

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7163 CS PCB ENVR 06-07 Wetland Mitigation

SPONSOR(S): Environmental Regulation Committee

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Environmental Regulation Committee	7 Y, 0 N	Kliner	Kliner
1) Agriculture & Environment Appropriations Committee	12 Y, 0 N, w/CS	Dixon	Dixon
2) State Resources Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

The bill provides a phased approach for implementation of environmental resource permitting (ERP) in Northwest Florida (NWF) that requires the Department of Environmental Protection (DEP) and the Northwest Florida Water Management District (NFWWMD) to jointly develop rules "taking into consideration the differing physical and natural characteristics of the area" for

- Stormwater management by January 1, 2007, and
- Management and Storage of Surface Waters, by January 1, 2008

Rules shall:

1. Update the stormwater rules to improve water quality and protection, and to apply the least restrictive measures and criteria adopted by other WMDs.
2. Minimally encroach upon property interests and to fashion permitting thresholds and requirements for the management and storage of surface waters to reflect the historically rural nature of the district.
3. Adopt the existing exemptions and general permits adopted by the DEP and the other WMDs, and provide that any activity or structure that is exempt in any other WMD will be exempt in the NFWWMD. Furthermore, the rules shall specifically exempt resurfacing or paving of unpaved roads and an alteration of a wholly-owned artificially created surface water that is not connected to state waters.

The bill requires the DEP and the NFWWMD to enter into an operating management agreement that delegates to the water management district (WMD) the responsibility for managing ERP in NWF to the extent "resources allow" including, at a minimum, the responsibility for regulating silviculture and agriculture.

The bill prohibits a local government from adopting or enforcing an ordinance or policy that prohibits or restricts mitigation that offsets construction impacts pursuant to Part IV of Chapter 373. The bill also prohibits a local government in the NFWWMD to adopt or enforce a wetland regulatory program or criteria that is more stringent or duplicative of the ERP program once it is enacted.

If there is no appropriation to fund the program in any given fiscal year, the bill provides that law governing development activity in the district shall revert to those in effect on April 1, 2006, until such time as funding and staffing levels are restored consistent with the act. The bill appropriates the sum of \$2,740,000 for the 2006-07 fiscal year from the General Revenue Fund to the DEP for the operational expenditures of the NFWWMD to implement this act.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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DATE: 4/11/2006

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill requires the DEP and the NFWMD to jointly execute rules for environmental resource permitting and to enter into a management agreement that delegates to the WMD the responsibilities for managing ERP in NWF to the extent “resources allow” including, “at a minimum, the responsibility for regulating silviculture and agriculture.”

B. EFFECT OF PROPOSED CHANGES:

Present Situation

The ERP program was created in 1993 when the former Department of Natural Resources and the former Department of Environmental Regulation were merged to create the DEP. The program provided a streamlined, but still comprehensive, permitting process by combining the state’s dredge and fill permit with the “management and storage of surface waters” (MSSW) permit that was being issued by the water management districts. ERP goals include preventing new construction from adversely impacting the flow and storage of surface waters, and therefore protecting existing homes and structures; reducing stormwater pollution; and protecting wetlands.

The ERP program is implemented by four of the five water management districts in the state through operating agreements with DEP. However, in the NFWMD, the DEP administers an interim environmental permitting program, called the Wetlands Resource Permitting program, which is limited to wetland permitting rules in effect in 1984.

In 1993, the Legislature decided not to extend the ERP program to the NFWMD because the District didn’t have the funding to fully implement it, and because the Panhandle area was projected to grow much slower than the rest of the state. (The Northwest Florida Water Management District’s ad valorem millage rate is constitutionally and statutorily capped at .05 mills, which is less than one-tenth of what the other four water management districts can levy.)

Pursuant to s. 373.4145, F.S, the NFWMD is exempt from the ERP. Under this regulatory framework, the DEP processes “wetlands resource permits” for many wetlands activities within the area of the NFWMD. Currently, the area of the NFWMD is exempted from the environmental resource permitting (ERP) program by s. 373.4145, F.S., as amended, until July 1, 2010.

Under the existing authority in NWF, the DEP administers dredge and fill and stormwater programs for all non-agricultural projects under rules adopted prior to creation of the ERP program. The dredge and fill program regulates activities in most natural waterbodies and connected wetlands using boundaries determined by the 1994 unified statewide wetland delineation methodology. However, the dredge and fill program does not regulate activities in isolated wetlands.

The NFWMD administers a limited MSSW program for non-agricultural facilities, primarily the construction or alteration of dams and levees, and an agricultural MSSW program. The agricultural program regulates, to a limited extent, surface water management projects in agricultural settings, including isolated wetlands.

The implementation of a full ERP program in the NFWMD will result in changes to the current environmental regulatory programs in two areas: (1) stormwater (water quality and water quantity) and (2) isolated wetlands.

DEP has prepared a proposed rule -- Rule 62-346 -- in anticipation of the implementation of ERP in NFWFMD. If Rule 62-346 were implemented as drafted, the following changes would result in each of these areas:

Stormwater

- Water Quality - DEP's stormwater program in the NFWFMD currently regulates activities in uplands and wetlands that create new impervious areas (under Rule 17-25) and only addresses stormwater water quality and not the increased quantity of stormwater (i.e. flooding) generated by development projects.
- Water Quantity – NFWFMD administers a limited MSSW program for non-agricultural facilities, primarily the construction or alteration of dams and levees, and an agricultural MSSW program. The agricultural program regulates, to a limited extent, surface water management projects in agricultural settings, including isolated wetlands. The MSSW program is designed to address issues relating to water flow and flooding.
- Under the ERP program, stormwater quality and quantity would be addressed in a single environmental resource permit issued by the NFWFMD.

Isolated wetlands

- Currently, impacts to isolated wetlands are regulated by the NFWFMD only to a limited degree with regard to water flow and water quantity issues (i.e. under the NFWFMD MSSW program). They are not regulated by any state agency with regard to their habitat value.
- Under the ERP program, isolated wetlands would be regulated with regard to their habitat value.
- Under the ERP program, no distinction would be made between “isolated wetlands” and “wetlands” that are contiguous to a water body (i.e. creek, river, lake, bay, etc.). Therefore, all wetlands would be regulated regardless of whether they are isolated.
- As drafted, Rule 62-346 defines “wetlands” basically as any area that is wet enough under normal conditions to support wetland vegetation.
- The Proposed Rule exempts certain activities from regulation. Included in the exemptions are activities associated with typical agricultural practices that alter the topography of the land. However, the exemption does not apply if the alteration is “for the sole or predominant purpose of impounding or obstructing surface waters.” Therefore, any activity that alters agricultural land for the purpose of filling a wetland (i.e. obstructing a wetland) would not qualify for the exemption.
- The Proposed Rule allows certain activities to be conducted under “noticed general permits.” Included in those activities is “the dredging or filling of less than 100 square feet of wetlands or other surface waters.” Such an activity may be undertaken after notice is provided to the NFWFMD of the landowner’s intent to pursue the activity. Therefore, the filling of an isolated wetland where the wetland is less than 100 square feet in surface area could be filled through the “noticed general permit.”
- Under the Proposed Rule, the filling of an isolated wetland greater than 100 square feet would require an individual permit, and the permit application would be reviewed pursuant to all the criteria listed in Proposed Rules 62-346.301 and 62-346.302 (including criteria relating to the protection of habitat for fish and wildlife) and pursuant to the requirements to modify the project to eliminate or reduce adverse impacts and to mitigate for such impacts.
- If the wetland is a “pond” that is wholly-owned and was entirely constructed in uplands, then the review of the application would be limited to the impacts of the filling on water quality and water quantity (i.e. not subject to review of impacts to fish and wildlife habitat), unless the pond provides significant habitat for threatened or endangered species.

Effect of Proposed Changes

The bill provides a phased approach for implementation of ERP in NW Florida that:

(1) Requires the DEP and the NFWFMD to jointly develop rules “taking into consideration the differing physical and natural characteristics of the area” for

- (a) Stormwater management by January 1, 2007, and
- (b) MSSW, by January 1, 2008.

In drafting the rules, the bill directs the DEP and the NFWFMD to:

- Update the stormwater rules to improve water quality and protection, and to apply the least restrictive measures and criteria adopted by other WMDs.
- Minimally encroach upon property interests and to fashion permitting thresholds and requirements for the management and storage of surface waters to reflect the historically rural nature of the district.
- Adopt the existing exemptions and general permits adopted by the DEP and the other WMDs, and provide that any activity or structure that is exempt in any other WMD will be exempt in the NFWFMD. Furthermore, the rules shall specifically exempt resurfacing or paving of unpaved roads and an alteration of a wholly-owned artificially created surface water that is not connected to state waters.

(2) Requires the DEP and the NFWFMD to enter into an operating management agreement that delegates to the WMD the responsibilities for managing ERP in NWF to the extent “resources allow” including, “at a minimum, the responsibility for regulating silviculture and agriculture.”

(3) Grandfathers:

- (a) Any legal activity existing before the new programs rules take effect, as long as those activities abide by the condition of their original authorization.
- (b) Activities that have been permitted under the old NW Florida rules but not yet begun construction or operation. Activities include those that are proposed in applications prior to the implementation of the new rules. These projects may be amended if the modification “lessens the environmental impact” however; the modifications may not extend the time limit for construction by more than two years.

(4) Provides statutory exemptions common to the other four WMDs, excluding exemption from the Harris Act; and

(5) Deletes statutory exemptions for the NFWFMD from the ERP.

(6) Amends s. 373.414, F.S., to limit, on a state-wide basis, local government’s ability to regulate local activities that affect surface waters or wetlands, as well as restrict what local governments within the NFWFMD may regulate. Section 373.414, F.S., which addresses additional criteria for activities in surface waters and wetlands, contemplates mitigation measures to offset adverse effects that may be caused by regulated activity (i.e., construction in wetlands). The amendment to this section:

- Prohibits a local government from adopting or enforcing an ordinance or policy that prohibits or restricts mitigation that offsets construction impacts pursuant to Part IV of Chapter 373. The amendment also requires that a local government ordinance that regulates construction in wetlands to consider measures “proposed by or acceptable to the applicant” to mitigate adverse effects.

- Prohibits a local government in the NFWFMD from adopting or enforcing a wetland regulatory program or criteria that is more stringent or duplicative of the ERP program once it is enacted.¹

(7) Provides that the regulations governing development activity in Northwest Florida shall revert back to those in effect on April 1, 2006 if the Legislature fails to appropriate funds to implement this program in any given fiscal year.

Generally, the bill provides flexibility in the rulemaking process by requiring the DEP and the NFWFMD to jointly develop rules “taking into consideration the differing physical and natural characteristics of the area.” Flexibility is achieved in the language mandating the operating management agreement by delegating responsibility to the WMD as “resources allow.” The bill appropriates the sum of \$2,740,000 for the 2006-07 fiscal year from the General Revenue Fund to the Department of Environmental Protection for the operational expenditures of the NFWFMD to implement this act. If resources do not allow the WMD to assume the delegated responsibilities under the operating management agreement, the bill provides the regulations governing development activity in Northwest Florida shall revert to those in effect on April 1, 2006 until such time as funding and staffing levels are restored consistent with the act.

C. SECTION DIRECTORY:

Section 1. Amends paragraph (b) of subsection (1) of s. 373.414, F.S., limiting on a state-wide basis, local government’s ability to regulate local activities that affect surface waters or wetlands, as well as restricting what local governments within the NFWFMD may regulate.

Section 2. Amends s. 373.4145, F.S., providing the mechanism for implementing ERP in NWF.

Section 3. Provides an appropriation.

Section 4. Repeals section 4 of chapter 2005-273, Laws of Florida, and section 32 of chapter 2005-71, Laws of Florida.

Section 5. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

2. Expenditures:	FY 06-07	FY 07-08	FY 08-09
General Revenue	(\$2.74 million)	(\$1.72 million)	(\$1.72 million)

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

¹ This language appears to conflict with s. 373.441(1), F.S., contemplating delegation of ERP provisions to local governments, subject to the local governments’ financial, technical, and administrative capability. Specifically, s. 373.441(1)(b) allows a locally delegated permit program to have stricter standards than state standards. In addition, the prohibition against a duplicative local government program may be unnecessary as s. 373.441(1)(c) contemplates reconciling duplicative permitting.

2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

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:

B. RULE-MAKING AUTHORITY:

In drafting the rules, the bill directs the DEP and the NFWWMD to:

- Update the stormwater rules to improve water quality and protection, and to apply the least restrictive measures and criteria adopted by other WMDs.
- Minimally encroach upon property interests and to fashion permitting thresholds and requirements for the management and storage of surface waters to reflect the historically rural nature of the district.
- Adopt the existing exemptions and general permits adopted by the DEP and the other WMDs, and provide that any activity or structure that is exempt in any other WMD will be exempt in the NFWWMD. Furthermore, the rules shall specifically exempt resurfacing or paving of unpaved roads and an alteration of a wholly-owned artificially created surface water that is not connected to state waters.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 11, 2006, the Agriculture and Environment Appropriations Committee adopted one amendment changing the appropriation from the Water Management Lands Trust Fund to the General Revenue Fund.