

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 Environmental Preservation and Conservation Committee

BILL: SB 2016
 INTRODUCER: Senator Bennett
 SUBJECT: Environmental Permitting
 DATE: March 27, 2009 REVISED: _____

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

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

The bill provides:

- Legislative intent relating to the coordination and implementation of regulatory duties and functions among various state and federal agencies for wetlands regulation and delineation.
- Authorization for the Department of Environmental Protection (department) to obtain an expanded state programmatic general permit, or a series of regional permits from the U.S. Army Corps of Engineers (Corps) for certain activities.
- For ratification of the changes that were approved by the Environmental Regulation Commission to the plant list used to delineate wetlands to reclassify slash pine and gallberry as facultative species provided certain conditions are met.
- That wetland delineation determinations made prior to the effective date of this bill is not subject to the provisions of this bill for the term of the permit.
- These changes to the wetland delineation methodology do not apply to certain specified evaluations.

There is no significant fiscal impact to the department.

The bill would take effect July 1, 2009.

This bill amends section 373.4144 and 373.4211, Florida Statutes.

II. Present Situation:

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 of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past or may be susceptible to use to transport interstate or foreign commerce.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.

Section 404 of the federal Clean Water Act established 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 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

The Department of Environmental Protection regulates dredging and filling activities in wetlands and other surface waters in order to protect the environment. The water management districts and the local governments also have a role in the delineation and protection of wetlands.

Section 373.421, F.S., directed the Environmental Regulation Commission (ERC) to adopt a unified statewide methodology for the delineation of the extent of wetlands. This methodology

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.

did not become effective until ratified by the Legislature in 1994. The wetland delineation rule is found in ch. 62-340, F.A.C.

For most projects, the use of the federal delineation method and the state delineation method result in similar wetland boundaries. However, the plant lists used by the federal government and the state government differ as indicators of wetland boundaries. For example, the federal plant list shows slash pine and gallberry as wetland indicators while the state list shows these plants as upland indicators. There is some consensus in the biological community that these plants should be listed as facultative or neutral indicators. On February 23, 2006, the ERC approved amendments to the wetland plant list to change slash pine and gallberry from an “upland” status to a “facultative” status. The rule change reduces the current differences that exist between the state and federal wetland methodologies—a step toward streamlining the state and federal programs. In order for this change to become effective, the Legislature must ratify the change.

Section 373.4143, F.S., directed the department to develop a strategy for consolidating or streamlining the state and federal programs to the extent possible. The department developed the strategy, identified the problems, and made a number of recommendations which were submitted in a formal report to the Legislature and the Governor.

III. Effect of Proposed Changes:

Section 1 amends 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 department, 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, the Florida Fish and Wildlife Conservation Commission, and other relevant federal and state agencies.
- Authorize the department to obtain issuance by the Corps of an expanded state programmatic general permit, or a series of regional permits for certain activities.
- Use the mechanism of a general permit or permits to eliminate overlapping federal regulations and state rules that seek to protect the same resource and to avoid duplication of permitting between the Corps and the department for minor work located in waters of the United States, including navigable waters, so as to eliminate an inappropriate need for a separate, individual approval from the Corps while ensuring maximum protection of wetland resources.
- Prohibit the department from seeking issuance of or taking any action under such permit or permits unless the conditions of the permit or permits would 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.
- Add slash pine and gallberry, as facultative species, to the list of plants that this state uses to delineate jurisdictional wetland communities as an incentive for, and contingent upon, aligning the method by which the federal government and Florida delineate jurisdictional wetland communities so that federal and state methods delineate the same communities and an impediment to the authorization of a state programmatic general permit by the Corps is removed.

- Require the department to report annually to the Legislature on efforts to eliminate impediments to achieving greater efficiencies through expansion of a state programmatic general permit or regional general permits.

In order to avoid duplication and effectuate efficient permitting of activities that affect wetlands, the department and the water management districts shall, subject to agreement by the Corps, implement a statewide programmatic general permit for all dredge and fill activities affecting 5 acres or less of wetlands or other surface waters, including navigable waters. The permit must be voluntary and is subject to certain specified conditions.

The department is not precluded from pursuing a series of regional general permits for construction activities in wetlands and surface waters or complete assumption of certain federal permitting programs.

New provisions are added to this section which directs the department and the water management districts to compare their rules regarding mitigation with those of the Corps. The goal of the comparison is to identify inconsistencies and recommend changes and to recommend ways of increasing the geographic size of basins in order better facilitate a watershed approach to mitigation. The department and districts shall report by January 1, 2010 to the Legislature on the need to amend laws that may act as a barrier to changing their rules or otherwise interfering with the objectives outlined in this provision.

Section 2 amends s. 373.4211, F.S., to ratify the change to rule 62-340.450(3), F.A.C., approved on February 23, 2006, by the Environmental Regulation Commission which adds *Pinus elliottii* (slash pine) and *Ilex glabra* (gallberry) to the list of facultative plants. This ratification and the rule revision may not take effect until state and federal wetland jurisdictional delineation methodologies are aligned.

Certain surface water and wetland delineations approved in a permit issued before the effective date of this act, remain effective until the expiration of the permit. For surface water and wetland delineations not identified and approved in a permit issued 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. This section also applies to any modification of the permit issued under rules adopted under this part which do not constitute a substantial modification within the geographical area to which the permit applies.

Any declaratory statement issued by the department under s. 403.914, F.S., 1984, Supplement, or by the department or a water management district under s. 373.421, F.S., in response to a petition filed on or before the effective date of this act shall continue to be valid for the duration of the declaratory statement. Any petitions pending on or before the effective date of this act are exempt from the change 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.

A permit application under this part for dredging and filling or other activity that is pending on or before the effective date of this act is exempt from the change to rule 62-340.450(3), F.A.C.

Section 3 provides that this bill will become effective 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:

No significant impact.

VI. Technical Deficiencies:

The bill requires the department 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 annual report is to be provided.

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.)

None.

B. Amendments:

Barcode 921184 by Environmental Preservation and Conservation on March 31, 2009:

The amendment rearranges existing bill provisions and rewords the conditional ratification of gallberry and slash pine neither of which are substantive changes. Finally the amendment removed a requirement that the mitigation study make recommendations on the appropriate size of a basin for mitigation purposes.

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