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/CS/SB 1174
INTRODUCER:	Environmental Preservation and Conservation Committee, Agriculture Committee and Senators Siplin and Lynn
SUBJECT:	Agricultural-related Exemptions to Water Management Requirements
DATE:	March 31, 2011 REVISED:

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

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This Committee Substitute for Committee Substitute (CS) provides that the exemption allowing the topography of land to be altered for agricultural activities without an environmental resource permit (ERP) will not be superseded by language in the Warren S. Henderson Wetlands Protection Act[1] (Wetlands Protection Act) so long as the alteration is not for the sole or predominant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 CS 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 CS gives DACS necessary rulemaking authority and requires the DACS and each WMD to enter into or amend existing memoranda of agreement to implement a binding determination process.

[1] Chapter 84-79, Laws of Florida.

The CS 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 CS substantially amends sections 373.406. 373.407, and 403.927 of the Florida Statutes.

II. Present Situation:

Agricultural Activities and State Surface Water and Wetland Permitting

Part IV, ch. 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 Act[3] 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 order[4] 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 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 interpretation[6] 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 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

[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.
[4] *A. 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).
[5] *A. 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.

impacting wetlands. Various persons, entities, and organizations involved in agricultural industries and occupations have expressed concerns 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 memoranda of agreement (MOA) 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 WMDs 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.

Federal Permitting for Surface Water and Wetlands in Florida

For activities occurring in "waters of the United States" in Florida, including wetlands, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) require compliance with and regulate activities under the authority of Section 404 of the Clean Water Act (CWA).[7] Wetlands are also regulated under Section 10 of the federal Rivers and Harbors Act of 1899,[8] although the focus of this legislation is primarily maintaining navigable waters.[9] When a dredge and fill permit is required in addition to permits required by the state, it is issued independently from the DEP permit or the WMD permit and is reviewed by the Corps. However, the Corps' issuance of the permit is dependent on the applicant first receiving state water quality certification or waiver through the ERP program under section 401 of the CWA. The Corps has also delegated to Florida the authority to issue federal dredge and fill permits under Section 404 of the CWA for certain activities.

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., the 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. The CS provides that the exemption applies only to lands classified as agricultural pursuant to s. 193.461, F.S., and to activities requiring an ERP pursuant to part IV, ch. 373, F.S. The exemption shall specifically not apply to activities previously permitted under part IV, ch. 373, F.S., or permitted under ch. 403, F.S.

[7] 33 U.S.C. ss. 1251-1387.
[8] 33 U.S.C. s. 403.
[9] Florida Dep't of Environmental Protection, *Consolidation of State and Federal Wetland Permitting Programs, Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)* (2005).

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. The CS requires the DACS and each WMD to enter into or amend existing MOAs to set forth how it will make its review and issue a binding determination. The CS further states that the 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 a purpose other than an agricultural use, mitigation under chs. 373 or 403, F.S., is not required to offset any adverse effects caused by agricultural activities if such activities occurred in the four 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 activities do not qualify as "agricultural activities" if they are 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.

Other Potential Implications:

Exemptions for altering (impeding, diverting or adversely affecting) wetlands and surface waters without a permit for agricultural activities may expose both private landowners and state agencies to liability. There are several legal theories available to a lower (servient) parcel's landowner if changes to the surface water or wetlands of an upper parcel increase flow, intensity of flow or generally alter natural drainage patterns. Common law nuisance and trespass, and negligence causes of action are well established in case law and can and do apply to surface water flooding and alteration to wetlands.[10] Courts have consistently held that both private and public landowners may be liable for damages for filling or draining wetlands that result in flooding or other impacts to other properties.[11]

[10] Jon Kusler, *Common Legal Questions: Landowner Liability for Draining or Filling Wetlands*, Assoc. of State Wetland Managers, Inc., http://www.aswm.org/propub/4_liability_6_26_06.pdf (last visited Mar 27, 2011). No landowner has a right to use his or her land in a manner that substantially interferes, in a physical sense, with the use of adjacent lands. See, e.g., *Sandifer Motor, Inc. v. City of Rodland Park*, 628 P.2d 239 (Kan. 1981). Landowners can also bring trespass actions for activities that result in a physical invasion of private property such as flooding or drainage. See *Hadfield v. Oakleim County Drain Com'r*, 422 N.W.2d 205 (Mich., 1998).

[11] *Id.* at 3. See *Hendrickson v. Wagners, Inc.*, 598 N.W.2d 507 (S.D., 1999) (Court granted an injunction to require landowner who altered wetlands with resultant flooding to lower estate to fill drainage ditches); *Boren v. City of Olympia*, 112 Wash. App. 359, 53 P.3d 1020 (Wash. 2002) (City was potentially negligent for increasing discharge of water to a wetland which damaged landowner); *Snohomish County v. Postema*, 978 P.2d 1101 (Wash. 1998) (Lower landowner had potential trespass action against upper landowner who cleared and drained wetland); *Lang et al v. Wonnenberg et al*, 455 N.W.2d 832 (N.D. 1990) (Court upheld award of damages against landowner who drained wetlands which resulted in periodic flooding of neighboring properties.). In some cases, the permitting agency may also be liable. See *Hurst v. United States*, 739 F. Supp. 1377 (D.S.D 1990) (Court held the U.S. Army Corps of Engineers liable for negligently supervising the project and for failing to issue a prohibitory order which resulted in flood and erosion damage.).

The WMDs have expressed concerns with various provisions of the CS:

- The CS expands the original intent of the agricultural exemption contained in the Wetlands Protection Act. The original act did not allow for "leveling" as a defined agricultural activity, which will allow agricultural operations to fill depressional wetlands. While "cultivating" and "fallowing" were also added, they are not seen as significant expansions.
- The CS specifies that the DACS is the sole regulator of wetlands on agricultural lands and must issue binding determinations. Currently, the DACS assists the WMDs in making a determination, but ultimately, the determination is made by a WMD. The concern is whether the department has the necessary expertise or staff to carry out this requirement.
- The exemption allows for activities that impede or divert surface waters or adversely impact wetlands. Wetlands are regulated by both state (the DEP and WMDs) and federal agencies (the EPA and the Corps). It is unknown what impact the provisions of this CS will have on federal delegation to the state of certain wetland permitting functions.
- The provision for negating the mitigation of adverse effects occurring before the conversion of the land from agriculture to another use appears to provide a "loophole" for flipping land from agricultural to development within four years without obtaining permits.

Further, allowing agricultural activities to alter wetlands and surface waters without a permit may create additional litigation. Third parties may challenge a ruling that the alterations are for the sole or predominate purpose of impeding or diverting surface waters or adversely impacting wetlands. The current rule does not allow the exemption if it impacts surface waters or wetlands – an objective standard. The CS sets up the determination as a subjective standard, which can lead to confusion if litigation does arise.

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:

There are potential savings of time and expense for agricultural operations that may be exempt from obtaining ERPs to alter topography. There also may be increased litigation

costs for agricultural operations and third parties who challenge the exemptions and binding determinations. Additionally, agricultural land converted to other uses but having been in agricultural activities for the previous four years prior to conversion are not subject to mitigation requirements for those alterations.

C. Government Sector Impact:

The DACS estimates two new positions, at a minimum, would be needed to handle the additional workload arising from requests for determination as set forth below:

	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 Environmental Preservation and Conservation on Mar 30, 2011
The CS narrows the agricultural-related exemption to those activities requiring an ERP pursuant to Part IV, ch. 373, F.S., rather than all activities regulated pursuant to this part. It also does not require mitigation to offset any adverse effects caused by agricultural activities if such activities occurred in the four years preceding the conversion.

CS by Agriculture on March 21, 2011:
The CS removed language making the agricultural-related exemption retroactive to July 1, 1984[12] 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, ch. 373, F.S. It also added language that specifically states that the exemption shall not apply to activities previously permitted under part IV, ch. 373, or ch. 403, F.S.

B. Amendments:

None.

[12] The effective date of the Warren S. Henderson Wetlands Protection Act.