

The Florida Senate
PROFESSIONAL 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: Environmental Preservation and Conservation Committee

BILL: SB 2082

INTRODUCER: Senator Bennett

SUBJECT: Wetlands Permitting

DATE: April 16, 2007

REVISED: 04/11/07

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Branning	Kiger	EP	Fav/1 amendment
2.			GO	
3.			GA	
4.				
5.				
6.				

Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

This bill provides legislative intent relating to the coordination and implementation of regulatory duties and functions among various state and federal agencies for wetlands regulation and delineation. Authorizes the Department of Environmental Protection (DEP) to obtain an expanded state programmatic general permit, or a series of regional permits from the U.S. Army Corps of Engineers (Corps) for certain activities. Ratifies the changes that were approved by the Environmental Regulation Commission to the plant list used to delineate wetlands to reclassify slash pine and gallberry if certain conditions are met. Provides that wetland delineation determinations made prior to the effective date of this bill are not subject to the provisions of this bill for the term of the permit. Changes to the wetland delineation methodology do not apply to certain specified evaluations.

This bill amends ss. 373.4144 and 373.4211, F.S.

II. Present Situation:

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) regulates 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.¹ 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. Permits for these activities are issued by the U.S. Army Corps of Engineers.

Section 404 of the federal Clean Water Act established a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g., certain farming and forestry activities.)²

Proposed activities are regulated through a permit process. An individual permit is required for potentially significant impacts and are reviewed by the U.S. Army Corps of Engineers. For discharges that will have only minimal adverse effects, a general permit may be issued. General permits are issued on a nationwide, regional, or state basis for particular categories of activities. Under this program, the U.S. Army Corps of Engineers administers the day-to-day program; conducts or verifies jurisdictional determinations; and enforces Section 404 provisions. The Environmental Protection Agency develops and interprets policy, guidance and environmental criteria used in evaluating permit application; determines scope of geographic jurisdiction and applicability of exemptions; approves and oversees state and tribal assumption; and enforces Section 404 provisions.³

The Department of Environmental Protection regulates dredging and filling activities in wetlands and other surface waters in order to protect the environment. The water management districts and the local governments also have a role in the delineation and protection of wetlands.

Section 373.421, F.S., directed the Environmental Regulation Commission (ERC) to adopt a unified statewide methodology for the delineation of the extent of wetlands. This methodology did not become effective until ratified by the Legislature in 1994. The wetland delineation rule is found in ch. 62-340, F.A.C.

For most projects, the use of the federal delineation method and the state delineation method result in similar wetland boundaries. However, the plant lists used by the federal government and the state government differ as indicators of wetland boundaries. For example, the federal plant list shows slash pine and gallberry as wetland indicators while the state list shows these plants as upland indicators. There is some consensus in the biological community that these plants should be listed as facultative, or neutral indicators. On February 23, 2006, the ERC approved

¹ <http://www.usace.army.mil/cw/cecwo/reg/33cfr329.htm#329.3>

² http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf

³ Id.

amendments to the wetland plant list to change slash pine and gallberry from an “upland” status to a “facultative” status. The rule change reduces the current differences that exist between the state and federal wetland methodologies—a step toward streamlining the state and federal programs. In order for this change to become effective, the Legislature must ratify the change.

Section 373.4143, F.S., directed the 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.

III. Effect of Proposed Changes:

This bill amends s. 373.4144, F.S., to provide that it is the intent of the Legislature to:

- Facilitate coordination and a more efficient process of implementing regulatory duties and functions among the DEP, the water management districts, the U.S. Army Corps of Engineers (Corps), the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the U.S. Environmental Protection Agency, the Florida Fish and Wildlife Conservation Commission, and other relevant federal and state agencies.
- Authorize the DEP to obtain issuance by the Corps of an expanded state programmatic general permit, or a series of regional permits for certain activities.
- Use the mechanism of a general permit or permits to eliminate overlapping federal regulations and state rules that seek to protect the same resource and to avoid duplication of permitting between the Corps and DEP for minor work located in waters of the United States, including navigable waters, so as to eliminate an inappropriate need for a separate, individual approval from the Corps while ensuring maximum protection of wetland resources.
- Prohibit the DEP from seeking issuance of or taking any action under such permit or permits unless the conditions of the permit or permits would protect the environment and natural resources at least as much as the provisions of part IV of ch. 373, F.S., the federal Clean Water Act, and the federal Rivers and Harbors Act.
- Add slash pine and gallberry, as facultative species, to the list of plants that this state uses to delineate jurisdictional wetland communities an incentive for, and contingent upon, aligning the method by which the federal government and Florida delineate jurisdictional wetland communities so that federal and state methods delineate the same communities and an impediment to the authorization of a state programmatic general permit by the Corps is removed.

In order to avoid duplication and effectuate efficient permitting of activities that affect wetlands, the DEP and the water management districts shall, subject to agreement by the Corps, implement a statewide programmatic general permit for all dredge and fill activities affecting 5 acres or less of wetlands or other surface waters, including navigable waters. The permit must be voluntary and is subject to certain specified conditions.

The DEP is not precluded from pursuing a series of regional general permits for construction activities in wetlands and surface waters or complete assumption of certain federal permitting programs.

Section 373.4211, F.S., is amended to provide that the wetland methodology shall not be used to delineate areas that are not wetlands, which include agricultural and silvicultural lands resulting from conversion of nonwetland pine flatwoods, or to delineate as wetlands or surface waters areas exempted from delineation by statute or agency rule. This bill also amends the provision in rule 17-340.100(2), F.A.C.,⁴ wetland delineation methodology rule to read:

“To ensure statewide coordination and consistency in the delineation of surface waters and wetlands under this rule the department shall provide the staff of the department, water management districts, and local governments with training and guidance in implementing the requirements under this rule concerning methodology and technical peer review of the delineations that may be requested.”

This bill further provides that the Legislature recognizes that rule 62-340.450, F.A.C., was formerly known as rule 17-340.450, F.A.C. The Legislature ratifies the changes to rule 62-340.450(3), F.A.C., by the ERC on February 23, 2006, which add slash pine and gallberry to the list of facultative plants. However, this ratification does not take effect unless the state and federal methods to delineate wetland communities for the purpose of wetland permitting are aligned.

Certain surface water and wetland delineations approved in a permit issued before July 1, 2007, are effective for the duration of the permit. For surface water and wetland delineations not identified and approved in a permit before July 1, 2007, the delineation must be determined under the rules applicable when the permit was issued. A modification to a permit which is not substantial before July 1, 2007, must be determined under the rules applicable when the modification was granted.

A declaratory statement or a formal determination issued by the DEP or a water management district in response to a petition that was filed on or before July 1, 2007, is valid for the duration of the statement or determination. A petition for a declaratory statement by the DEP or for a formal determination by the DEP or the water management district which is pending on or before July 1, 2007, is exempt from any changes to rule 62-340.450(3), F.A.C., which were approved by the ERC on February 23, 2006.

The changes proposed to the delineation methodology do not apply to certain specified activities.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

⁴ The rule number has been changed to 62-340.100(2), F.A.C.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that a unified methodology for delineating wetlands exists that is substantially the same for the state and federal waters, there could be a reduction of costs and permitting time because the duplication of efforts has been either reduced or eliminated.

C. Government Sector Impact:

No significant impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

Barcode 875768 by Environmental Preservation and Conservation Committee:

The amendment rewrites the bill as follows:

Section 1 amends s. 373.4144, F.S., to provide that it is the intent of the Legislature to:

- Facilitate coordination and a more efficient process of implementing regulatory duties and functions between the DEP, the water management districts, the U.S. Army Corps of Engineers (Corps), the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the U.S. Environmental Protection Agency, the Florida Fish and Wildlife Conservation Commission, and other relevant federal and state agencies.
- Authorize the DEP to obtain from the Corps pursuant to state and federal law, an expanded state programmatic general permit, or a series of regional permits for certain activities conducted in waters of the United States governed by the Clean Water Act and in navigable waters under the Rivers and Harbors Act of 1899.
- Use a state general permit or regional general permits to eliminate overlapping federal regulations that relate to the same resource and to avoid duplication of permitting between the Corps and DEP for minor work located in waters of the United States, including navigable waters, thus eliminating, if appropriate, the need for separate approval from the Corps while ensuring the most stringent protection of wetland resources.
- Direct the DEP to not seek issuance of or taking any action pursuant to obtaining a general permit or regional general permits unless conditions are at least as protective of the environment and natural resources as existing state law under part IV of ch. 373, F.S., and federal law under the Clean Water Act and the Rivers and Harbors Act of 1899.
- Add slash pine and gallberry to the state list of facultative species as an incentive for and contingent upon the alignment of federal and state wetland jurisdictional delineation, so that the alignment eliminates an impediment to obtaining authorization from the Corps for a state programmatic general permit or regional general permits.

In order to effectuate efficient wetland permitting and avoid duplication, the DEP and the water management districts are authorized to implement a voluntary state programmatic general permit for all dredge and fill activities impacting 1 acre or less of wetlands or other surface waters, including navigable waters, subject to agreement with the Corps, if the general permit is at least as protective of the environment and natural resources as existing state law and federal law

The DEP is not precluded from pursuing a series of regional general permits for construction activities in wetlands and surface waters or complete assumption of certain federal permitting programs.

The DEP shall report annually to the Legislature on efforts to eliminate impediments to achieving greater efficiencies through expansion of a state programmatic general permit or regional general permits.

Section 2 creates s. 373.4211, F.S., to provide that the Legislature ratifies the change to rule 62-340.450(3), F.A.C., approved on February 23, 2006, by the Environmental Regulation Commission (ERC) which adds *Pinus elliotti* (slash pine) and *Ilex glabra* (gallberry) to the list of

facultative plants. However, this ratification and the rule revision shall not take effect until state and federal wetland jurisdictional delineation methodologies are aligned.

Certain surface water and wetland delineations identified and approved in a permit issued before the effective date of this act, remain effective until expiration of the permit.

Where surface water and wetland delineations were not identified and approved pursuant to a permit issued under rules adopted under part IV of ch. 373, F.S., delineations within the geographical area to which the permit applies shall be determined pursuant to the rules applicable at the time the permit was issued. This also applies to any modification which does not constitute a substantial modification within the geographical area to which the permit applies.

Certain declaratory statements issued by the DEP pursuant to s. 403.914, 1984 Supplement to the Florida Statutes, or by the department or a water management district in response to a petition that was filed on or before the effective date of this act, is valid for the duration of the declaratory statement. Any petition pending on or before the effective date of this act is exempt from any changes to rule 62-340.450(3), F.A.C., which were approved by the ERC.

A permit application for dredging and filling that is pending on or before the effective date of this act shall be exempt from the change to rule 62-340.450(3), F.A.C.

Sections 3, 4, and 5 amend ss. 161.041, 373.4141, and 403.087, F.S., to provide that when the DEP or a water management district denies an application for a permit, the department or the district shall provide written notice to the applicant. Specifies what the notice must contain.

Section 6 provides that the Division of Statutory Revision is directed to substitute the date on which this act takes effect for the phrase “the effective date of this act” wherever it occurs in provisions of s. 373.4212, F.S., as amended by this act, when preparing that section for publication in the next edition of the Florida Statutes.

Section 7. This act takes effect upon becoming a law. (WITH TITLE AMENDMENT)