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

BILL:	CS/SB 2016
INTRODUCER:	Community Affairs Committee and Senator Bennett
SUBJECT:	Environmental Permitting
DATE:	April 14, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hennigan	Kiger	EP	**Fav/1 amendment**
2.	Molloy	Yeatman	CA	**Fav/CS**
3.			GO	
4.			GA	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The CS/SB 2016 (the bill) expresses the Legislature's intent to facilitate coordination and a more efficient process of implementing regulatory duties and functions between the Department of Environmental Protection (DEP), the water management districts, and federal regulatory and environmental agencies. The DEP is directed to pursue the issuance of an expanded state programmatic general permit, or a series of regional general permits, for categories of activities in federal waters governed by the Clean Water Act or the Rivers and Harbors Act of 1899. The department is directed to use the state general permit or regional general permits as a mechanism to eliminate overlapping federal regulations and state rules that require duplicative permitting by the state and the federal government.

The bill ratifies changes to administrative rules approved by the Environmental Regulation Commission relating to facultative plants effective when a voluntary state programmatic general permit for all dredge and fill activities affecting 5 acres or less of wetlands or other surface waters is implemented as provided in s. 373.4144(3), F.S.

The bill provides that a local government may consider certain biofuel processing facilities and renewable energy facilities as valid agricultural, industrial, or silvicultural uses permitted within

those land use categories, authorizes a 25-year consumptive use permit under certain circumstances, and provides that certain biofuel production projects are eligible for expedited permitting.

The bill amends ss. 373.4144, 373.4211, 373.236, 373.243, and 403.973, Florida Statutes and creates s. 125.0112, Florida Statutes.

II. Present Situation:

Rivers and Harbors Act of 1899
Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) regulates work in, over, and under waters listed as "Navigable Waters of the United States." Navigable waters of the United States are those waters subject to the ebb and flow of the tide shoreward to the mean high water mark and which have been, are, or will be susceptible to use to transport interstate or foreign commerce.[1] 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. Permits for these activities are issued by the U.S. Army Corps of Engineers.

Clean Water Act
Section 404 of the federal Clean Water Act establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g., certain farming and forestry activities.)[2]

Proposed activities are regulated through a permit process. An individual permit is required for potentially significant impacts and is reviewed by the U.S. Army Corps of Engineers. For discharges that will have only minimal adverse effects, a general permit may be issued. General permits are issued on a nationwide, regional, or state basis for particular categories of activities. Under this program, the U.S. Army Corps of Engineers administers the day-to-day program; conducts or verifies jurisdictional determinations; and enforces Section 404 provisions. The U.S. Environmental Protection Agency develops and interprets policy, guidance and environmental criteria used in evaluating permit application; determines scope of geographic jurisdiction and applicability of exemptions; approves and oversees state and tribal assumption; and enforces Section 404 provisions.[3]

[1] http://www.usace.army.mil/cw/cecwo/reg/33cfr329.htm#329.3
[2] http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf
[3] Id.

Chapter 2005-273, Laws of Florida

Chapter 2005-273, Laws of Florida, required the DEP to develop a strategy to consolidate, to the maximum extent practicable, federal and state wetland permitting and to secure complete authority over dredge and fill activities impacting 10 acres or less of wetlands or other surface waters, including navigable waters, through the environmental resource permitting program established in Part IV of ch. 373, F.S. The department was directed to submit a report to the Legislature by October 1, 2005. The report submitted by the DEP, entitled "*Consolidation of State and Federal Wetland Permitting Programs, Implementation of HB 759 (Chapter 2005-273, Laws of Florida)"* analyzed two options for streamlining the programs.

The first option, for the DEP to assume the federal permitting program, would require amendments to the federal Clean Water Act, the Rivers and Harbors Act, and state law. The Clean Water Act would need to be amended to remove provisions which prohibit the states from assuming the entire Section 404 program so that the DEP could assume the program for wetlands and surface waters throughout the state. The Rivers and Harbors Act would need to be revised to allow the state to assume authority for Section 10 navigation-related permits. Part IV of ch. 373, F.S., would have to be revised to modify, revoke or rescind permits issued by the water management districts so that the DEP would be the lead state agency for wetland permitting.

The second option suggested that the U.S. Army Corps of Engineers may issue a state programmatic general permit to authorize a state to issue Clean Water Act and Rivers and Harbors Act permits in limited circumstances. State programmatic general permits are limited to similar classes of projects with minimal individual and cumulative impacts, and the complexity and physical size of the projects are important considerations. Because the state programmatic general permit authorizes the issuance of federal permits, individual permits with impacts to listed species must be coordinated by the Corps with other federal resource agencies. This consolidation cannot be accommodated with the administrative review process established in ch. 120, F.S., therefore actions taken by the state under the programmatic general permit are not final actions and the permit must be elevated to the Corps.

The DEP recommended pursuing a greatly expanded state programmatic general permit through state and federal legislative actions, but preliminary discussions with the Corps indicated that a 10-acre upper limit as proposed under HB 759 was unlikely, and that the expanded state programmatic general permit would require that state applicants waive the ability to use ch. 120, F.S., to allow for federal coordination on endangered species.

As part of the effort to coordinate the permits, the DEP initiated rulemaking to add slash pine[4] and gallberry[5] as "facultative" in the state's wetlands delineation rule to make the state and federal wetland boundary lines ecologically equivalent. Slash pine and gallberry are wetland indicators on the federal plant list, but are upland indicators on the state list. Therefore, the current state methodology for wetlands delineation is less strict than the federal methodology when using slash pine and gallberry as indicators. The Environmental Regulation Commission

[4] Also known as southern pine, yellow slash pine, swamp pine, pitch pine, Cuban pine. Slash pine grows through the southeastern United States, but South Florida slash pine is found only in the southern half of Florida and the Florida Keys.
[5] Gallberry is a slow growing medium sized evergreen shrub, native to the Florida pine flatwoods, and is an important honey plant.

approved the rule modification on February 23, 2006, but these changes to the rule must be ratified by the Legislature before taking effect.

Growth Management
Adopted by the 1985 Legislature, the Local Government Comprehensive Planning and Land Development Regulation Act,[6] also known as Florida's Growth Management Act, requires all of Florida's 67 counties and 410 municipalities to adopt local government comprehensive plans that guide future growth and development. Comprehensive plans contain chapters or "elements" that address future land use, housing, transportation, infrastructure, coastal management, conservation, recreation and open space, intergovernmental coordination, and capital improvements. The state land planning agency that administers these provisions is the Department of Community Affairs (DCA).

Local Planning Agencies
Currently, the governing body of a local government may designate itself as the local planning agency with the addition of a nonvoting school board representative. A local planning agency prepares a comprehensive plan or amendment after the required hearings and makes recommendations to the local governing body regarding the adoption or amendment of the local plan.

Plan Amendments
A local government may amend its comprehensive plan provided certain conditions are met including two advertised public hearings on a proposed amendment before its adoption and mandatory review by the DCA. A local government may amend its comprehensive plan only twice per year with certain exceptions. Small-scale plan amendments are treated differently. These amendments may not change goals, policies, or objectives of the local government's comprehensive plan. Instead, these amendments propose changes to the future land use map for site-specific small scale development activity. The DCA does not issue a notice of intent for small scale development amendments.

Alternative State Review Process Pilot Program
In 2007, the Legislature created a pilot program to provide an alternate, expedited process for plan amendments with limited state agency review. Pilot communities transmit plan amendments, along with supporting data and analyses to specified state agencies and local governmental entities after the first public hearing on the plan amendment. Comments from state agencies may include technical guidance on issues of agency jurisdiction as it relates to ch. 163, part II, F.S., the Growth Management Act. Comments are due back to the local government proposing the plan amendment within 30 days of receipt of the amendment.

Following a second public hearing that shall be an adoption hearing on the plan amendment, the local government transmits the amendment with supporting data and analyses to DCA and any other state agency or local government that provided timely comments. An affected person, as defined in s. 163.3184(1)(a), F.S., or DCA may challenge a plan amendment adopted by a pilot community within 30 days after adoption of the amendment. DCA's challenge is limited to those issues raised in the comments by the reviewing agencies.

[6] See Chapter 163, Part II, F.S.

The pilot communities and Pinellas and Broward counties, and the cities within those counties, and Jacksonville, Miami, Tampa, and Hialeah. Cities within the pilot counties may elect, by a super majority vote of the governing body, not to participate in the pilot program.

Consumptive Use Permits

Consumptive use permits for the use of water are issued by the water management districts or the Department of Environmental Protection under s. 373.219, F.S., and may impose reasonable conditions necessary to assure that the proposed use is consistent with the overall objectives of the district or the department and is not harmful to water resources. No permit is required for domestic consumption of water by individual users.

To be granted a consumptive use permit, an applicant must meet the "three-prong test" established in s. 373.223, F.S. The proposed use must be a reasonable-beneficial use, the proposed use may not interfere with any existing legal use of water, and the proposed use must be consistent with the public interest. Pursuant to s. 373.229, F.S., if the applicant proposes to use less than 100,000 gallons per day, the governing board or the department may consider the application and objections to the application without a public hearing. However, if the application is for a proposed use of 100,000 gallons or more per day and no objection is received, the application may be approved without a hearing. Pursuant to s. 373.236, F.S., consumptive use permits must be granted for a period of 20 years, if requested, under certain conditions. Permits for a city or other governmental body or public works or public service corporation may be granted for up to 50 years in cases where a longer term permit is required to retire bonds for construction of water facilities or waste disposal facilities.

Summary Hearings

Section 403.973(14), F.S., provides that a challenge to an agency action in the expedited permitting process is subject to the summary hearing provisions of s. 120.574, F.S., except that the administrative law judge's decision is in the form of a recommended order and does not constitute final agency action. When only one agency of the state is challenged, the agency must issue the final order within 10 days of receipt of the administrative law judge's recommended order. When the action of more than one state agency is being challenged, the Governor must issue the final order within 10 working days of receipt of the administrative law judge's recommended order. The participating state agencies may opt at the preliminary hearing conference to allow the administrative law judge's recommended order constitute final agency action.

For challenges to a state-of-the art biomedical research institution and campus, challenges must meet the above requirements except that, notwithstanding s. 120.574, F.S., the summary proceedings must be conducted within 30 days after a party files the motion for summary hearing whether or not the parties agree to the summary proceeding.

III. Effect of Proposed Changes:

Section 1 amends subsection (1) of s. 373.4144, F.S., to provide that it is the intent of the Legislature to facilitate coordination and a more efficient process of implementing regulatory duties and functions among the DEP, the water management districts, the U.S. Army Corps of Engineers (Corps), the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the

U.S. Environmental Protection Agency (U.S. EPA), the Florida Fish and Wildlife Conservation Commission, and other relevant federal and state agencies.

A new subsection (2) is created to direct the DEP to:

- Pursue the issuance by the Corps of an expanded state programmatic general permit, or a series of regional permits for certain activities in waters governed under the Clean Water Act and the Rivers and Harbors Act of 1899. Such activities may only cause minimal adverse environment impacts when performed separately and minimal cumulative adverse effects on the environment.
- Use general permits or regional permits to eliminate overlapping federal regulations and state rules that seek to protect the same resource, and to avoid duplicative permitting for minor work located in federal waters, including navigable waters, in order to eliminate the need for a separate individual approval from the Corps, while ensuring maximum protection of wetland resources.
- The DEP may not seek issuance of or take any action under such permit or permits unless the permit conditions protect the environment and natural resources at least as much as the provisions of part IV of ch. 373, F.S., the federal Clean Water Act, and the federal Rivers and Harbors Act.
- Report annually to the Legislature by January 15 of each year on efforts to eliminate impediments to achieving greater efficiencies through expansion of a state programmatic general permit or regional general permits.

A new subsection (3) is created to provide the DEP and the water management districts with authority to implement a voluntary state programmatic general permit for all dredge and fill activities that impact 5 or fewer acres of wetlands or other surface waters, including navigable waters, subject to agreement with the Corps. The permit must be at least as protective as existing state and federal law. The DEP and the water management districts are not precluded from pursuing and implementing a statewide programmatic permit for projects that impact more than 5 acres of wetlands or surface waters.

Subsection (4) is amended to provide that in addition to pursuing complete assumption of federal permitting programs regulating dredge and fill activities, the DEP is not precluded from pursuing a series of regional general permits for construction activities in wetlands and surface waters.

Subsection (5) is created to direct the DEP and the water management districts to compare their rules regarding mitigation for adverse impacts with those of the Corps, and the U.S. EPA. After completion of the comparison, the DEP and the water management districts must:

- Identify any inconsistent or contradictory provisions.
- Recommend revisions to remove inconsistencies or contradictory provisions while maintaining environmental protection.
- Recommend ways of increasing the geographic size of drainage basins and regional watersheds to facilitate or reflect a watershed approach to mitigation.

The DEP and the water management districts must submit by January 15, 2010, a consolidated report to the Governor, the chair of the Senate's Environmental Preservation and Conservation Committee, and the chair of the House Agriculture and Natural Resources Policy Committee on

the implementation of the rule review provisions. The report must identify any state law that conflicts with requirements to remove rule inconsistencies and contradictions.

Section 2 amends subsection (19) of s. 373.4211, F.S., to create paragraph (b) to ratify changes to Rule 62-340.450(3), F.A.C., approved by the Environmental Regulation Commission on February 23, 2006, to add *Pinus elliottii* (slash pine) and *Ilex glabra* (gallberry) to the list of facultative plants. This ratification and the rule revision is not effective until a voluntary state programmatic general permit for all dredge and fill activities affecting 5 acres or less of wetlands or other surface waters is implemented as provided in s. 373.4144(3), F.S.

Paragraph (c) is created to provide that unless the holder of a valid permit elects to use the delineation as amended to add slash pine and gallberry to the list of facultative plants, the surface water and wetland delineations identified and approved in a permit issued under rules adopted before July 1, 2009, are valid until the expiration of the permit. The delineations are identified and approved when:

- The delineation was field-verified by the permitting agency and such verification was surveyed as part of the permit application review process; or
- The delineation was field-verified by the permitting agency and approved as part of the permit.

Where surface water and wetland delineations were not identified and approved in a permit issued under rules adopted under part IV of ch. 373, F.S., delineations within the geographical area to which the permit applies shall be determined pursuant to the rules applicable at the time the permit was issued, notwithstanding changes to Rule 62-340.450(3), F.A.C. These provisions apply to permit modifications issued under rules adopted under this part which do not constitute a substantial modification within the geographical area to which the permit applies.

Paragraph (d) is created to provide that unless a petitioner elects to use the delineation line as amended to add slash pine and gallberry to the list of facultative plants, any declaratory statement issued by the DEP under s. 403.9144, F.S., 1984 Supplement to the Florida Statutes 1983, as amended, pursuant to rules adopted thereunder, or a formal determination issued by the DEP or a water management district under s. 373.421, F.S., in response to a petition filed on or before July 1, 2009, shall continue to be valid for the duration of the declaratory statement or formal determination. Any petitions pending on or before July 1, 2009, are exempt from the changes to Rule 62-340.450(3), F.A.C., and shall be subject to the provisions of ch. 63-340, F.A.C., in effect prior to that change. Activities proposed within the boundaries of a valid declaratory statement issued under a petition submitted to the DEP or the relevant water management district on or before July 1, 2009, or within the boundaries of a revalidated jurisdictional determination prior to its expiration, are exempt from the changes to Rule 62-340.450(3), F.A.C., as described in this subsection.

Section 3. Creates s. 125.0112, F.S., to provide that a local government may consider certain biofuel processing facilities and renewable energy facilities as valid agricultural, industrial, or silvicultural uses permitted within those land use categories. If the local comprehensive plan does not provide for such uses, the local government must establish a specific review process, including expedited review of a local comprehensive plan amendment, zoning changes, use permits, waivers, variances, or special exemptions. Local expedited review of a comprehensive

plan amendment does not obligate a local government to approve a proposed use. A plan amendment that is approved by a local government is eligible for the alternative state review process in s. 163.32465, F.S. The construction and operation of a facility and related improvements on a portion of a property under this section does not affect the remainder of the property's classification as agricultural under s 193.461, F.S.

Section 4. Creates subsection (6) in s. 373.236, F.S., to provide that a consumptive use permit approved for the use of water for a renewable energy operating facility or for cultivating agricultural products on lands of 1,000 acres or more for renewable energy, may be granted for a term of at least 25 years based on the anticipated life of the facility. The permit applicant must request the extended consumptive use permit, and there must be sufficient data to provide reasonable assurances that the permit conditions will be met for the duration of the permit. Permits may be issued for a short duration that reflects the longest period for which reasonable assurances are provided. The permit applicant must submit a compliance report every 5 years during the term of the permit.

Section 5. amends s. 373.243, F.S., to provide that the Department of Environmental Protection or the governing board of a water management district may revoke a 25-year permit created in the act only for nonuse of the water supply for a period of 4 years or more.

Section 6. Amends s. 403.973, F.S., to provide that projects resulting in the production of biofuels cultivated on lands of 1,000 acres or more, or projects that result in the construction of a biofuel or biodiesel processing facility or renewable energy generating facility are eligible for certification by the Office of Tourism, Trade and Economic Development (OTTED) in the Executive Office of the Governor or by a Quick Permitting County, as eligible for the expedited permitting process.

The regional permit action team will be established through the execution of an MOA developed by the permit applicant and OTTED with input from various state agencies. The MOA must accommodate participation in the expedited process by other local governments and federal agencies as necessary.

A local government's appeal of a project must be conducted pursuant to the summary hearing provisions in s. 120.574, F.S., and consolidated with the challenge of applicable state agency actions, if any. Summary proceedings for challenges to state agency action in the expedited permitting process for establishment of the biofuel projects must be conducted within 30 days after a party files a motion for hearing. Projects for which electrical power is derived from a renewable energy fuel source as defined in s. 366.91(2)(d), F.S., are not eligible for expedited review.

Section 7. Provides that the act will take effect July 1, 2009.

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:

None.

B. Private Sector Impact:

To the extent that a unified methodology for delineating wetlands exists that is substantially the same for the state and federal waters, there could be a reduction of costs and permitting time because the duplication of efforts has been either reduced or eliminated.

C. Government Sector Impact:

The fiscal impact to state and local government from the provisions of the bill are indeterminate at this time.

VI. Technical Deficiencies:

The bill requires the DEP to report annually to the Legislature concerning efforts to eliminate impediments to achieving greater efficiencies through the expansion of the general permitting program. The bill does not provide when the department is to begin providing the report.

VII. Related Issues:

None.

VIII. Additional Information:

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

CS by Community Affairs on April 14, 2009:
The committee substitute incorporates the amendment adopted by the Environmental Preservation and Conservation Committee on March 31, 2009, clarifies provisions of the bill relating to the Legislature's intent to facilitate efficient permitting, directs the Department of Environmental Protection and the water management districts to pursue the issuance of a state programmatic general permit or regional general permits, and revises provisions governing the ratification of a rule adopted by the Environmental Regulation Commission to add slash pine and gallberry to the list of facultative plants.

The committee substitute contains provisions relating to biofuel processing facilities and renewable energy facilities, provides for long-term consumptive use permits under certain conditions, and provides that certain biofuel production projects are eligible for expedited permitting under s. 403.973, F.S.

B. Amendments:

None.