

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: General Government Appropriations Committee

BILL: CS/SB 1730

SPONSOR: General Government Appropriations and Senator Dockery

SUBJECT: Environmental Permitting Programs

DATE: April 11, 2005

REVISED: 4/12/05

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Branning</u>	<u>Kiger</u>	<u>EP</u>	<u>Favorable</u>
2.	<u>DeLoach</u>	<u>Hayes</u>	<u>GA</u>	<u>Fav/CS</u>
3.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
4.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
5.	<u> </u>	<u> </u>	<u> </u>	<u> </u>
6.	<u> </u>	<u> </u>	<u> </u>	<u> </u>

I. Summary:

The committee substitute directs the Department of Environmental Protection (DEP) to develop on or before October 1, 2005, a mechanism or plan to consolidate the federal and state wetland permitting programs. The bill's stated intent is to have the state process all dredge and fill activities impacting ten acres or less in wetlands or water as part of the environmental resource permitting program. The mechanism or plan shall analyze and propose the development of an expanded state programmatic general permit program in conjunction with the U.S. Army Corps of Engineers pursuant to s. 404 of the federal Clean Water Act and s. 10 of the Rivers and Harbors Act of 1899.

The DEP shall file a report with the Speaker of the House of Representatives and the President of the Senate proposing any required federal and state statutory changes that would be necessary to accomplish the expanded state programmatic general permit. The DEP must coordinate with the Florida Congressional Delegation on any necessary changes to federal law to implement the directives.

The committee substitute extends the date for the Northwest Florida Water Management District (NFWFMD) to implement a Environmental Resource Permit program from July 1, 2005, to July 1, 2010.

The committee substitute creates sections 373.4143 and 373.4144; reenacts ss. 373.4145 (1), (2), (3) and (4); and amends ss. 373.4145 (6), Florida Statutes.

II. Present Situation:

Wetlands are regarded as valuable and important ecosystems which provide vital wildlife habitats which are essential to Florida's fisheries and wildlife resources. Additionally, they provide natural flood control, recharge to the aquifers, and act as natural water purification systems. Wetlands also provide a variety of recreational activities such as fishing, boating, hunting, and the observation of wildlife.

In 1984, the Legislature enacted the Warren Henderson Wetlands Protection Act. The passage of that legislation represented a significant accomplishment in efforts to modernize and strengthen Florida's wetlands protection laws.

In the interim preceding the 1992 legislative session, the Senate Natural Resources Committee was asked to review the 1984 Henderson Wetlands Act to determine how well the act was working and to determine what changes were needed to improve the protection of wetlands. Numerous workshops were held to identify categories of concern. Early on, it was determined that an appropriate long-term goal for Florida would be to seek the authority to administer the section 404 program of the federal Clean Water Act of 1977 and the Rivers and Harbors Act of 1899. The committee's bill to implement the recommendations of the interim project directed the Department of Environmental Regulation¹ to pursue the responsibility for implementing the federal regulatory programs authorized by s. 404 of the federal Clean Water Act of 1977 and s. 10 of the Rivers and Harbors Act of 1899. The department would have been the sole wetlands permitting entity in Florida. The water management districts would continue to regulate isolated wetlands until the department received assumption of the federal programs; however the water management districts would have to use the definition of wetlands and the methodology provided for in the bill. The department would have been authorized to delegate all or part of its dredge and fill authority to water management districts or local governments to the extent allowable under the assumption agreement. That bill, however, did not pass.

The Florida Environmental Reorganization Act of 1993 was enacted to provide efficient governmental services to the public and to streamline governmental services by providing for delivery of environmental services to the public in a timely, cost-efficient manner. A provision in the act was intended to streamline the environmental permitting process relating to wetland and stormwater requirements. As stated in the act, it was the Legislature's intent to transfer the protection of wetlands and the permitting of wetlands impacts encompassed by the Warren S. Henderson Wetlands Act to ch. 373, F.S. Furthermore, the Department of Environmental Regulation² and the water management districts were to consolidate all permits for activities involving dredging and filling, management and storage of surface water (MSSW) including stormwater control, into a single type of permit which would be known as the "environmental resource permit."

In 1994, ch. 94-122, L.O.F., directed the Governor, in consultation with the Florida Congressional Delegation, to pursue with all deliberate speed and due diligence:

¹ In 1993, the Legislature merged the Department of Environmental Regulation and the Department of Natural Resources into the Department of Environmental Protection.

² Id.

- Assumption of the s. 404 permitting program by the Department of Environmental Protection (DEP) and the water management districts or request the U.S. Army Corps of Engineers to issue a statewide programmatic general permit under s. 404 of the Clean Water Act for all activities regulated by the DEP and the districts; and
- As part of the assumption or state programmatic general permit, seek acceptance by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers that a determination of the extent of wetlands and surface waters by the DEP or a water management district pursuant to the methodology ratified in s. 373.4211, F.S., constitutes an appropriate determination of the regulatory jurisdiction under an approved state s. 404 program or a state programmatic general permit.

Activities covered by s. 10 of the Rivers and Harbors Act include the building of any structure in the channel or along the banks of navigable waters of the U.S. that changes the course, conditions, location or capacity. This section is administered by the U.S. Army Corps of Engineers.³

Activities covered under s. 404 of the federal Clean Water Act and the associated permits are administered by the U.S. Army Corps of Engineers. A summary of those activities and permits are as follows:⁴

Permit	Activity
Letters of Permission	Minor or routine work with minimum impacts
Nationwide Permits	<ul style="list-style-type: none"> • Repair, rehabilitation, or replacement of structures destroyed by storms or floods in past 2 years. • Bank stabilization less than 500 feet in length solely for erosion protection. • Filling of up to 1 acre of a non-tidal wetland or less than 500 linear ft. of a non-tidal stream that is either isolated from other surface waters or upstream of the point in a drainage network where the average annual flow is less than 5 cfs. • Restoration of natural wetland hydrology, vegetation, and function to altered and degraded non-tidal wetlands, and restoration of natural functions of riparian areas on private lands, provided a wetland restoration or creation agreement has been developed.
Regional Permits	<ul style="list-style-type: none"> • Small projects with insignificant environmental impacts.
Individual Permits	<ul style="list-style-type: none"> • Proposed filling or excavation that causes severe impacts, but for which no practical alternative exists; may require an environmental assessment under NEPA.

As provided in Title 33 of the Federal Code of Regulations, the Secretary of the Army, acting through the Chief of Engineers of the U.S. Army Corps of Engineers, may after notice for public hearing, issue general permits on a state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental

³ www.fema.gov/ehp/cwa.shtm

⁴ Id.

effects when performed separately, and will have only minimal cumulative adverse effect on the environment.⁵ There is no similar provision in the Rivers and Harbors Act.

Florida has obtained a State Programmatic General Permit from the federal government to administer the federal 404 Clean Water Act program and s. 10 of the Rivers and Harbors Act for most of Florida since 1997. The area excluded is the northwest portion served by the Northwest Florida Water Management District. This district does not have an environmental resources permit program. Under this general permit, the Department of Environmental Protection has been limited in its ability to authorize certain activities such as docking and boat launching facilities because of restraints related to threatened and endangered species.

According to the Department of Environmental Protection, the department has tried to obtain assumption of all dredge and fill activities from the Corps over the past few years and expand the general permit with little success. Regional permits also exist in Florida but they cover large areas and include mitigation requirements that are time consuming to develop.

There appear to be a number of legal issues involved regarding the assumption of the Corps' wetland permitting functions that have not been resolved.

III. Effect of Proposed Changes:

The committee substitute provides that it is the policy of the Legislature that the state provide efficient government services by consolidating, to the maximum extent practicable, federal and state permitting associated with wetlands and navigable waters within the state.

The Department of Environmental Protection (DEP) is directed to develop, on or before October 1, 2005, a mechanism or plan to consolidate, to the maximum extent practicable, the federal and state wetland permitting programs. It is the intent of the Legislature that all dredge and fill activities impacting 10 acres or less of wetlands or waters, including navigable waters, be processed by the state as part of the environmental resource permitting program implemented by the DEP and the water management districts. The resulting mechanism or plan shall analyze and propose the development of an expanded state programmatic general permit program in conjunction with the U.S. Army Corps of Engineers pursuant to s. 404 of the Clean Water Act and s. 10 of the Rivers and Harbors Act of 1899. Alternatively, or in combination with an expanded state programmatic general permit, the mechanism or plan may propose the creation of a series of regional general permits issued by the U.S. Army Corps of Engineers. The bill's stated intent is that the expansion of the state programmatic general permit program or the creation of a series of regional general permits provide the exclusive federal and state regulation of all dredge and fill activities impacting 10 acres or less of wetlands or waters, including navigable waters, within the state. All of the regional general permits must be administered by the department or the water management districts.

The DEP is directed to file with the Speaker of the House of Representatives and the President of the Senate a report proposing any required federal and state statutory changes that would be

⁵ www.wetlands.com/regs/sec404fc.htm

necessary to accomplish the directives of the bill and to coordinate with the Florida Congressional delegation on any necessary changes to federal law to implement the directives.

The DEP is not precluded from pursuing complete assumption of the federal permitting programs regulating the discharge of dredged or fill material pursuant to s. 404 of the Clean Water Act and s. 10 of the Rivers and Harbors Act of 1899, so long as the assumption encompasses all dredge and fill activities in, on, or over jurisdictional wetlands or waters, including navigable waters, within the state.

Finally, the committee substitute extends the deadline for implementing an Environmental Resource Permit program within the Northwest Florida Water Management District's boundaries. Section 373.4145, Florida Statutes, authorizes the regulatory responsibilities of the DEP and the NFWMD until July 1, 2005. The committee substitute continues this provision until July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There could be a savings to those entities needing wetlands permits from both the state and the U.S. Army Corps of Engineers because of a streamlined permit process. The amount of such savings cannot be determined at this time.

C. Government Sector Impact:

The DEP would incur some limited costs associated with the development of the plan or mechanism to implement the proposed consolidated state and federal dredge and fill permit. If the DEP is successful in obtaining full assumption of the s. 404 program of the Clean Water Act and the s. 10 program of the Rivers and Harbors Act, additional staff would be needed by the department to implement the program. However, in recent years the department has not been successful in expanding the program in Florida. The U.S.

Corps of Engineers has not approved requests by the DEP for assumption of a consolidated permit for projects of 10 acres or less primarily because of concerns and provisions relating to endangered and threatened species issues. The most recent issue that impacts Florida is dock permitting and manatees.

Should the department be successful in obtaining federal delegation of these permitting programs, additional staff and resources needed to implement the programs could be considered in future budget requests from the agency to the Legislature.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

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