

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Agriculture Committee

BILL: CS/SB 1174

INTRODUCER: Agriculture Committee and Senator Siplin

SUBJECT: Agricultural-related Exemptions to Water Management Requirements

DATE: March 21, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Weidenbenner	Spalla	AG	Fav/CS
2.	_____	_____	EP	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill provides that the exemption that allows the topography of land to be altered for agricultural activities without an environmental resource permit will not be superseded by language in the Warren S. Henderson Wetlands Protection Act¹ (Wetlands Protection Act) so long as the alteration is not for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands. It specifies certain lands and certain activities that do not qualify for this exemption.

The bill provides that the Department of Agriculture and Consumer Services (DACS) has exclusive authority to make a binding determination as to whether an activity qualifies for an agricultural-related exemption upon request from a water management district (WMD) or a landowner. The bill gives DACS necessary rulemaking authority and requires DACS and each WMD to enter into or amend existing memorandum of agreements to implement a binding determination process.

¹ Chapter 84-79, Laws of Florida.

The bill establishes circumstances under which land converted from agricultural uses will not be subject to mitigation and it redefines the definition of agricultural activities contained in the Wetlands Protection Act.

This bill substantially amends sections 373.406, 373.407, and 403.927 of the Florida Statutes.

II. Present Situation:

Part IV of Chapter 373, F.S., addresses the management and storage of surface waters in Florida. Persons engaged in certain agricultural occupations are currently exempted from having to obtain an environmental resource permit from a WMD when altering the topography of land unless such alteration is being done for the sole or predominant purpose of impounding or obstructing surface waters.² The Wetlands Protection Act³ established a permitting process for dredge and fill permits to protect and manage wetlands and it provides that agricultural activities are not subject to specific discharge permits except that the Department of Environmental Protection (DEP) may require a stormwater permit or discharge permit at the point of discharge from an agricultural water management system.

In 2009, two appellate court decisions were entered regarding a challenge by a large agricultural entity to certain rules of a WMD and its statutory interpretation of s. 373.406(2), F.S. The entity was charged with constructing numerous drainage ditches without obtaining a permit and appealed the Administrative Law Judge's (ALJ) recommended order⁴ which was adopted by the WMD. *Duda I* addressed only the rule challenge and found in favor of the WMD. While the enforcement issue was not addressed, *Duda I* recognized that the exemption providing for the alteration of the topography of land for agriculture purposes was limited by the further statutory provision that the alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters. The WMD interpreted that to mean "that there is no exemption if the alteration of topography has the effect of more than incidentally trapping, obstructing or diverting surface waters."⁵ After a lengthy analysis, the *Duda I* court made a finding that that such interpretation rendered the agricultural exemption in s. 373.406(2), F.S., virtually meaningless and that the ALJ had erred in accepting the WMD's erroneous interpretation⁶ and remanded that part of the appeal for further review by the ALJ. In *Duda II*, a panel made up of different judges from the same court found that the WMD had shown sufficient evidence that wetlands had been impacted and agreed that the company had to either restore the impacted wetlands or apply for after-the-fact permits. While this was the result of the court's second opinion, the court also said that the opinion in *Duda I* did not address the interplay between s. 373.406(2), F.S., and the language in the Warren S. Henderson Wetlands Protection Act and reiterated the prior panel's finding that those provisions, read together, virtually eliminate the agricultural exemption as it applies to alterations impacting wetlands. Various persons, entities, and organizations involved in agricultural industries and occupations have expressed concerns

² Section 373.406(2), F.S.

³ Section 403.927, F.S., the remaining section of the Warren S. Henderson Wetlands Protection Act that has not been repealed.

⁴A. *Duda and Sons, Inc. v. St. Johns River Water Management District*, 17 So. 3d 738 (Fla. 5th DCA 2009) (*Duda I*) and 22 So. 3d 622 (Fla. 5th DCA 2009) (*Duda II*).

⁵A. *Duda and Sons, Inc. v. St. Johns River Water Management District*, 17 So. 3d 738 (Fla. 5th DCA 2009) at 741.

⁶ *Id.* at 744.

about the practical usefulness of the agricultural exemption in s. 373.406(2), F.S., because of the conflict between the WMD's interpretation and the findings in *Duda I* and *Duda II*.

Pursuant to s. 373.407, F.S., DACS and each of the five WMD's entered into a memorandum of understanding (MOU) in 2007 which sets forth a procedure for DACS to make a nonbinding review as to whether an existing or proposed activity qualifies for an agricultural-related exemption in s. 373.406(2). DACS reports that this involves a site visit, review of technical support materials and issuance of a written non-binding determination. DACS further states that only one or two requests per year are received from the WMD's and would expect that number to increase when landowners can also make a request for a binding determination.

Currently, if land served by a water management system is converted to a use other than agricultural use, that land will no longer be entitled to agricultural-related exemptions. And the definition of "Agricultural activities" contained in the Wetlands Protection Act does not include the activities of cultivating, fallowing, or leveling nor does the predominant purpose of the activity matter if the result is that it impedes or diverts the flow of surface water.

III. Effect of Proposed Changes:

Section 1 amends s. 373.406, F.S., to specify that, notwithstanding the provisions of s. 403.927, F.S., (Wetlands Protection Act) persons engaged in agricultural activities may impede or divert the flow of surface waters or adversely impact wetlands, so long as that is not the sole or predominate purpose of the activity or alteration of the topography.⁷ The bill provides that the exemption applies only to lands classified as agricultural pursuant to s. 193.461, F.S., to activities regulated pursuant to part IV, Chapter 373. The exemption shall specifically not apply to activities previously permitted under part IV, Chapter 373 or permitted under chapter 403.

Section 2 amends s. 373.407, F.S., to provide that a WMD or a landowner may request the DACS to make a binding determination in the event of a dispute about whether an existing or proposed activity qualifies for an agricultural-related exemption under s. 373.406(2), F.S., from having to obtain an environmental resource permit. The bill requires DACS and each WMD to enter into or amend existing memorandum of agreements to set forth how DACS will make its review and issue a binding determination. The bill further states that DACS has exclusive authority to make this binding determination and may adopt rules to implement this procedure.

Section 3 amends s. 403.927, F.S., to provide that when land is converted to other than an agricultural use, mitigation under chapters 373 or 403, F.S., is not required to offset any adverse effects caused by agricultural activities if such activities occurred in at least 4 of the last 7 years preceding the conversion. It also redefines "Agricultural activities" to add cultivating, fallowing, and leveling to the existing list of activities and it specifies that "Agricultural activities" must not be for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

Section 4 provides that the act shall take effect July 1, 2011.

⁷ The effective date of the Warren S. Henderson Wetlands Protection Act.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Potential savings of time and expense for agricultural operations that may be exempt from obtaining an environmental resource permit to alter topography.

C. Government Sector Impact:

DACS estimates additional staff and expense would be needed to handle the additional workload arising from requests for determination as set forth in the below table:

	FY 10-11	FY 11-12	FY 12-13
	Amount/FTE	Amount/FTE	Amount/FTE
Revenues:			
Recurring	\$175,000/2	\$175,000/2	\$175,000/2
Non-Recurring	-0-	-0-	-0-

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Agriculture on March 21, 2011:

The CS removed language making the agricultural-related exemption retroactive to July 1, 1984 and replaced it with provisions that limit the exemption to lands classified as agricultural pursuant to s. 193.461, F.S., and to activities regulated pursuant to part IV, chapter 373. It also added language that specifically states that the exemption shall not apply to activities previously permitted under part IV, Chapter 373 or chapter 403.

- B. **Amendments:**

None.