

STORAGE NAME: h2067s1.gg

DATE: April 20, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GENERAL GOVERNMENT APPROPRIATIONS
ANALYSIS**

BILL #: CS/HB 2067 (formerly PCB WRM 99-02)

RELATING TO: Extending the interim wetlands permitting program for the Northwest Florida WMD

SPONSOR(S): Committee on General Government Appropriations (FRC); Committee on Water and Resource Management (RLC); Rep. Alexander and others

COMPANION BILL(S): SB 1250 (c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) WATER & RESOURCE MANAGEMENT YEAS 12 NAYS 0
 - (2) GENERAL GOVERNMENT APPROPRIATIONS YEAS 11 NAYS 0
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

Within the Northwest Florida Water Management District (NFWFMD), wetlands activities are regulated under a different program than the environmental resource permitting (ERP) program used in the rest of the state. The statutory authorization for the NFWFMD program expires July 1, 1999.

CS/HB 2067 would extend the repeal another four years, to July 1, 2003. Additionally, the legislation would direct DEP and the NFWFMD to develop a plan by which the permitting for activities proposed in surface waters and wetlands shall fully comply with the provisions of part IV, chapter 373, F.S. (which governs the wetlands permitting program used in the rest of Florida), by the same date. The plan would address the division of wetlands permitting responsibilities between DEP and the NFWFMD; the process by which the NFWFMD shall implement the existing wetlands delineation methodology; the ability of the NFWFMD to implement federal permitting programs related to activities in surface waters and wetlands; and the Chapter 70 (Bert Harris Private Property Rights Act) implications of implementing an ERP program within the NFWFMD.

Additionally, DEP and the NFWFMD shall submit a joint interim report on their progress in developing the plan to the Governor and the Legislature on March 1, 2001, and a final report on March 1, 2003.

CS/HB 2067 has minimal fiscal impact on DEP and the NFWFMD. However, if the Legislature in four years decides to fully implement an ERP in the Panhandle area, both agencies likely will seek additional staff positions and funding.

As amended in the General Government Appropriations Committee, CS/HB 2067 also would: delete the requirement that DEP repay a \$3.2 million "loan" it borrowed from its Pollution Recovery Trust Fund in 1993 to implement the federally delegated National Pollutant Discharge Elimination System program; extend for another 3 years the current wetlands jurisdiction determinations on several Northwest Florida projects; clarify that once a county becomes eligible for payment-in-lieu of it shall receive payments for 10 years; and make technical cross-reference changes.

CS/HB 2067 would take effect upon becoming a law.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Wetlands permitting

The 1993 Environmental Reorganization Act merged the departments of Natural Resources (DNR) and Environmental Regulation (DER) into the Department of Environmental Protection, for the purposes of streamlining the old agencies' governmental services so that they would be provided delivery of services to the public in a timely, cost-efficient manner. One of the outcomes of the legislation was the creation of an "environmental resource permit" (ERP) which consolidated the old DER wetlands dredge-and-fill permits, and management and storage of surface waters permits (the water management districts' old MSSW permits) into a single permit. The water management districts assumed the lead role for the issuance of these permits. Four of the five water management districts have established ERP programs.

While the NFWFMD has had the authority to operate a MSSW program pursuant to chapter 373, F.S., it has never fully operated such a program due to funding limitations. The NFWFMD has a constitutional millage cap of .05 mill, with the remaining four water management districts capped at 1 mill. Over the years, several unsuccessful attempts have been made to place on a statewide ballot an amendment to the state Constitution that raises the NFWFMD's constitutional millage rate to 1 mill.

Section 373.4145, F.S., was created in 1993 to provide for a five-year, interim environmental permitting program for the NFWFMD. Since the NFWFMD was financially unable to implement an ERP program, DEP operates a limited permitting program in this water management district with state financial subsidies for both. Last fiscal year, DEP spent \$1.96 million of its state General Revenue funding to operate the wetlands permitting program in the Panhandle, while the NFWFMD used \$300,000 in state General Revenue to implement its small wetlands program.

Within the NFWFMD, DEP's permitting authority is limited to wetlands permitting rules which were in effect under the Henderson Wetlands Act of 1984. The Henderson Act differs from the ERP program in several ways, primarily that activities in isolated wetlands or activities in uplands that could impact water quality or wildlife habitat are not regulated by the state. Considerations of the impacts of stormwater runoff also are not part of these Henderson Act wetlands resource permits.

Meanwhile, the NFWFMD only processes permits for the construction, operation and maintenance of dams used in agricultural operations. It regulates agricultural and silvicultural activities largely through the use of BMPs.

Except where delegated, the U.S. Army Corps of Engineers implements federal wetlands regulations uniformly throughout Florida.

The interim provisions of s. 373.4145, F.S., expire on July 1, 1999. Much legal uncertainty exists as to how permit applications for wetlands activities would be processed if the Legislature allows the repeal to occur without implementation of a specific replacement program. Would DEP and the NFWFMD be able to implement any type of wetlands permitting program they chose? Would the ERP program by default be the law of the land in the Panhandle? Or would there be no mechanism, besides the federal program, to permit wetlands activities?

In addition, since July 1, 1994, wetlands in Florida have been delineated using the same statewide methodology adopted by the Legislature in the spring of 1994. However, within the boundaries of the Northwest Florida WMD there are a number of projects that were "grandfathered in" (pursuant to s. 373.414(13), F.S.) using the previous wetlands jurisdictional determination. As of April 1999, there are 90 issued, valid "jurisdictional declaratory statements" that will expire on or before July 1, 2003, and a handful of others that either have longer expiration dates or are at some other stage in the process. The statutes are silent about what would happen to these grandfathered-in projects.

Another legal issue to be addressed relates to chapter 70, F.S., the Bert J. Harris Jr. Private Property Rights Act, which provides protections for property owners against governmental laws and regulations that inordinately restrict an existing use of, or vested interest in, real property. Pursuant to s. 70.001(12), F.S., no cause of action can be brought against a governmental entity for applying laws, rules or regulations enacted on or before May 11, 1995. Because the ERP rules were adopted

prior to that date, they are exempt from Chapter 70 provisions. The policy question is whether the Legislature also would exempt any ERP rules adopted by the NFWFMD.

There is an appropriations issue, as well, implicit in the discussion of implementing an ERP program in the Panhandle. Last fiscal year, DEP spent \$1.96 million of its state funding to operate the wetlands permitting program in the Panhandle, while the NFWFMD used \$300,000 in state General Revenue to implement its small wetlands program. Based on a January 1998 report prepared by the Governor's Office, it would cost between \$2.8 million and \$4.4 million a year to implement an ERP program in the NFWFMD.

NPDES "loan forgiveness"

Section 86 of ch. 93-213, L.O.F., provided statutory authority for DEP to accept delegation of the National Pollutant Discharge Elimination System, which permits wastewater discharges. To implement the program, DEP received authorization from the Legislature to hire 54 FTEs, and to use \$3.2 million in the Pollution Recovery Trust Fund for start-up costs. DEP had hoped that the fees charged for NPDES permits would cover the costs of reviewing and issuing those permits, plus finance other aspects of the program. Historically, however, the NPDES revenues have been covering about 60 percent of program costs, and DEP has been unable to repay the "loan" from the Pollution Recovery Trust Fund.

Payment in Lieu of Taxes

Certain counties, municipalities and other local governmental entities are eligible to receive "payment in lieu of taxes" (PILT), intended to compensate them for loss of ad valorem tax revenues caused by the state or water management district buying lands through the Preservation 2000 program. The criteria are complicated: eligible counties are those which either levy an ad valorem tax of at least 8.25 mills or who experience a tax loss that exceeds .01 percent of the county's total taxable value, and which have a population of 75,000 or less. (For areas of critical state concern, the population threshold is 100,000.) For a local government (e.g., municipalities, the county school board and mosquito control districts) to qualify for PILT, it must have a population of less than 10,000, and either levy at least 8.25 mills or experience a tax loss that exceeds .01 percent of its total taxable value.

The payment amount is to be based upon the actual taxes paid on the property for three years preceding acquisition subject to certain conditions. Payments are limited to 10 consecutive years beginning the year the property becomes eligible.

Since 1993, 16 counties have received PILT from the water management districts for a total of \$556,609. Nine counties, two school boards, one mosquito control district and the Lower Keys District have received PILT from the state during that same time, for a total of \$1.36 million.

In past years, an otherwise eligible county or local government would lose PILT if it raised its millage rate, or forgot to file for the money, or its population exceeded the threshold. The Legislature has amended the language at least twice in recent years to reflect that once a county or local government becomes eligible, it should receive the full 10 years of PILT, but DEP or the Department of Revenue has still denied one or more local governments additional PILT for varied reasons. For example, last year, Walton County's property values escalated to such an extent that even with all the large state land purchases there, the county was ruled ineligible because its property tax loss from Preservation 2000 acquisitions did not exceed the .01 percent threshold.

B. EFFECT OF PROPOSED CHANGES:

Under HB 2067:

- o The current repeal date of interim wetlands permitting program for the NFWFMD is extended to July 1, 2003.
- o DEP and the NFWFMD are directed to develop a plan by which the permitting for activities proposed in surface waters and wetlands shall fully comply with the provisions of part IV, chapter 373, F.S., beginning July 1, 2003. The plan shall address the division of ERP responsibilities between DEP and the district; the process by which the district shall implement the existing wetlands delineation methodology; the ability of the district to implement federal permitting

programs related to activities in surface waters and wetlands; and the Chapter 70 (Bert Harris Private Property Rights Act) implications of implementing an ERP program within the district.

- o DEP and the NFWFMD shall submit a joint interim report on their progress in developing the plan to the Governor and the Legislature on March 1, 2001, and a final report on March 1, 2003.
- o Valid wetlands jurisdictional declaratory statements for projects within the Northwest Florida WMD that meet certain other criteria shall be extended to January 1, 2002.
- o DEP does not have to repay the \$3.2 million to its Pollution Recovery Trust Fund.
- o Once a county receives a PILT check, it is entitled to receive these benefit for the full 10 years.
- o Reflects changes in the reorganization of DEP because of the creation of the new Fish and Wildlife Conservation Commission (the subject of CS/HB 2145). References to the current DEP Division of Water Facilities are changed to the division's name, as of July 1, 1999, the "Division of Water Resource Management".

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes, DEP and the NFWFMD would be directed to develop a plan by which the state would implement an ERP program in the Panhandle area, and to report back to the Legislature.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 252.927, 373.4145, 378.901, and 403.021, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends s. 373.4145, F.S., to extend by four years the July 1, 1999, repeal of certain provisions within the section. Specifies new repeal date would be July 1, 2003. Directs the Department of Environmental Protection (DEP) and the Northwest Florida Water Management District (NFWFMD) to begin developing a plan by which the permitting for activities in surface waters and wetlands within the jurisdiction of the NFWFMD shall fully comply with the provisions in part IV, chapter 373, F.S., relating to the environmental resource permit. Specifies issues to be addressed within the plan. Directs DEP and the NFWFMD to jointly prepare, for the Governor and the Legislature, an interim report by March 1, 2001, and a final report by March 1, 2003. Extends certain jurisdictional declaratory statements to January 1, 2002.

Section 2: Amends s. 252.937, F.S., to reflect name changes.

Section 3: Amends s. 378.902, F.S., to reflect name change.

Section 4: Amends s. 403.021, F.S. to reflect name change.

Section 5: Amends section 86 of chapter 93-213, Laws of Florida, to delete requirement that DEP repay NPDES loan.

Section 6: Directs DEP and the water management districts to pay PILT for 10 years to eligible governmental entities.

Section 7: Provides that this act shall take effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. For the next two or three fiscal years, DEP will incur minimal costs in developing the implementation plan.

Since the PILT provisions attempt to ensure that the law is implemented by DEP and the water management districts as the Legislature intended, there should be no unexpected recurring costs to the state.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

Indeterminate, but minimal.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. For the next two or three fiscal years, the NFWMD will incur minimal costs in developing the implementation plan.

Continuing the 10-year PILT payments to eligible counties and local governments is not an unexpected cost to the water management districts.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

CS/HB 2067 does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

CS/HB 2067 does not reduce the authority that municipalities or counties have to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

CS/HB 2067 does not reduce the percentage of state tax revenues shared with counties and municipalities.

V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 22, 1999, the Committee unanimously adopted one amendment to PCB WRM 99-02 that replaced a reference to "s. 373.414, F.S.," with the broader reference to "part IV, chapter 373," to incorporate stormwater management into consideration of a wetlands and surface water permitting program for Northwest Florida. A second amendment, which would have required a report and implementation of environmental resource permitting rules by earlier dates than the PCB, was defeated by a voice vote. The committee then voted 12-0 to report the PCB as favorable.

PCB WRM 99-02 was later assigned the bill number HB 2067.

The House General Government Appropriations Committee adopted four amendments on April 19, 1999. One made technical name changes to a DEP division; another dealt with the PILT issue; a third repealed the NPDES loan requirement; and the fourth extended the wetlands jurisdictional declaratory statements for eligible projects in the NFWFMD to January 1, 2001.

VII. SIGNATURES:

COMMITTEE ON WATER & RESOURCE MANAGEMENT:

Prepared by:

Joyce Pugh

Staff Director:

Joyce Pugh

AS REVISED BY THE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS:

Prepared by:

Cynthia P. Kelly

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