

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1343 CS Environmental Protection
SPONSOR(S): Williams
TIED BILLS: **IDEN./SIM. BILLS:** SB 2544

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

SUMMARY ANALYSIS

The bill proposes the acceleration of the distribution of funds to the Florida Forever program for fiscal years 2006-2007 and 2007-2008, allowing annual appropriations to increase from \$300 million to \$600 million. The annual debt service limit is lifted for Florida Forever bonds from \$30 million to \$60 million. This increases the amount of proceeds from the excise tax of documents distributed to the Land Acquisition Trust Fund to pay debt service.

The bill authorizes The Florida Department of Environmental Protection (DEP) to implement a state programmatic general permit (SPGP) for activities affecting up to 10 acres, if the Army Corps of Engineers (COE) agrees. The bill provides that an applicant in the Northwest Florida Water Management District may seek to use the SPGP authorized by this subsection and, for the limited purposes of implementing the statewide programmatic general permit authorized by this section, the department may apply its permitting criteria and authority to the regulation of isolated wetlands.

The bill offers a conditional ratification of the state's vegetative index for wetlands delineation.

Fiscal Impact: If the proposed \$300 million increase in appropriation for the Florida Forever program is bonded for fiscal years 2006-2007 and 2007-2008, and bonds are sold at the earliest possibility for the 1st year (FY 06/07) the debt service would be 27.2 million. For the FY 07/08 –FY 25/26 it would be 54.5 million per year, then would drop back to 27.2 million in FY 26/27.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill provides that if DEP gets the 10-acre SPGP then the DEP would use the "higher" of the state/federal wetland delineation line and use United States Department of Agriculture, Natural Resource Conservation Service's National Cooperative Soil Survey data. DEP staff will be responsible for knowing both lines in each circumstance.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

- **Florida Forever**

The Florida Forever Program is the successor land acquisition program to Preservation 2000.¹ The Florida Forever Program authorizes the issuance of \$3 billion in bond proceeds over a 10 year period for acquisition of land and water areas, and for restoration, conservation, recreation, and water resource development purposes. The first series of Florida Forever bonds was issued in 2001. Debt service for the first series of Florida Forever bonds was capped at \$30 million, with annual incremental increases of \$30 million up to a total of \$300 million. Debt service for each bond issue must be appropriated by the Legislature annually, and like the Preservation 2000 Program, documentary stamp tax revenues are used to pay off the bond debt.

Like P2000, bond proceeds are distributed to the Department of Environmental Protection, the five water management districts, the Department of Agriculture, the Fish & Wildlife Conservation Commission, and the Department of Community Affairs. To date, three series of Florida Forever bonds have been authorized. The Florida Forever program appropriation has been \$300 million with a \$30 million per year debt service limitation.

- **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 and/or 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. 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.

In conjunction with 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

¹ The Preservation 2000 Program, created in 1990, was a 10-year, \$3 billion land acquisition program, funded through the annual issuance of \$300 million in bonds.

tributaries to Navigable Waters of the United States. 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.

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 greatly broadened their role by giving 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 Section 404 general permits, there are two types of general permits, regional permits and nationwide permits. In both cases, these types of permits are issued when the proposed activities are minor in scope with minimal projected impacts.

- **State of Florida Dredge and Fill Regulation**

The 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. Such impacts can 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 causes a reduction of beneficial functions provided by the wetlands.

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 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, 2010.

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, subject to conditions.

In the 2005 Legislative Session, s. 373.4143, F.S., was created directing DEP to develop a strategy for consolidating or streamlining the state and federal programs to the extent possible. DEP 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’s Office.

- **Wetland Delineation Rules**

Federal wetland boundaries are delineated (a.k.a. drawn) under the Federal Clean Water Act and other Federal statutes utilizing the U.S. Army Corps of Engineers 1987 wetland delineation manual adopted under the oversight of Environmental Protection Agency. The State of Florida and its political subdivisions delineate wetland boundaries under the provisions of ch. 62-340, F.A.C., as ratified by the Florida Legislature in sections 373.421 and .4211, F.S.

As a practical matter for most projects use of the Federal and State methods results in similar wetland boundaries. However, the Federal plant list shows slash pine and galberry as wetland indicator plants while the State plant list shows these two plants as upland indicators. Some biologists believe these species should be "neutral" (e.g. not indicate wetlands or uplands). In addition, the State methodology relies on the Federal Natural Resources Conservation Service (formerly Soil Conservation Service) soils manual while the Federal methodology does not in certain circumstances (ex. the use of "high organics" in the surface horizon to indicate wetlands). As a result a strict application of the Federal methodology delineates the wetland boundary "higher" in some pine flatwoods and improved pasture than does the State methodology.

Effects of Proposed Changes

The bill proposes the acceleration of the distribution of funds to the Florida Forever program for fiscal years 2006-2007 and 2007-2008, allowing annual appropriations to increase from \$300 million to \$600 million. The annual debt service limit is lifted for Florida Forever bonds from \$30 million to \$60 million. This increases the amount of proceeds from the excise tax of documents distributed to the Land Acquisition Trust Fund to pay debt service.

The bill authorizes DEP to implement a state programmatic general permit (SPGP) for activities affecting up to 10 acres, if the Army Corps of Engineers (COE) agrees. The bill provides that if DEP gets the 10-acre SPGP then the DEP would use the "higher" of the state/federal wetland delineation line and use United States Department of Agriculture, Natural Resource Conservation Service's National Cooperative Soil Survey data.² DEP staff will be responsible for knowing both lines in each circumstance. The section also states that the COE may apply federal conditions to the SPGP.³ The bill also states that, for the purposes of the SPGP in NW Florida, DEP may regulate isolated wetlands.⁴

The bill offers a conditional ratification of the state's vegetative index for wetlands delineation. According to comments provided by DEP, this rule was recently endorsed by the Environmental Regulation Commission.⁵ The bill would only ratify the wetland delineation vegetative index rule change in the context of the "new" SPGP from Section 4 and only if it's "no less than 5 acres..." DEP's position is that the change to the vegetative index needs to be ratified directly. Relating to the Statewide Programmatic General Permit (SPGP) for dredge and fill activities:

- A SPGP applicant shall affirmatively consent to federal regulations, notwithstanding provisions of 373.4145, F.S.
- The DEP is authorized to apply MSSW to both waters of the state and isolated wetlands.

² <http://soils.usda.gov/>

³ According to the DEP, the COE would not need authorization in Florida Statutes in order to apply those conditions.

⁴ This section will need to be considered if legislation is passed separately that implements ERP in NW Florida. DEP believes that if the DEP is to have the authority to regulate isolated wetlands, it should be unconditional, not limited to SPGP circumstances.

⁵ The ERC is created under Section 20.255(7), Florida Statutes (F.S.). Commission membership is comprised of "seven residents of this state appointed by the Governor, subject to confirmation by the Senate." Members are selected from various sections of the state and are "representative of agriculture, the development industry, local government, the environmental community, lay citizens, and members of the scientific and technical community who have substantial expertise in the areas of the fate and transport of water pollutants, toxicology, epidemiology, geology, biology, environmental sciences, or engineering." The power and duties of the ERC are established in Section 403.804, F.S. The ERC is the standard setting authority for the Department.

Regarding the ratification of changes to rule 60-340.450(3), FAC, adding slash pine and gallberry to the list of facultative plants, the ratification is conditional, and shall be effective 60 days after the date of the SPGP becomes effective covering no less than five acres of wetland impact. The bill:

- Grandfathers surface water and wetland delineations approved under rules prior to the effective date of the SPGP authorized under 373.4144, F.S. – those shall remain valid until their expiration notwithstanding changes to the rule.
- Prohibits the application of the new rule methodology to a modification of an existing permit provided the modification is not a substantial modification.
- Preserves declaratory statements made by the DEP pursuant to s. 403.914 1984 Supplement, F.S., or by the DEP or a WMD regarding delineation methods in response to a petition filed on or before the effective date of the SPGP.
- Exempts a permit application pending on or before the effective date of the SPGP from the changes in the rule.
- Exempts mining operations from changes to the rule.

C. SECTION DIRECTORY:

Section 1. Provides express legislative intent language increasing the Florida Forever program appropriation during fiscal years 2006-2007 and 2007-2008 from \$300 million to \$600 million, and lifting the annual limit on debt service for Florida Forever bonds.

Section 2. Amends paragraph (1) of subsection (1) of section 201.15, F.S., increasing the limitation on the amount transferred to the Land Acquisition Trust Fund from excise tax revenue to support the debt service increase from \$30 million to \$60 million per year for fiscal years 2006-2007 and 2007-2008.

Section 3. Amends paragraph (a) of subsection (1) of section 201.15, F.S., as amended by section 1 of Chapter 2005-92, Law of Florida, effective July 1, 2007, to increase the limitation on the amount transferred by an additional \$60 million instead of \$30 million each subsequent year fiscal year.

Section 4. Amends subsection (1) of section 373.4144, F.S., authorizing DEP to implement a State Programmatic General Permit (SPGP) for activities affecting up to 10 acres, if the Army Corps of Engineers (COE) agrees. The bill provides that an applicant in the Northwest Florida Water Management District may seek to use the SPGP authorized by this subsection and, for the limited purposes of implementing the statewide programmatic general permit authorized by this section, the department may apply its permitting criteria and authority to the regulation of isolated wetlands.

Section 5. Amends subsection (19) of section 373.4211, F.S., conditionally ratifying the wetland delineation vegetative index rule changes (gallberry, slash pine) in rule 62-340, F.A.C. This section provides grandfathering provisions and certain exemptions from application of the new rules.

Section 6. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.

2. Expenditures:

If the proposed \$300 million increase in appropriation for the Florida Forever program is bonded for fiscal years 2006-2007 and 2007-2008, and bonds are sold at the earliest possibility for the 1st year

(FY 06/07) the debt service would be 27.2 million. For the FY 07/08 –FY 25/26 it would be 54.5 million per year, then would drop back to 27.2 million in FY 26/27.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.
2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action 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:

The bill, relating to environmental protection, amends environmental permitting in the state, and also amends the funding schedule for Florida Forever. For some, the disparate issues may present a single subject issue.

B. RULE-MAKING AUTHORITY:

- C. The bill authorizes DEP to implement a State Programmatic General Permit (SPGP) for activities affecting up to 10 acres, if the Army Corps of Engineers (COE) agrees. Provides redundant rulemaking authority to DEP to apply MSSW to both waters of the state and isolated wetlands.

D. DRAFTING ISSUES OR OTHER COMMENTS:

DEP Comments:

With regard to the vegetative index used for wetland delineation that is dealt with in section 5 of this bill, the bill's approach is not among the recommendations developed by DEP in response to direction in HB 0759 last year. The bill's approach may, in fact, exacerbate the problem because it is only a conditional ratification of that index and the DEP needs to have something solid in this respect in order to attempt to consolidate the federal and state delineation methods.

If this bill passes, for fiscal years 2006-2007 and 2007-2008 the Florida Forever program appropriation could increase from \$300 million to \$600. The annual limitation on debt service for the Florida Forever program bonds will be lifted. The amount of proceeds from the excise tax of documents distributed to the Land Acquisition Trust Fund will be increased from \$30 million to \$60 million each year.

It should also be noted that the degree to which doubling the Florida Forever appropriation enables the state to accelerate the actual acquisition of properties will depend upon the extent to which recipient

state agencies are able to actually utilize the additional funding. A \$300 million increase in appropriations will not necessarily translate into a doubling of annual acquisitions.

Section 201.15 (1) (a) provides in part “no series of bonds may issued pursuant to this paragraph unless such bonds are approved and the debt service for the remainder of the fiscal year in which the bonds are issued is specifically appropriated in the General Appropriations Act (GAA)”. As such, the debt service required to support the increase in Florida Forever funding authorized in this bill, would be contingent upon appropriation in the GAA.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 5, 2006, the Committee on Environmental Regulation approved a strike-all offered by the bill sponsor. The strike all amended the bill relating to the Statewide Programmatic General Permit (SPGP) for dredge and fill activities impacting 10 acres or less, subject to the agreement of the Army Corps of Engineer:

- Stipulating that a SPGP applicant affirmatively consent to federal regulations, notwithstanding provisions of 373.4145, F.S.
- Providing rulemaking authority to DEP to apply MSSW to both waters of the state and isolated wetlands.

Regarding the ratification of changes to rule 60-340.450(3), FAC, adding slash pine and gallberry to the list of facultative plants, the ratification is conditional, and shall be effective 60 days after the date of the SPGP becomes effective covering no less than five acres of wetland impact. The strike all:

- Grandfathers surface water and wetland delineations approved under rules prior to the effective date of the SPGP authorized under 373.4144, F.S. – those shall remain valid until their expiration notwithstanding changes to the rule.
- Prohibits the application of the new rule methodology to a modification of an existing permit provided the modification is not a substantial modification.
- Preserves declaratory statements made by the DEP pursuant to s. 403.914 1984 Supplement, F.S., or by the DEP or a WMD regarding delineation methods in response to a petition filed on or before the effective date of the SPGP.
- Exempts a permit application pending on or before the effective date of the SPGP from the changes in the rule.
- Exempts mining operations from changes to the rule.