the adoption by rule of an expedited permitting process, and the timeframes within which the DEP must make permitting decisions; and
- Authorizes the DEP to delegate administration of the section 404 permitting program if such delegation is in accordance with federal law.

The DEP will experience additional workload associated with the administration of a section 404 permitting program. The costs of this additional workload and the costs associated with reprogramming the permit tracking and compliance and enforcement applications and databases are indeterminate. The DEP has indicated that it can absorb the costs within its existing resources.

II. Present Situation:

Dredge and Fill Activities

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 (WMDs), the Florida Department of Environmental Protection (DEP), and the U.S. Army Corps of Engineers (Corps).

The state of Florida regulates dredge and fill activities in all waters of the state³ through the DEP's environmental resource permit (ERP) program.⁴ The ERP program operates in addition to the federal regulatory program for dredge and fill activities. The Corps has been responsible for regulating activities in navigable waters⁵ through the granting of permits since the passage of the Rivers and Harbors Act of 1899.⁶ Section 404 of the Clean Water Act broadened the Corps authority over "dredging and filling" in the waters of the United States.⁷ The Corps administers these dredge and fill programs and the U.S. Environmental Protection Agency (EPA) provides oversight of the Corps' dredge and fill program in waters of the United States.⁸ Federal section 404 permits and state ERP permits overlap in that both must be obtained for impacts above regulatory thresholds in federal waters. Activities confined to state waters, beyond the limits of federal jurisdiction, require only a state ERP permit.

¹ Section 373.403(13), F.S.

² Section 373.403(14), F.S.

³ Section 373.019(22), F.S., defines the term "waters of the state" as any and all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as all coastal waters within the jurisdiction of the state.

⁴ See Part IV, Ch. 373, F.S., especially s. 373.4131, F.S.

⁵ Navigable waters (section 10 waters) are a subset of section 404 waters, extend to the high tide line, and include any adjacent non-tidal 404 waters to the ordinary high water mark or the limit of the adjacent wetlands.

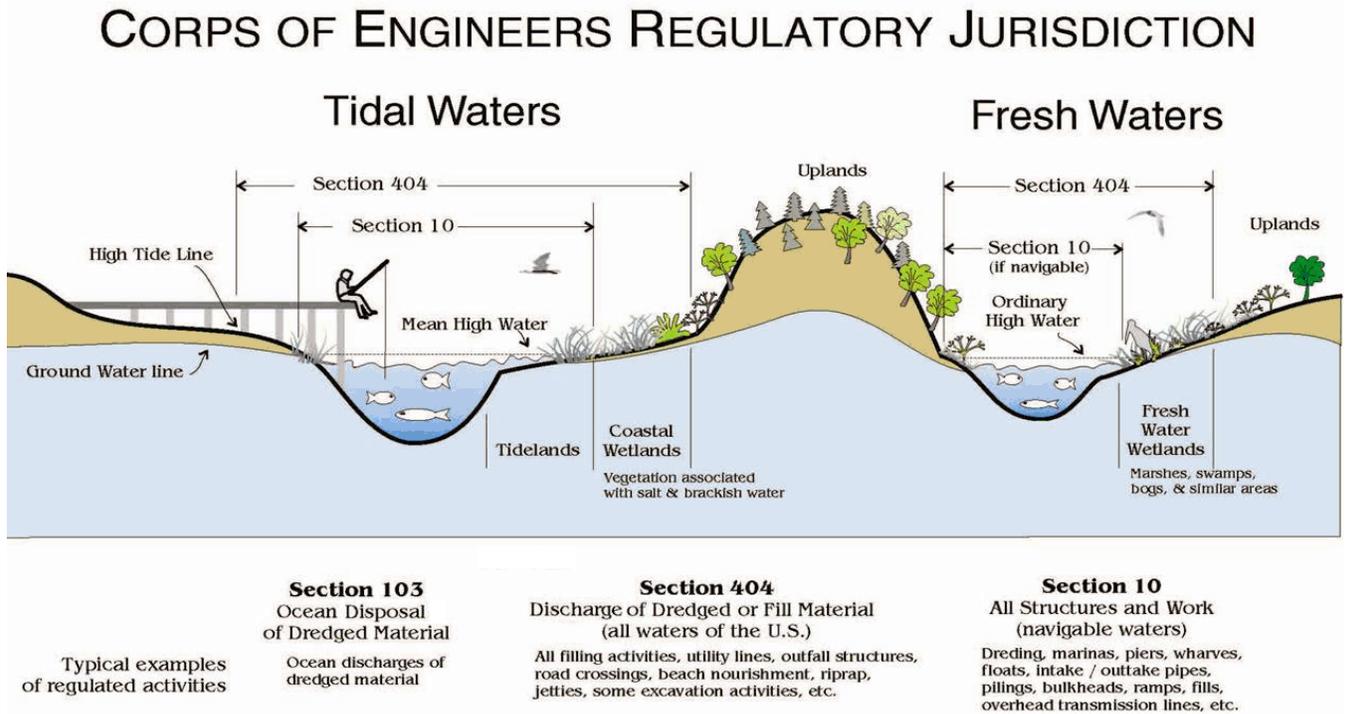
⁶ Department of Environmental Protection (DEP), *Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)*, 2 (Sept. 30, 2005) available at https://www.aswm.org/pdf_lib/consolidation_program.pdf.

⁷ Waters of the United States are surface waters such as navigable waters and their tributaries, all interstate waters and their tributaries, natural lakes, all wetlands adjacent to other waters, and all impoundments of these waters. However, the precise definition of "waters of the United States" is subject to multiple interpretations. The U.S. Court of Appeals has stayed a 2015 revised regulatory definition for the Sixth Circuit. In response, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers have reverted to the definition promulgated in 1986 and 1988 as interpreted by subsequent Supreme Court decisions and guidance documents. See *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Rapanos v. United States*, 547 U.S. 715 (2006).

⁸ 33 U.S.C. s. 1344 (2012).

Federal Dredge and Fill Permits

The federal government regulates dredge and fill activities in navigable waters through section 10 of the Rivers and Harbors Act of 1899.⁹ The federal government regulates a broader category of waters, “waters of the United States,” pursuant to section 404 of the Clean Water Act. Section 404 establishes a program for permits for the discharge of dredged or fill material into 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.¹⁰ The illustration below is descriptive of the Corps jurisdiction over dredge and fill activities.¹¹



Requirements for a Section 404 permit

The Corps administers section 404 permits under the EPA established guidelines, subject to an EPA veto on a case-by-case basis.¹² 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

⁹ 33 U.S.C. s. 403 (2012).

¹⁰ DEP, *Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)*, 2 (Sept. 30, 2005) available at https://www.aswm.org/pdf_lib/consolidation_program.pdf.

¹¹ U.S. Army Corps of Engineers (Corps), *Regulatory Jurisdiction Overview*, <http://www.spn.usace.army.mil/Missions/Regulatory/Jurisdiction-Determinations/> (last visited Jan. 10, 2018).

¹² 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/> (last visited Jan. 9, 2018).

- The nation's waters would be significantly degraded.¹³

An individual permit is required for potentially significant impacts. The Corps evaluates applications under a public interest review, as well as the environmental criteria set forth by the EPA.¹⁴ The guidelines provide a sequential review process which first requires a permit applicant to demonstrate that all available alternatives to the discharge of dredged or fill material have been considered and that no practicable alternative exists which would have a less adverse impact on the aquatic ecosystem, and which also would not have other significant adverse environmental consequences.¹⁵ Practicable alternatives, include, but are not limited to:

- Activities that do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters.
- Discharges of dredged or fill material at other locations in waters of the United States or ocean waters.¹⁶

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. Practicable alternatives could include moving the proposed activity to an area not presently owned by the applicant.¹⁷ If the activity associated with a discharge is not water dependent, practicable alternatives that do not involve wetlands or other special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, practicable alternatives to a proposed discharge into a wetland, which do not themselves involve a discharge into a special aquatic site, are presumed to have less adverse impact on the aquatic ecosystem, unless otherwise clearly demonstrated.¹⁸ A discharge cannot be permitted if it would violate other applicable laws, including state water quality standards, toxic effluent standards, the Endangered Species Act, and marine sanctuary protections.¹⁹ Further, the discharge cannot cause or contribute to significant degradation of wetlands by adversely impacting human health or welfare, wildlife, ecosystem integrity, recreation, aesthetics, and economic values.²⁰ If all of these guidelines are met, then the applicant must show that all appropriate and practicable steps will be taken to minimize adverse impacts of the discharge on wetlands.²¹

After avoidance and minimization criteria are satisfied, the Corps considers mitigation. The purpose of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States. In establishing mitigation requirements, the Corps strives to achieve a goal of no overall net loss of natural wetland values and functions. The developer can be required to enhance, restore, or create wetlands on or near the development site.²²

¹³ EPA, *Section 404 Permitting Program*, <http://www.epa.gov/cwa-404/section-404-permit-program> (last visited Jan. 9, 2018).

¹⁴ *Id.*

¹⁵ 40 C.F.R. § 230.10(a)(1).

¹⁶ *Id.*

¹⁷ 40 C.F.R. § 230.10(a)(2).

¹⁸ 40 C.F.R. § 230.10(a)(4).

¹⁹ 40 C.F.R. § 230.10(b).

²⁰ 40 C.F.R. § 230.10(c).

²¹ 40 C.F.R. § 230.10(d).

²² 40 C.F.R. § 230.93.

Section 404 Exemptions

Discharges of dredged or fill material are not prohibited or otherwise subject to regulation if they are associated with normal ongoing farming, ranching, and forestry activities, such as plowing, seeding, cultivating, or harvesting food, fiber, or forest products; minor drainage; maintenance of drainage ditches; construction and maintenance of irrigation ditches; construction and maintenance of farm or stock ponds; construction and maintenance of farm or forest roads, in accordance with best management practices; construction of temporary sedimentation basins on a construction site; and maintenance of dams, dikes, and levees. These discharges are exempt from the 404 permitting requirements if they do not convert a wetland to an upland area through the discharge of dredged or fill material. In addition, discharges resulting from an activity with respect to which a state has an approved program under section 1288(b)(4) are exempt. Such programs are intended to remediate areas having substantial water quality control problems and address control of dredge and fill discharge of agriculture and silviculture nonpoint sources of pollution, mine-related sources of pollution, construction activity related sources of pollution, salt water intrusion, residual waste, or disposal of pollutants on land or in subsurface excavations.²³

State Dredge and Fill Permits

Florida regulates dredge and fill activities through its ERP program, which is administered primarily under part IV of ch. 373, F.S. It is a statewide program implemented jointly by the DEP and the WMDs under operating agreements that provide a division of responsibilities between the agencies. Provisions exist for local programs to be delegated authority to implement the program on behalf of the DEP and the WMDs. Currently Broward County is the only local program to have received delegation.²⁴

ERPs are required for alterations to the landscape that exceed permitting thresholds or that are not otherwise exempt by statute or rule from regulation.²⁵ Such alterations are generally referred to as surface water management systems and include the management of the flow of water across the land surface and activities involving the construction, alteration, operation, maintenance or repair, removal, and abandonment of dams, impoundments, reservoirs, and appurtenant works. It also includes alterations of uplands and dredging and filling in wetlands and other surface waters, including isolated wetlands. Activities regulated by the ERP program include clearing; grading; paving; erection, alteration, or removal of structures; and the construction of new or altered stormwater management systems. Certain permitting thresholds exist, specific to each WMD, and exemptions from permitting also exist by statute and rule.²⁶

²³ 33 U.S.C. s. 1344(f); 33 C.F.R. § 323.4; 40 C.F.R. § 232.3.

²⁴ DEP, *Overview of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida*, 2 (Feb. 23, 2011).

²⁵ Section 373.413(1), F.S.; DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 1.0, incorporated by reference in Fla. Admin. Code R. 62-330.010(4), (Oct. 1, 2013) available at <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited Jan. 15, 2018).

²⁶ DEP, *Overview of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida*, 4 (Feb. 23, 2011).

ERP Exemptions

Under ss. 373.406 and 403.927, F.S., most routine, customary agricultural, silvicultural, floricultural, and horticultural activities do not require an ERP permit. Any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture has the right to alter the topography of the land for purposes consistent with the practice of such occupation, provided the alteration is not for the sole or predominant purpose of impounding or obstructing surface waters. All five state WMDs have adopted specific rules to regulate other agricultural activities, including the adoption of noticed general permits.²⁷ The review of all agricultural activities, including permitting, compliance, and enforcement, is the responsibility of the WMDs.²⁸ The Department of Agriculture and Consumer Services (DACCS), in cooperation with the DEP and the WMDs, have developed various best management practices handbooks to assist the agriculture community in working in a manner that will minimize adverse impacts to wetlands and other surface waters.²⁹

Other exempt activities include activities permitted by other agencies, maintenance activities on already impacted areas, maintenance of deepwater ports, and other minor structures.

The DEP and the WMDs may establish by rule activities that they determine will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district.³⁰ The DEP has identified 60 activities that are exempt from ERP requirements.³¹ Further, the DEP and the WMDs may determine, on a case-by-case basis, whether a specific activity only minimally or insignificantly has an individual or cumulative adverse impact on the water resources. These are known as *de minimis* exemptions.³²

Certain other activities have been exempted by statute or rule from the need for regulatory permits. Most of these exemptions are established in s. 403.813, F.S. Examples of exempt activities include:

- Construction of small, private docks, maintenance dredging, repair and replacement of seawalls, and installation of new seawalls and rip rap in artificial waters;
- Maintenance dredging of existing navigational channels and canals;
- Construction and alteration of boat ramps within certain size limits; and
- Certified aquaculture activities that apply appropriate best management practices adopted under s. 597.004, F.S.³³

²⁷ Fla. Admin. Code Ch. 62-113, accessible at: <https://floridadep.gov/ogc/ogc/content/operating-agreements>, (last visited Jan. 15, 2018).

²⁸ DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 1.0, incorporated by reference in Fla. Admin. Code R. 62-330.010(4), (Oct. 1, 2013) available at <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 15, 2018).

²⁹ DEP, *Overview of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida*, 4, 12 (Feb. 23, 2011); s. 570.93, F.S.

³⁰ Section 373.406, F.S.

³¹ Rule 62-330.051, F.A.C.

³² DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 3.2.7, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 16 2018).

³³ Section 403.813, F.S.

ERP Permit Standards

The ERP application is issued, withdrawn, or denied in accordance with state statutory and rule criteria.³⁴ Any activities requiring a permit may not:

- Cause adverse water quantity impacts to receiving waters and adjacent lands;
- Cause adverse flooding to on-site or off-site property;
- Cause adverse impacts to existing surface water storage and conveyance capabilities;
- Adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;
- Adversely affect the quality of receiving waters such that state water quality standards, which includes surface waters and groundwater, will be violated. Special provisions apply to allow no degradation of the water quality of Outstanding Florida Waters (OFWs);³⁵
- Cause adverse secondary impacts to water resources;
- Adversely impact the maintenance of surface or groundwater levels or surface water flows; or
- Adversely impact a work of a WMD.³⁶

In addition, activities requiring a permit must:

- Be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed;
- Be conducted by an entity with the financial, legal, and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued; and
- Comply with applicable special basin or geographic area criteria adopted by rule.³⁷

Activities in wetlands and other surface waters must not be contrary to the public interest, or, if the activity is located in an OFW, the activity must be clearly in the public interest.³⁸ Direct, secondary, and cumulative impacts are considered for all activities requiring a permit. Secondary impacts are those actions or actions that are very closely related and directly linked to the activity under review that may affect wetlands and other surface waters and that would not occur but for the proposed activity. Cumulative impacts are residual adverse impacts to wetlands and other surface waters in the same drainage basin that have or are likely to result from similar activities (to that under review) that have been built in the past, that are under current review, or that can reasonably be expected to be located in the same drainage basin as the activity under review. Mitigation that fully offsets impacts within the drainage basin where the project impacts occur is assumed to have no adverse cumulative impacts. Consideration is given to upland buffers that are designed to protect the functions that uplands provide to wetlands and other surface waters. Special provisions also exist to protect waters used for shellfish harvesting.³⁹

³⁴ *Id.* at 2, 3; s. 373.406, F.S.; s. 373.4131, F.S.; Fla. Admin. Code Ch. 62-330.

³⁵ Listed in Fla. Admin. Code Ch. 62-302.

³⁶ Fla. Admin. Code R. 62-330.301(1).

³⁷ *Id.*

³⁸ Section 373.414, F.S.

³⁹ DEP, *Overview of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida*, 6, 7 (Feb. 23, 2011).

ERP Permit Processing

The DEP, the WMD, or delegated local government initially receive the ERP application. A joint application is forwarded to the Corps. Upon receipt of the ERP application, the DEP, the WMDs, and delegated local governments immediately send a copy of the application to the Corps if the activity involves work in wetlands or other surface waters. Also upon receipt, the DEP, the WMDs, and delegated local governments have 30 days to review the application and inform the applicant of any material needed to evaluate the application in accordance with statutory and rule criteria.⁴⁰

For the DEP, an applicant has 90 days to respond to the request, and upon receipt of new material submitted by the applicant, the agencies have another 30 days to review the material for completeness. The WMD processing procedures vary to accommodate the requirements of their different governing boards. The DEP and the WMDs must issue or deny an ERP within 60 days of receiving a complete application. Application completeness is determined by whether the applicant has submitted all the materials required by review as specified by rule and statute.

Upon receipt of an application, a copy also is initially sent to the state's Fish and Wildlife Conservation Commission (FWC). Comments and suggestions regarding listed species and other wildlife impacts from the FWC are considered during processing of the application. The FWC also may object to issuance of an ERP or wetland resource permit under Florida's Approved Coastal Zone Management Act coordination process. The DEP and the WMDs do not rely on, but will also consider, comments from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service when such comments are made in a timely manner during the processing of a state permit.

ERP permits are valid for the life of the system, including all structures and works authorized for construction or land alteration. The ERP permit does not automatically expire after the construction phase, and continues to cover the operation and use of the system.⁴¹

State Assumption of the Federal Section 404 Program

A state may apply to the EPA for state assumption of the federal section 404 program. The application for state assumption must include a complete description of the state program it proposes to administer and establish under state law.⁴² 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.⁴³ The EPA then conducts a rigorous assessment of the state's program and

⁴⁰ *Id.* at 10.

⁴¹ DEP, *Overview of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida*, 10, 11 (February 23, 2011), DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 5.5.3.5, incorporated by reference in Fla. Admin. Code R. 62-330.010(4), (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 15, 2018), s. 373.4141, F.S.

⁴² 33 U.S.C. s. 1344(g).

⁴³ *Id.*

ensures that it is no less stringent than the federal program.⁴⁴ To date, only two states (Michigan and New Jersey) have assumed section 404 permitting authority.⁴⁵

A state that is approved by the EPA to administer the section 404 permitting program serves as the regulatory entity over dredge and fill activities within section 404 waters in place of the Corps. However, under federal law, waters that are, or could be, used to transport interstate or foreign commerce, tidal waters, and wetlands adjacent to these waters are non-assumable.⁴⁶ Thus, the Corps retains jurisdiction over these waters.⁴⁷ For coastal states, the extent of jurisdiction retained by the Corps may be an impediment to state assumption. Additionally, there is uncertainty regarding what specific waters the Corps retains jurisdiction over and the extent to which their adjacent wetlands extend landward.⁴⁸

To curtail some uncertainty over the scope of assumable waters and wetlands, the EPA formed the Assumable Waters Subcommittee to provide advice and develop recommendations on how the EPA can best clarify which waters a state may assume, and which waters the Corps retains jurisdiction over. The report recommended that the Corps retain authority over waters included on the lists of waters regulated under section 10 of the Rivers and Harbors Act, which are developed by the Corps.⁴⁹ The report also recommends that each state and the Corps agree to an administrative boundary that would determine the authority the Corps would retain over all wetlands adjacent to the retained navigable waters. If a default is not agreed upon, the report recommends a 300-foot national administrative default line.⁵⁰

Therefore, the DEP and the Corps may negotiate an administrative boundary for the adjacent wetlands of section 10 waters in order to conform the boundary to existing state regulations or natural features or, alternatively, use a national administrative default boundary of 300 feet from retained navigable waters.⁵¹ Florida could potentially assume authority to administer the federal dredge and fill regulations for those waters classified as section 404 waters, excluding navigable section 10 waters.

⁴⁴ 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, 18 (May-June 2009) available at http://www.aswm.org/pdf_lib/evans_2009.pdf (last visited Jan. 9, 2018).

⁴⁵ See 40 C.F.R. §§233.70 and 233.71.

⁴⁶ Association of State Wetland Managers (ASWM), *Section 404 Program Assumption: A Handbook for States and Tribes*, 5 (Aug. 2011).

⁴⁷ *Id.*; see 33 U.S.C. s. 403 (2012).

⁴⁸ Assumable Waters Subcommittee, *Draft Final Report of the Assumable Waters Subcommittee Submitted to the National Advisory Council for Environmental Policy and Technology*, 1 (May 2017) available at https://www.epa.gov/sites/production/files/2017-05/documents/draft_aw_subcommittee_final_report_5.2.17.pdf (last visited Jan. 10, 2018).

⁴⁹ *Id.* at 3; See

http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other_permitting_factors/Jacksonville%20District%20OSection%2010%20Waters.pdf for the Section 10 Rivers and Harbors Act listed waters in Florida.

⁵⁰ ASWM, *Section 404 Program Assumption: A Handbook for States and Tribes*, 4 (Aug. 2011).

⁵¹ Environmental Protection Agency (EPA), *Final Report of the Assumable Waters Subcommittee*, vi (May 2017) https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprot_05-2017_tag508_05312017_508.pdf (last visited Jan. 15, 2018).

Assumption Requirements

In order to be eligible to assume administration of the section 404 permitting program, a state must meet the following specified criteria:

- The state must have jurisdiction over all waters, including wetlands that are under federal jurisdiction. Dredge and fill activities in lakes, streams, and other waters defined in federal regulations must be regulated by the state in addition to wetlands.
- The state's laws must regulate at least the same activities as those regulated under federal law. State regulations can be broader than federal regulations but cannot exempt activities that require a federal permit.
- The state laws must ensure compliance with federal regulations, including the section 404(b)(1) guidelines. State regulations can provide greater resource protection but cannot be less stringent than federal regulations.
- The state program must have adequate enforcement authority. Under a state-assumed program, primary responsibility for enforcement rests with the state.⁵²

A state must have the authority necessary to assume responsibility for the entire section 404 permitting program. It is not possible to assume only a portion of the program.⁵³

While a state is not required to adopt the federal wetland delineation methodology, it must show that the state methodology is equally as, or more, protective. The three categories of wetland indicators considered in determining whether a certain area is considered a wetland are hydrologic indicators, hydric soils, and wetland plant species.⁵⁴ Currently, the federal delineation methodology and Florida's delineation methodology use the same hydrologic indicators, the same hydric soil definition and index, and align substantially the same on wetland plant species, with a few exceptions like slash pine and gallberry. For a location to be deemed a wetland under the Corp's wetland delineation manual, indicators from all three categories of indicators must be present at the same time for such location.⁵⁵ Under the DEP's wetland methodology, only two of the three indicators must be present for the location to be deemed a wetland.⁵⁶ Thus, every instance where the Corps would deem a location a wetland, the location would be delineated as a wetland under the DEP's methodology as well.

State Program Operation and Federal Oversight

A state must provide public notice of state-administered section 404 permit applications and provide a reasonable period, normally 30 days, for interested parties to provide comment.⁵⁷ Interested parties may request a public hearing on a state-administered section 404 permit

⁵² EPA, *Final Report of the Assumable Waters Subcommittee*, 2 (May 2017) available at https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprot_05-2017_tag508_05312017_508.pdf (last visited Jan. 15, 2018).

⁵³ ASWM, *Clean Water Act Section 404 State Assumption*, 3, available at https://www.aswm.org/pdf_lib/cwa_section_404_state_assumption_factsheets.pdf (last visited Jan. 13, 2018).

⁵⁴ EPA, *Section 404 of the Clean Water Act: How Wetlands are Defined and Identified*, <https://www.epa.gov/cwa-404/section-404-clean-water-act-how-wetlands-are-defined-and-identified> (last visited Jan. 10, 2018).

⁵⁵ Corps, *Corps of Engineers Wetlands Delineation Manual*, (Jan. 1987), available at <http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/Wetlands/1987WetlandDelineation.pdf> (last visited Jan. 10, 2018).

⁵⁶ Fla. Admin. Code R. 62-300(2)(d).

⁵⁷ 40 C.F.R. § 233.32(b).

application. A state must hold a public hearing when it determines there is a significant degree of public interest in a state-administered section 404 permit application or a draft general permit. A state may also hold a hearing, at its discretion, whenever it determines a hearing may be useful to a decision on the state-administered section 404 permit application.⁵⁸

If the EPA does not comment on a state-administered section 404 permit application, the state must make its final permit decision at the close of the public comment period.⁵⁹ If the EPA comments on the state-administered section 404 permit application, the state must follow a specific procedure.⁶⁰ In the event that the state neither satisfies the EPA's objections or requirements for a permit condition nor denies the state-administered section 404 permit, the Corps must process the permit application. Significantly, if the EPA objects to issuance of a permit, the state may not issue a section 404 permit unless the objection is resolved. There is no federal provision for the automatic issuance of a permit based on the running of time.⁶¹

The EPA has responsibility for oversight of state-assumed section 404 permitting programs. An approved state section 404 program is operated under the provisions of the EPA's 404 state program regulations, found at 40 C.F.R. Part 233. These regulations define the process for requesting approval of a state program and operation of a state program.

A Memorandum of Agreement (MOA) between the EPA and the state, signed at the time of program approval, clarifies the roles and responsibilities of both parties, and the scope of federal oversight. Similarly, an MOA entered into between the state and the Secretary of the Army includes a description of the waters within the state over which the Corps retains jurisdiction, the procedures for transferring to the state pending 404 permit applications, and the identification of all general permits to be administered and a plan for transferring those permits to the state. While all permit applications received by the state are subject to review by the EPA, the EPA typically waives review of all but a small percentage (two to five percent on an annual basis). These applications include:

- Those public notices for which review is mandated under the federal regulations, including projects with the potential to impact critical resource areas such as wetlands that support federally listed species, sites listed under the National Historical Preservation Act, components of the National Wild and Scenic River System, and similar areas; and
- State-specific categories of projects negotiated in the state program MOA. States also provide the EPA with an annual report that summarizes permitting and enforcement actions taken during the year.⁶²

Section 404 permits issued by the state must include conditions prescribed by the EPA.⁶³ This includes that state-administered section 404 permits may not exceed five years.⁶⁴ Section 404 permits issued by the Corps and Florida's ERPs have longer or indefinite durations. Applicants

⁵⁸ 40 C.F.R. § 233.33.

⁵⁹ 40 C.F.R. § 233.35(b).

⁶⁰ 40 C.F.R. § 233.35(a).

⁶¹ 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(j).

⁶² ASWM, *Clean Water Act Section 404 State Assumption*, 3, 4, 10, available at https://www.aswm.org/pdf/lib/cwa_section_404_state_assumption_factsheets.pdf (last visited Jan. 13, 2018).

⁶³ 40 C.F.R. § 233.23.

⁶⁴ 33 U.S.C. § 1344(h)(1)(A)(ii); 40 C.F.R. § 233.23(b).

may seek to extend the duration of their state-administered section 404 permits, but the extension may not last beyond five years from the original effective date.⁶⁵ A state may continue the Corps or state issued section 404 permits until the effective date of the new permits, if state law allows.⁶⁶

Endangered Species Act

Once a state assumes section 404 permitting authority, the permits become state permits issued under state law. Therefore, provisions of federal law, which apply to federal permit actions, including section 7 of the Endangered Species Act (ESA), no longer apply.⁶⁷ Section 7 of the ESA requires direct consultation with the United States Fish and Wildlife Service (USFWS) for any federal activity that may affect a federally listed species.

To ensure that federally listed species do not lose protections, state assumption requirements necessitate that the EPA review all permit applications that have a reasonable potential for affecting federally listed species.⁶⁸ In this review, the EPA coordinates with the USFWS, as well as the National Marine Fisheries Service (NMFS) and the Corps as applicable, and retains the authority to prohibit the state from issuing a section 404 permit if the EPA objects.⁶⁹

A state is prohibited from issuing a section 404 permit if the issuance of the permit would jeopardize the continued existence of a listed federal species or result in the likelihood of the destruction or adverse modification of critical habitat, unless an exemption has been granted by the Endangered Species Commission.⁷⁰ The section 404(b)(1) guidelines require full consideration of impacts to threatened and endangered species and require that any such impacts be considered in making factual determinations and the findings of compliance or non-compliance.⁷¹

In some states with a considerable number of endangered species, like Florida, the need for coordination under the ESA could prove to be a significant impediment to state program assumption. The coordinated-review process with the EPA and the USFWS for applications that may affect federally listed species may be achieved through an MOA.⁷² The DEP has stated that it intends to develop such an agreement that maintains section 7 consultation with the DEP standing in like a federal agency. The agreement will specify which permit applications need to be reviewed by the USFWS and the timing of the process.⁷³

⁶⁵ 40 C.F.R. § 233.36(c)(2)(v).

⁶⁶ 40 C.F.R. § 233.38.

⁶⁷ ASWM, *Section 404 Program Assumption: A Handbook for States and Tribes*, 24 (Aug. 2011) available at https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf (last visited Jan. 10, 2018).

⁶⁸ 40 C.F.R. § 230.30.

⁶⁹ ASWM, *Section 404 Program Assumption: A Handbook for States and Tribes*, 25 (Aug. 2011).

⁷⁰ 40 C.F.R. §230.10(b)(3).

⁷¹ 40 C.F.R. Part 230.

⁷² ASWM, *Section 404 Program Assumption: A Handbook for States and Tribes*, 25 (Aug. 2011).

⁷³ Email from Kevin Cleary, Legislative Affairs Director, DEP (Dec. 15, 2017) (on file with the Senate Committee on Environmental Preservation and Conservation).

Funding

The initial evaluation and development of a state-administered section 404 permitting program can be significant. The EPA has estimated that states spend an average of \$225,000 when investigating the option to assume the section 404 program.⁷⁴ The EPA does provide federal financial assistance through Wetland Program Development Grants to states fully considering assumption.⁷⁵

While federal funds may be available for gaining state assumption, no federal funds are allocated to a state for administration of the state program. Federal law requires all pending section 404 permit applications to be transferred to the state program upon assumption.⁷⁶ Annual costs for the ongoing administration of a state program varies from state to state.⁷⁷ For states that already expend funds operating a state permit program, such as Florida's ERP program, the added cost of state assumption may not be as significant.⁷⁸

Existing State Authority

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 affecting 10 acres or less of wetlands and other surface waters, including navigable waters, through the environmental resource-permitting program.⁷⁹ Florida law was later amended to authorize the DEP to obtain issuance from the Corps of an expanded state programmatic general permit or a series of regional general permits for Florida and 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.⁸⁰

The Clean Water Act authorizes, and the Corps has developed, numerous alternative permitting procedures to reduce regulatory burdens. A "general permit" is a Corps authorization issued on a nationwide or regional basis for a category of activities that are substantially similar in nature and cause only minimal individual and cumulative impacts.⁸¹ After the Corps issues a general permit, individual activities falling within the categories authorized by the general permits do not need to seek further authorization by the Corps.⁸² The Corps currently implements 17 general permits specifically for Florida and 44 nationally. These activities include maintenance dredging, transmission lines, residential docks, and other minor structures.⁸³

A state desiring to administer a general permit may submit to the Corps a description of the program the state proposes to establish and administer under state law.⁸⁴ If the Corps approves

⁷⁴ ASWM, *Section 404 Program Assumption: A Handbook for States and Tribes*, 14 (Aug. 2011).

⁷⁵ *Id.* at 26.

⁷⁶ 40 C.F.R. § 233.14(b)(2).

⁷⁷ ASWM, *Section 404 Program Assumption: A Handbook for States and Tribes*, 27 (Aug. 2011).

⁷⁸ *Id.*

⁷⁹ Ch. 2005-273, s. 3, Laws of Fla.

⁸⁰ Section 373.4144, F.S.

⁸¹ 33 U.S.C. § 1344(e)(1).

⁸² 33 C.F.R. § 325.2(e)(2).

⁸³ Corps, *Sourcebook*, <http://www.saj.usace.army.mil/Missions/Regulatory/Source-Book/> (last visited Jan. 16, 2018).

⁸⁴ 33 U.S.C. §1344(g)(1).

the state's program, the state takes over issuing the general permits.⁸⁵ Programmatic general permits are a type of general permit founded on an existing state, local, or federal agency program designed to avoid duplication with that program. The Corps has issued 12 programmatic general permits for Florida.⁸⁶

III. Effect of Proposed Changes:

Authority for State Assumption

The bill:

- Defines the term “state assumed waters” to mean waters of the United States that the state assumes permitting authority over pursuant to federal law for the purposes of permitting the discharge of dredge or fill material;
- Provides that the Department of Environmental Protection (DEP) has the power and authority to assume, in accordance with federal law, the dredge and fill permitting program established in section 404 of the Clean Water Act;
- Authorizes the DEP to adopt by rule any federal requirements, criteria, or regulations necessary to obtain assumption of the section 404 permitting program, including, but not limited to, the section 404(b)(1) guidelines and the public interest review criteria in 33 C.F.R. s. 320.4(a);
- Provides that any such rules adopted may not become effective or otherwise enforceable until the Environmental Protection Agency (EPA) has approved the state's assumption application; and
- Provides that the authority granted to the DEP in the bill is intended to be sufficient to enable the DEP to assume and implement the federal section 404 dredge and fill permitting program in conjunction with the state's environmental resource permit (ERP) program.

Reconciliation of State Law

The bill provides that:

- The application of state law to further regulate discharges in state assumed waters is not prohibited if such state law does not conflict with the federal requirements necessary to obtain assumption of the section 404 permitting program;
- State laws which conflict with the federal requirements do not apply to state-administered section 404 permits.

Applicability of Federal and State Exemptions

A state-administered section 404 permit is not required for activities exempted from federal regulation. The bill clarifies that specified state statutory exemptions from permitting requirements continue to apply to ERPs, but those same exemptions do not apply to state-administered section 404 permits.

⁸⁵ 33 U.S.C. §1344(h).

⁸⁶ Corps, *Sourcebook*, <http://www.saj.usace.army.mil/Missions/Regulatory/Source-Book/> (last visited Jan. 16, 2018).

Implementation of Section 404 Program

The bill:

- Provides that upon state assumption of the section 404 permitting program, the DEP must grant or deny an application for a state-administered section 404 permit within the time allowed for permit review under federal rules;
- Specifically exempts the DEP from the time limitations provided in state statute for state-administered section 404 permits;
- Requires that all state-administered section 404 permits must be for a period of no more than five years;
- Provides that a state-administered section 404 permit does not expire until the DEP takes final action upon the application for reissuance of the permit or until the last day for seeking judicial review of the agency order or a later date fixed by order of a reviewing court;
- Provides that if the DEP fails to render a permitting decision within the time allowed by federal law and rule or a memorandum of agreement executed by the DEP and the EPA, whichever is shorter, the applicant may apply for an order from the circuit court requiring the DEP to render a decision within a specified time;
- Requires the DEP to adopt by rule an expedited permit review process that is consistent with federal law for the reissuance of state-administered section 404 permits where:
 - There have been no material changes in the scope of the project as originally permitted;
 - Site and surrounding environmental conditions have not changed; and
 - The applicant does not have a history of noncompliance with the existing permit; and
- Provides that a decision by the DEP to approve the reissuance of a state-administered section 404 permit is subject to state statutory provisions governing challenges and hearings of agency decisions only with respect to any material permit modification or material changes in the scope of the project as originally permitted.

The bill authorizes the DEP to delegate administration of the section 404 permitting program if such delegation is in accordance with federal law. If a delegation occurs, the DEP must retain the authority to review, modify, revoke, or rescind a state-administered section 404 permit issued by any delegated entity to ensure consistency with federal law.

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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

The Department of Environmental Protection (DEP) maintains that the provisions of this bill do not provide authority to collect a fee for 404 permit applications and that assumption of the section 404 program does not grant authority to collect fees. According to the DEP, despite any other provision of law that may provide authorization, it does not intend to charge additional fees for 404 permit applications.⁸⁷

B. Private Sector Impact:

Indeterminate. Assumption of the 404 dredge and fill permitting program by the state may reduce the costs incurred by permit applicants because of the streamlined permitting process and may increase other efficiencies that result from dredge and fill permitting by a single government agency. State assumption may also reduce the length of time necessary to obtain a dredge and fill permit.⁸⁸

C. Government Sector Impact:

The DEP will experience additional workload associated with the administration of a section 404 permitting program. The additional workload includes rulemaking to adopt federal requirements, criteria, and regulations necessary to obtain assumption of the section 404 permitting program and the actual processing of the additional section 404 permits. The costs of this additional workload and the costs associated with reprogramming the permit tracking and compliance and enforcement applications and databases are indeterminate. The DEP has indicated that it can absorb the additional workload within existing resources. The DEP does not anticipate an increase in permitting administration expenditures and believes that, upon assumption, the processing of state 404 permits, as well as enforcement activities for state 404 permits, can be absorbed without an increase in staffing or administrative costs.⁸⁹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 373.4146 of the Florida Statutes.

⁸⁷ Department of Environmental Protection, *Senate Bill 1402 Agency Legislative Bill Analysis* (January 17, 2018) (on file with the Senate Committee on Environmental Preservation and Conservation).

⁸⁸ *Id.*

⁸⁹ *Id.*

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
