

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 421 Agricultural-related Exemptions to Water Management Requirements

**SPONSOR(S):** Bemby and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1174

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	12 Y, 1 N	Kaiser	Blalock
2) Rulemaking & Regulation Subcommittee			
3) Agriculture & Natural Resources Appropriations Subcommittee			
4) State Affairs Committee			

### SUMMARY ANALYSIS

Florida law has afforded an agricultural exemption to bona fide farm operators since the mid-1980's in regards to obtaining a permit from the water management districts (WMDs) for altering the topography of any tract of land as long as the alteration is not for the sole or predominant purpose of impounding or obstructing surface waters. The bill revises the current agricultural exemption to specify that certain agricultural activities may impede or divert the flow of surface waters or adversely impact wetlands, as long as it is not the sole or predominant purpose of the agricultural activity or alteration. The bill also provides retroactive application of the exemption to July 1, 1984.<sup>1</sup>

The bill allows the WMD or a landowner to request a determination from the Department of Agriculture and Consumer Services (department) when a dispute regarding an exemption occurs. The bill further states that the determination by the department is binding. The bill authorizes the department and the WMDs to enter into a new memorandum of understanding (MOU), or amend an existing MOU, to propose procedures by which the department will undertake the review and determination process. The department is given rule-making authority to implement these processes.

The bill provides that mitigation to offset any adverse effects of lands converted to a non-agricultural use is not necessary if the damage occurred in at least 4 of the last 7 years preceding the conversion.

And lastly, the bill amends the definition of agricultural activities to include: cultivating, fallowing, and leveling, and provides that such activities constitute "agricultural activities" provided the activities are not for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

The legislation appears to have a negative fiscal impact of approximately \$175,000 to state government in the form of increased expenses by the department. The bill does not appear to have a fiscal impact on local governments.

<sup>1</sup> The effective date of the Warren S. Henderson Wetlands Protection Act.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Section 1**

##### Present Situation

In 1984, the Legislature passed the Warren S. Henderson Wetlands Protection Act<sup>2</sup> (act), which was the first concerted effort at protecting and managing wetlands in the state. Among other things, the legislation established a permitting system for dredge and fill permits. The act also provided an exemption from the permitting process for “normal and necessary” agriculture and forestry operations. The act placed agricultural operations under the control of the water management districts (WMDs) rather than under the jurisdiction of the then-Department of Natural Resources (DNR).

In 1993, during the reorganization of the DNR to the Department of Environmental Protection (DEP), the Wetlands Protection Act was repealed, with the exception of section 403.927, F.S. Section 403.927, F.S., provides that “agricultural activities”<sup>3</sup> are not subject to specific discharge permits, except that DEP may require a stormwater permit or discharge permit at the point of discharge from an agricultural water management system.

Current law<sup>4</sup> also allows persons engaged in certain agriculture occupations<sup>5</sup> to alter the topography of any tract of land without obtaining an environmental resource permit from a WMD. The current exemption states that the alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

In 2009, a large agricultural company filed suit<sup>6</sup> against one of the WMDs in regards to the agricultural exemption in s. 373.406(2), F.S. The WMD alleged the defendant had constructed numerous drainage ditches on its property without first obtaining required permits from the district. The defendant claimed the construction fell under the exemption afforded through s. 373.406 (2), F.S., since the ditches were consistent with the practice of agricultural activities and not for the “...sole or predominant purpose of impounding or obstructing surface waters...” The court ruled in favor of the WMD, stating that the provisions in s. 403.927, F.S., virtually eliminate the agricultural exemption in s. 373.406(2), F.S., as it applies to alterations impacting wetlands.

##### Effect of Proposed Changes

The bill revises the agricultural exemption in current law to specify that certain agricultural activities may impede or divert the flow of surface waters or adversely impact wetlands, as long as it is not the sole or predominant purpose of the said activity or alteration. The bill also provides retroactive application of the exemption to July 1, 1984.<sup>7</sup>

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<sup>2</sup> HB 1187, Sections 403.91-403.929, F.S.

<sup>3</sup> “Agricultural activities” includes all necessary farming and forestry operations which are normal and customary for the area, such as site preparation, clearing, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting, harvesting, construction of access roads, and placement of bridges and culverts, provided such operations do not impede or divert the flow of surface waters.

<sup>4</sup> Section 373.406(2), F.S.

<sup>5</sup> Silviculture, floriculture and horticulture.

<sup>6</sup> *A. Duda and Sons, Inc. v. St. Johns River Water Management District*, 17 So. 3d 738 (Fla. 5<sup>th</sup> DCA 2009) (Duda I) and 22 So.3d 622 (Fla. 5<sup>th</sup> DCA 2009) (Duda II)

<sup>7</sup> The effective date of the Warren S. Henderson Wetlands Protection Act.

## **Section 2**

### Present Situation

In 2006, the Legislature enacted legislation<sup>8</sup> that required the Department of Agriculture and Consumer Services (department) and the WMDs to enter into a memorandum of understanding (MOU) authorizing the department to assist the WMDs, at their request, in determining whether an existing or proposed activity qualifies for the agricultural exemption in s. 373.406(2), F.S. Currently, the determination issued by the department is non-binding, meaning the WMDs are not required to comply with the department's determination.

The department states that, on average, one or two requests for a determination are received per year. The department conducts a site visit, technical support materials are reviewed and a written non-binding conclusion is sent back to the appropriate WMD.

### Effect of Proposed Legislation

The bill allows the WMD or a landowner to request a determination from the department when a dispute regarding the agricultural exemption in s. 373.406(2), F.S., occurs. The bill further states that the department has exclusive authority to make a binding determination.

The bill authorizes the department and the WMDs to enter into a new MOU, or amend an existing MOU, to propose procedures by which the department will undertake the review and determination process. The department is given rule-making authority to implement these processes.

According to the department, the workload of the department may substantially increase since the requests may now originate from the landowner as well as the WMDs.

## **Section 3**

### Present Situation

Current law states that when land transfers from an agricultural use to a use other than agriculture, the non-agricultural land is no longer entitled to the agricultural exemption.

### Effect of Proposed Legislation

The bill provides that mitigation to offset any adverse effects of lands converted to a non-agricultural use is not necessary if the damage occurred in at least 4 of the last 7 years preceding the conversion.

The bill amends the definition of agricultural activities in s. 403.927, F.S., to include: cultivating, fallowing, and leveling, and provides that such activities constitute "agricultural activities" provided that the activities are not for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

## **Section 4**

The bill takes effect on July 1, 2011.

### **B. SECTION DIRECTORY:**

**Section 1:** Amending s. 373.406, F.S.; revising the exemption to include impacts to surface waters and wetlands; and, providing for retroactive application.

**Section 2:** Amending s. 373.407, F.S.; providing the Department of Agriculture and Consumer Services (department) with the exclusive authority to determine whether agricultural exemptions apply under certain conditions; authorizing the department to enter into a memorandum of agreement with the water management districts; and, allowing the department to adopt rules necessary for implementation.

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<sup>8</sup> HB 1015

**Section 3:** Amending s. 403.927, F.S.; providing an exemption from mitigation requirements for converted agricultural lands under certain conditions; and, amending the definition of “agricultural activities.”

**Section 4:** Providing an effective date of July 1, 2011.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

	<u>FY 10-11)</u> <u>Amount/FTE</u>	<u>(FY11-12)</u> <u>Amount/FTE</u>	<u>(FY12-13)</u> <u>Amount/FTE</u>
Recurring*	\$175,000/2	\$175,000/2	\$175,000/2

\*Department of Agriculture and Consumer Services' General Inspection Trust Fund

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Potentially positive for agriculture, as some agricultural operations that have been required to apply for and obtain a surface water permit (e.g., citrus, row crops) in the past may now be exempt from this requirement.

### D. FISCAL COMMENTS:

None

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None

### B. RULE-MAKING AUTHORITY:

The Department of Agriculture and Consumer Services is given rule-making authority regarding the determination of qualification for an agricultural-related exemption.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The water management districts (WMDs) expressed various concerns with the legislation as written. Some of the concerns are:

- The bill empowers the Department of Agriculture and Consumer Services (department) as the sole regulator of wetlands on agricultural lands. The concern is whether the department has the expertise and/or manpower to carry out this requirement.
- The exemption allows the impediment of water up and downstream, which may result in a potential impact to other entities up or downstream, as well as state waters.
- The provision for negating the mitigation of adverse effects occurring before the conversion of the land appears to provide a “loophole” for flipping land from agricultural to development without obtaining a permit.
- Amending the current language to “....may not be for the sole effect of....” would make the exemption easier to identify.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**