

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 759 CS Environmental Permitting Programs
SPONSOR(S): Williams and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1730

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Environmental Regulation Committee	7 Y, 0 N, w/CS	Perkins	Kliner
2) Agriculture & Environment Appropriations Committee	(W/D)		
3) State Resources Council	7 Y, 0 N, w/CS	Perkins	Hamby
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The bill requires the Department of Environmental Protection (DEP) to develop, on or before October 1, 2005, a mechanism or plan to consolidate, to the maximum extent practicable, federal and state permitting associated with wetlands and navigable waters within the state. The mechanism or plan is to be compiled into a report and filed with the Speaker of the House of Representatives and the President of the Senate.

The bill provides for all "dredge and fill" activities impacting 10 acres or less of wetlands or waters, including navigable waters, to be processed by the state as part of the environmental resource permitting program implemented by DEP and the water management districts. As part of the proposed mechanism or plan to consolidate federal and state permitting associated with wetlands and navigable waters within the state, DEP is to analyze and propose the development of an expanded state programmatic general permit program and may propose the creation of a series of regional general permits issued by the United States Army Corps of Engineers (Corps of Engineers) to be administered by DEP or the water management districts or their designees.

The bill extends the life of jurisdictional determination petitions to include those filed on or before June 1, 1994. The bill establishes a financial responsibility component for permitted phosphate mining activities that affect wetlands and other surface waters, requiring mining companies to provide certain security for wetlands mitigation based upon the expected life of the mining operation.

The bill extends the date for DEP to complete a cumulative impact study on the Peace River Basin from July 1, 2005, to January 31, 2007.

The bill extends the date by which implementation of the Environmental Resource Permit program is to be assumed by the Northwest Florida Water Management District (NFWMD) from July 1, 2005 to July 1, 2010. The proposed delay would delay expenditures associated with implementation of the program.

Except as noted above, this bill does not appear to have any significant fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill provides for the consolidation of existing federal and state permitting activities associated with wetlands and navigable waters which may reduce substantial costs to both public and private sectors, provide a more efficient delivery of government services, and avoid processing delays while maintaining the federal and state protection to Florida's natural resources. The bill extends the date by which implementation of the Environmental Resource Permit program is to be assumed by the Northwest Florida Water Management District (NFWFMD) from July 1, 2005 to July 1, 2010. The proposed delay would delay expenditures associated with implementation of the program. The bill extends the date for DEP to complete a cumulative impact study on the Peace River Basin from July 1, 2005, to January 31, 2007.

Safeguard Individual Liberty: Phosphate mining companies must be able to provide a demonstration of financial responsibility for wetland mitigation to DEP prior to impacting wetlands and other surface waters with mining activities.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Federal Dredge and Fill Regulation:

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), regulates virtually all 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 which are presently used, or have been used in the past or may be susceptible to use to transport interstate or foreign commerce. 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.¹ 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.

In conjunction with the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, is the federal act which governs activities in wetlands and regulates the discharge of "dredged or fill" material into the "Waters of the United States" and is intended to minimize adverse impacts by preventing the unnecessary loss of wetlands and other sensitive aquatic areas. Waters of the United States is a broader term than Navigable Waters of the United States. Included are adjacent wetlands and tributaries to Navigable Waters of the United States and other waters where degradation or destruction could affect interstate or foreign commerce. These are the waters where permits are required for the discharge of dredge or fill material pursuant to Section 404 of the Clean Water Act.²

The Corps of Engineers is responsible for regulating activities by others in navigable waterways through the granting of permits since passage of the Rivers & Harbors Act of 1899. Passage of the Clean Water Act in 1972 broadened the Corps of Engineers authority over "dredging and filling" in the waters of the United States, including many wetlands.

There are two types of Section 404 permits issued by the Corps of Engineers, individual and general permits. Activities in wetlands that involve more than minimal impacts require an individual permit. Within a Section 404 general permit, there are two types of general permits, a regional permit and a

¹ <http://www.mvn.usace.army.mil/ops/regulatory/permove.htm>

² <http://www.mvn.usace.army.mil/ops/regulatory/permove.htm>

nationwide permit. In both cases, these types of permits are issued when the proposed activities are minor in scope with minimal projected impacts.³

State of Florida Dredge and Fill Regulation:

DEP is the state agency which regulates “dredging and filling” activities in wetlands and other surface waters in order to protect the environment. In addition to DEP, “dredging and filling” is also regulated by the Corps of Engineers, the Florida Water Management Districts, counties and municipalities.

The term "filling" includes the placement or depositing of any material that is placed in wetlands or other surface waters. Dirt, sand, gravel, rocks, shell, pilings, and concrete are all considered fill if placed in wetlands. The term "dredging" refers to any type of excavation conducted in wetlands or other surface waters. Dredging includes digging, pulling up vegetation by the roots, leaving vehicular ruts, or any other activity that disturbs the soil.

Alteration of wetlands and other surface waters may have a detrimental impact on the environment. That impact could extend beyond the limits of the work site, affecting other public or private property. Polluted waters can be conveyed off-site through connecting waterbodies. The elimination or degradation of wetlands will cause a reduction of beneficial functions provided by the wetlands.

DEP and the Corps of Engineers have streamlined processing of state and federal regulatory permits under a state programmatic general permit. The state programmatic general permit avoids duplication of permitting between the Corps of Engineers and DEP for minor works located in waters of the U.S., including navigable waters. The state programmatic general permit allows DEP to approve the applicable federal permit during the review of an environmental resource permit for certain minor activities including shoreline stabilization, boat ramps, docks and piers, and maintenance dredging, as well as for activities that qualify for regulatory exemptions and general permits.⁴

Jurisdictional Determination Petitions and Mitigation Activities Related to Phosphate Extraction

Section 373.414(13), F.S., provides jurisdictional determination petitions to include those filed prior to June 1, 1994. Section 373.414(19), F.S., provides that phosphate and other mining companies must mitigate any damages occurring in wetland areas caused by mining activities. The present practice has been to provide financial assurances for conducting the mitigation activities as the mining operations occur, not in advance of the proposed mining activities. Many mining activities are conducted pursuant to long-term permits or life-of-the mine permits. Recently, an administrative law judge has ruled that mining operations must demonstrate financial responsibility for the mitigation of wetlands for the entire life of the mine before mining operations occur. As a result, many mining operations have begun to seek and operate under shorter mining permits and provide mitigation plans on a piecemeal basis.

Peace River Basin Study

DEP in consultation with the Southwest Florida Water Management District is in the process of conducting a study to address the cumulative impacts of changes in landform and hydrology in the Peace River Basin. Upon completion of the study, DEP is directed to prepare and adopt a resource management plan for the Peace River Basin to minimize any identified existing and future adverse cumulative impacts to water resources in the basin. The resource management plan is to be submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives no later than July 1, 2005.

Environmental Resource Permit Program:

The DEP, Environmental Resource Permit Program, regulates activities involving the alteration of surface water flows. This includes new activities in uplands that generate stormwater runoff from upland construction, as well as “dredging and filling” in wetlands and other surface waters. Environmental Resource Permit applications are processed by either DEP or one of the state's water management districts, in accordance with the division of responsibilities specified in operating

³ <http://www.cicacenter.org/wetpermits.html>

⁴ http://www.dep.state.fl.us/water/wetlands/docs/erp/ERP_Fact_Sheet.pdf

agreements between DEP and the water management districts. The Environmental Resource Permit Program is in effect throughout the State except for the Florida panhandle (within the limits of the NFWFMD). Statutory language regarding the current division of regulatory responsibilities of DEP and the NFWFMD for management and storage of surface waters, dredge and fill, and stormwater activities is scheduled to be repealed July 1, 2005.

Effect of Proposed Change

The bill creates section 373.4143, F.S., which sets forth the legislative policy for the state to 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 bill further creates section 373.4144, F.S., relating to federal environmental permitting activities, to provide the following provisions:

- 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. The mechanism or plan is to be compiled into a report and filed with the Speaker of the House of Representatives and the President of the Senate. The report is to propose any required federal and state statutory changes that would be necessary to accomplish the directives listed in this bill and to coordinate with the Florida Congressional Delegation on any necessary changes to federal law to implement the directives listed in this bill.
- 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 permitting program implemented by DEP and the water management districts. Navigable waters in this bill are interpreted to be the Navigable Waters of the United States under Section 10 of the Rivers and Harbors Act.
- The mechanism or plan will analyze and propose the development of an expanded state programmatic general permit program in conjunction with the Corps of Engineers pursuant to s. 404 of the Clean Water Act, Pub. L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq., and s. 10 of the Rivers and Harbors Act of 1899. In addition, the mechanism or plan may propose the creation of a series of regional general permits issued by the Corps of Engineers. All regional general permits must be administered by DEP or the water management districts or their designees.

The consolidation of existing federal and state permitting activities associated with wetlands and navigable waters may reduce substantial costs to both public and private sectors, provide a more efficient delivery of government services, and avoid processing delays while maintaining the federal and state protection to Florida’s natural resources.

The bill amends section 373.414, F.S., to extend the life of jurisdictional determination petitions to include those filed on or before June 1, 1994, and provide provisions relating to the mitigation for wetlands and other surface waters required by a permit issued pursuant to part IV of Chapter 373, F.S., for activities associated with the extraction of phosphate. The proposed mitigation for wetlands and other surface waters are subject to approval by DEP as part of the permit application review process. Specifically, the bill provides the following provisions related to activities associated with extraction of phosphate:

- Financial responsibility for permitted activities which will occur over a period of **three years or less** for mining operations must be provided to DEP prior to commencement of mining operations and will be in the amount of 110 percent of the estimated mitigation costs for wetlands and other surface waters affected under the permit.
- Financial responsibility for permitted activities which will occur over a period of **more than three years** for mining operations, the initial financial responsibility will be in an amount equal to 110 percent of the estimated mitigation costs for wetlands and other surface waters affected in the first three years of operation under the permit. Each year thereafter the financial responsibility will be updated to include an amount equal to 110 percent of the estimated mitigation costs for the next year of operations under the permit for which financial responsibility has not already

been demonstrated, along with releasing portions of the financial responsibility mechanisms in accordance with applicable rules.

- Mechanisms for providing financial responsibility pursuant to the permit are at the discretion of the applicant. Example of mechanisms include: cash or cash equivalent deposited in an escrow account, irrevocable letter of credit, performance bond, trust fund agreement, guarantee bond, or an insurance certificate. The bill provides that DEP must approve the form and content for all financial responsibility mechanisms.
- Permits initially issued by DEP prior to January 1, 2005, are not subject to the provisions of this section. However, nothing provided in these financial responsibility provisions supersedes or modifies the financial requirements of section 378.209, F.S., (Timing of Reclamation).

The bill extends the date for DEP to complete a cumulative impact study on the Peace River Basin from July 1, 2005, to January 31, 2007.

The bill extends the date by which implementation of the Environmental Resource Permit program is to be assumed by the NFWFMD from July 1, 2005 to July 1, 2010.

C. SECTION DIRECTORY:

Section 1. Amends s. 373.414(13) and (19), F.S., to extend the life of jurisdictional determination petitions to include those filed on or before June 1, 1994, and to require that financial responsibility must be provided to DEP for permitted phosphate mining activities that affect wetlands and other surface waters.

Section 2. Creates s. 373.4143, F.S., relating to the policy of the Legislature that the state provide efficient government services by consolidating federal and state permitting associated with wetlands and navigable waters within the state.

Section 3. Creates s. 373.4144, F.S., to direct DEP to develop a plan by October 1, 2005, to consolidate the federal and state wetland permitting programs and file the report with the Speaker of the House of Representatives and the President of the Senate.

Section 4. Amends s. 373.4145, F.S., to extend the date by which implementation of the Environmental Resource Permit program is to be assumed by the NFWFMD from July 1, 2005 to July 1, 2010.

Section 5. Amends ch. 2003-423(4), L.O.F., to extend the date for completing a cumulative impact study on the Peace River Basin from July 1, 2005, to January 31, 2007.

Section 6. Provides the act will take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.
2. Expenditures: Delaying implementation of the Environmental Resource Permit Program in NFWFMD will delay expenditure of state and NFWFMD funds required to implement the program.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: See above.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides for the consolidation of existing federal and state permitting activities associated with wetlands and navigable waters which may reduce substantial costs to both public and private sectors, provide a more efficient delivery of government services, and avoid processing delays while maintaining the federal and state protection of Florida's natural resources.

Phosphate mining companies must be able to demonstrate financial responsibility to DEP prior to impacting wetlands and other surface waters with mining activities. There may be companies that do not have the financial resources to provide the financial responsibility for the entire duration of the permit upfront.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require cities or counties to spend funds or take actions requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

DEP Comments:

- DEP has already tried to establish a permit based upon a 10-acre threshold and has tried to secure lesser acreage thresholds. The Corps of Engineers has declined those requests primarily on threatened and endangered species grounds, but also on legal grounds related to other challenges to the acreage in several of the Nationwide Permits that have severely limited the Nationwide Permit coverage.
- DEP has also tried variations on "all dredge and fill activities." The Corps of Engineers has declined those requests as the Corps of Engineers' authority to issue general permits, including state programmatic general permits, is limited to covering "similar activities" meaning the activity for which the dredging and filling is done, not the activity of dredging and filling itself.
- DEP has analyzed and proposed state programmatic general permit expansion multiple times over the years. However, as a result of federal lawsuits and legal impediments, as a practical matter it is likely that any future state programmatic general permits will be limited to a smaller list of projects covered than is listed in the current state programmatic general permit. However, the Corps of Engineers has included authorization for the water management districts to implement the state programmatic general permit in the current draft, to the extent the state programmatic general permit covers projects in the water management districts' permit.
- Regional general permits are possible and do exist, (i.e. Jupiter Farms). However, if they are to cover larger areas and include mitigation requirements they are tremendously time consuming to develop. There is a proposed regional general permit in Northwest Florida, but it is unlikely to go anywhere in the current expansive form for the reasons stated above.

- Attempting to restrict the Corps of Engineers to only issuing regional general permits to the state or water management districts is problematic from a legal perspective. As written it would prohibit a delegated local government from administering a regional general permit even if all the parties (Corps of Engineers/DEP/Water Management District/Local Government) agreed that doing so was desirable. In addition, it is unclear what, if any, impact this might have on administration of the Corps of Engineers Nationwide Permits within the state of Florida.
- Federal statutes that need amending related to the proposed activities in this bill include but are not limited to: Clean Water Act, Rivers and Harbors Act, Endangered Species Act, Marine Mammal Protection Act, and the Magnuson Stevens Act. DEP has testified twice in Congress on the needed Clean Water Act amendments and discussed those at length with the state delegation and the Association of State Wetland Managers. However, to date there has been little congressional interest in moving any amendments to the applicable sections of the Clean Water Act.
- At the state level Part IV, ch. 373, F.S., would likely also have to be amended to provide state authority equivalent to that of the Corps of Engineers for certain activities currently not addressed by state law. For example under section 373.414, F.S., DEP/Water Management Districts do not look at "upland" vegetative species, but the Corps of Engineers can look at "upland" vegetative species. The state program lacks a "no project" alternative; and certain changes are needed in state law to move the state wetland line closer to the federal line. These issues have been extensively discussed, but to date, DEP has received little Corps of Engineers or U.S. Environmental Protection Agency support for those changes.
- To the extent that DEP/Water Management Districts take on additional work to address federal issues, particularly to required coordination with federal resource agencies, there will be a need for additional staff.
- Assuming the issues associated with coordinating with the federal resource agencies could be addressed by assigning that responsibility to DEP/Water Management District staff, there would be increased state exposure to lawsuits under the federal "resource" laws.
- Under current federal law, Section 10 of the Clean Water Act, authority is not "assumable" and, in fact, Clean Water Act authority in Section 10 waters and "adjacent wetlands" is not assumable. Thus over 50% of Florida's waters are not assumable.

In concept, a bill encouraging DEP/Water Management Districts to pursue expansion of the state programmatic general permit, assumption, or other mechanisms to streamline state/federal permitting for smaller projects, is a recommended alternative approach. In the event this approach is accepted it is recommended that any reporting requirement be within a 6-month timeframe as opposed to the October 1, 2005 deadline.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 23, 2005, the Environmental Regulation Committee favorable adopted one amendment to HB 759. The amendment extends the date by which implementation of the Environmental Resource Permit program is to be assumed by the NFWMD from July 1, 2005 to July 1, 2010.

On April 13, 2005, the State Resources Council adopted two amendments to HB 759:

- **Amendment No. 1:** Expands the administration of the regional general permit to include "designees" of DEP or water management districts.
- **Amendment No. 2:** Extends the life of jurisdictional determination petitions to include those filed on or before June 1, 1994; requires that financial responsibility must be provided to DEP for permitted phosphate mining activities that affect wetlands and other surface waters; and extends the date for DEP to complete a cumulative impact study on the Peace River Basin from July 1, 2005, to January 31, 2007.