

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 Budget Subcommittee on General Government Appropriations

BILL: CS/SB 1354

INTRODUCER: Budget Subcommittee on General Government Appropriations and Senator Detert

SUBJECT: Environmental Resource Permitting

DATE: February 2, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Uchino	Yeatman	EP	Favorable
2.	Pigott	DeLoach	BGA	Fav/CS
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill directs the Department of Environmental Protection (DEP) to adopt statewide environmental resource permit (ERP) rules. The Water Management Districts (WMDs) and delegated local governments are directed to implement the rules without rulemaking, except to conform existing rules. The bill specifies the statewide ERP rules are to be based on existing DEP and WMD rules. Differences are allowed that are based on geographic differences in physical or natural characteristics. The bill allows the WMDs, with DEP oversight, to continue to adopt rules governing design and performance standards for stormwater quality and quantity. “Grandfather” clauses are included for ongoing activities that will not be subject to the new rules. The bill requires DEP staff oversight and training to ensure statewide consistency in implementing the ERP rules. The legislation requires local governments seeking delegation to implement the ERP program to use statewide ERP rules and gives local governments that have already received delegation, one year from adoption of the rules to conform their ordinances. Lastly, the bill reenacts s. 70.001(12), F.S., for the purposes of a cross-reference.

This bill creates s. 373.4131 and reenacts s. 70.001(12) of the Florida Statutes.

II. Present Situation:

Current ERP Program in Florida

Florida’s water resources are regulated by the ERP program. The program covers virtually all alterations to the landscape, including all tidal and freshwater wetlands and other surface waters (including isolated wetlands also subject to U.S. Army Corps of Engineers jurisdiction) and uplands. The ERP program regulates dredging and filling in wetlands and other surface waters,

stormwater runoff quality and quantity, runoff resulting from alterations of uplands, and direct, secondary and cumulative impacts.¹ Certain permitting thresholds exist within the WMDs and exemptions may be granted by rule or statute.² A permitting threshold is the level of impact that triggers the requirement to apply for a permit. Common exemptions exist for agricultural, silviculture, floriculture and horticulture activities as long as the alterations are not for the sole or predominant purpose of impounding or obstructing surface waters.

The department's issuance of an ERP also constitutes a water quality certification or waiver of such under section 401 of the federal Clean Water Act.³ In addition, issuance of an ERP in coastal counties constitutes a finding of consistency under the Florida Coastal Zone Management Program under Section 307 of the federal Coastal Zone Management Act.⁴ Proposed projects must meet all permit conditions and a public interest balancing test.⁵

General ERP Administration in Florida

The DEP and the WMDs jointly implement the ERP program. It is independent and in addition to federal regulatory permitting programs. ERPs are regulated under part IV of ch. 373, F.S., and through individual WMD rules and guidance documents. The program was adopted in 1995 in all WMDs except for Northwest Florida. In 2006, the Legislature directed the Northwest Florida WMD and the DEP to jointly develop and implement the ERP program in two phases, which are now fully implemented.⁶

The ERP program rules consist of rules adopted separately by the DEP and four of the five WMDs. The Suwannee River, St. Johns River, Southwest Florida and South Florida WMDs have each adopted their own set of implementing rules, which in turn have been adopted and incorporated by reference by the department for use within each WMD. Each WMD also has an Applicant's Handbook or Basis of Review that explains how those rules are implemented. The DEP incorporates those rules and handbooks by reference but also has separate procedural and noticed general permit rules.⁷

Because of the ERP program's joint regulatory structure, the department and the WMDs have executed individual operating agreements to administer the program. The agreements set out who has regulatory authority for implementing the ERP program based on the type of permitted activity. The division of responsibilities contained in the operating agreements ensures that applicants need only apply for permits from the DEP or the individual WMD, not both.⁸ The DEP generally reviews permit applications that involve:⁹

¹ DEP, *Summary of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida* (2011), available at <http://www.dep.state.fl.us/water/wetlands/docs/erp/overview.pdf> (last visited Jan. 19, 2012).

² *Id.* at 4-5.

³ See 33 U.S.C. s. 1341.

⁴ See 16 U.S.C. s. 1456.

⁵ See s. 373.414(1)(a), F.S.

⁶ Chapter 2006-228, Laws of Fla.

⁷ See rules 62-343 and 62-341, F.A.C., respectively.

⁸ DEP, *Environmental Resource Permitting (ERP) and Sovereign Submerged Lands (SSL) Rules*, <http://www.dep.state.fl.us/water/wetlands/erp/wmd.htm> (last visited Jan. 19, 2012). The webpage includes links to all five WMD operating agreements.

⁹ *Id.*

- Solid, hazardous, domestic and industrial waste facilities,
- Mining, except borrow pits,
- Power plants, transmission and communication cables and lines, and oil and gas activities,
- Certain docking facilities and structures, and dredging that is not part of a larger development plan,
- Navigational dredging by government entities that is not part of a larger project permitted by a WMD,
- Certain types of systems located seaward of the coastal construction control line or those serving a single family dwelling unit or residential unit,
- Seaports, and
- Smaller, separate water-related activities not part of a larger development plan.

The WMDs review all other ERP applications.

ERP Administration in the South Florida, Southwest Florida, St. Johns River and Suwannee River WMDs

The DEP and all WMDs except for Northwest Florida, due to its recent adoption of the program, operate under separate ERP rules. The ERP rules for these districts were developed by using a combination of the DEP's environmental criteria and the WMDs' former Management and Storage of Surface Waters rules, which were independently adopted by each WMD. The WMDs continued this process when developing ERP rules and each adopted similar but not identical ERP rules. After the adoption of the four districts' ERP rules, the DEP subsequently incorporated by reference each of the WMDs rules. If it had not done so, the DEP would not have been able to use the WMDs' new ERP rules for DEP permitting activities within the districts.

In order to incorporate the WMD rules by reference, the DEP must undertake rulemaking. This dual rulemaking process for a WMD ERP rule or any amendments to a WMD ERP rule must be completed before the DEP may implement the rule or any changes thereof for activities in the respective districts. Additionally, the DEP must adopt the WMDs' Applicant's Handbooks and Basis of Review and any amendments to those documents. In fact, the DEP staff has indicated that the DEP is not up to date on the most recent amendments to some WMD rules, Applicant's Handbooks and Basis of Review documents because it must undertake rulemaking to incorporate the changes and has not done so.¹⁰ The WMD ERP rules are contained in ch. 40, F.A.C., and each WMD is assigned a specific letter.¹¹ The DEP also has its own ERP rules and separate ERP noticed general permit rules.¹²

ERP Administration in the Northwest Florida WMD

In contrast to the DEP's administration of ERPs within the other four WMDs, the department's ERP administration and implementation ERPs within the Northwest Florida WMD is more streamlined and efficient. In this district, the ERP program is operated under a single substantive

¹⁰ Telephone interview with Shelley Yaun, Program Administrator, Water Resources Management, DEP, in Tallahassee, FL. (Aug. 15, 2011).

¹¹ See generally ch. 40, F.A.C. Northwest Florida is designated as "A," Suwannee River as "B," St. Johns River as "C," Southwest Florida as "D" and South Florida as "E."

¹² See chs. 62-343 and 62-341, F.A.C., respectively.

and procedural ERP rule, noticed general permit rule and Applicant's Handbook.¹³ The Legislature directed the DEP and the Northwest Florida WMD to jointly develop rules for the ERP program in the district. The DEP was further directed to initiate rulemaking to implement the ERP program. Unlike the other four WMDs, the Legislature specifically authorized the Northwest Florida WMD to implement the jointly developed rules.¹⁴ Consequently, both the DEP and the Northwest Florida WMD regulate ERPs under a unified rule and Applicant's Handbook. Any changes or amendments to the rule or Applicant's Handbook may be adopted by the DEP under the normal rulemaking process. The Northwest Florida WMD may then begin implementing any such changes without rulemaking.

ERP Rule Inconsistencies Between WMDs

ERP rules are critical to each WMD and the DEP. They identify:¹⁵

- Activities that require permits;
- Activities that are exempt from needing permits;
- Actions that fall below permitting thresholds;
- The types of permits available;
- The criteria used for issuing permits; and
- Other procedural requirements the WMDs use to implement their respective ERP programs.

While the environmental criteria, conditions for issuance, and noticed general permits are substantively the same in all of the WMDs, differences exist in rule text and implementation requirements between each WMD and the department. Some of those differences are needed to address differing physical and natural characteristics within each district, particularly regarding water quantity, stormwater quality, and special basins. In other instances, the rule language is substantially similar, yet the Applicant's Handbook or Basis of Review differs in its interpretation of the rule. Among the WMDs, regulation of wetlands and other surface waters is essentially identical. Stormwater management (water quality) differs significantly in both actual rule language and interpretation between districts and often has no clear relationship to the unique water, topographical or geological characteristics unique to each district. Water quantity and flood protection differ between districts but are directly related to each district's physical characteristics.¹⁶

This has created a situation where there are now differences in how rule and statutory language is interpreted and implemented. It is compounded when an applicant or consultant has to deal with several WMDs or the DEP from one project to another and face different requirements for similar projects. For example, a large retailer opening multiple stores in Florida in different WMDs may face different application processes and permit requirements even if the store plans are nearly identical. These problems are multiplied when local governments with delegated ERP authority rely on their own ordinances and codes to implement the ERP rules.

¹³ See generally rule 62-346, F.A.C.

¹⁴ Section 373.4145(1), F.S.

¹⁵ *Supra* note 11.

¹⁶ Email from Jon Steverson, Special Counsel on Policy and Legislative Affairs, DEP (July 12, 2011) (on file with the Committee on Environmental Preservation and Conservation).

Another example of inconsistent statewide application is the implementation and administration of the Uniform Mitigation and Assessment Method (UMAM). Subsection 373.414(18), F.S., directed the DEP and WMDs, in cooperation with local governments and relevant federal agencies, to develop a statewide method to determine the amount of mitigation required for regulatory permits. The UMAM rule became effective in February 2004.¹⁷ Although only the DEP was required to adopt the method by rule, it is now the sole means for all state and local government entities to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters. It is also used to determine how to debit and credit mitigation bank credits.¹⁸ Stakeholders in the regulated community have expressed concerns over interpretations of the UMAM by some of the WMDs. Although the method is intended to create uniform outcomes statewide, the method is applied differently in each WMD based in part on interpretations of the rule.

Interim Report 2012-121 – Statewide ERP

Staff of the Senate Committee on Environmental Preservation and Conservation conducted a study of the issues surrounding current ERP administration in Florida and the potential impacts of development of a statewide ERP.¹⁹ The report includes several recommendations that have been incorporated into the bill, including:

- Directing the DEP, in coordination with the WMDs, to develop and adopt statewide ERP rules by reconciling existing rules, Applicant’s Handbooks and Basis of Review documents;
- Authorizing the WMDs to implement the statewide ERP rules without having to adopt them by rule;
- Allowing for necessary variability in the statewide ERP rules to account for unique characteristics in each WMD; and
- To the extent feasible, standardizing forms, applications, noticing requirements, fees and other procedural aspects of existing ERP rules in the statewide ERP rules.

III. Effect of Proposed Changes:

Section 1 creates s. 373.4131, F.S., directing the DEP and the WMDs to create and adopt statewide ERP rules. The rules must provide for consistent statewide application of regulation of activities under part IV, ch. 373, F.S. The rules must include, at a minimum:

- Criteria and thresholds for issuing permits;
- The types of permits covered by the rules;
- Procedures for:
 - Review of applications and notices;
 - Duration and modification of permits;
 - Operational requirements;
 - Transfers of permits,
 - Emergencies; and
 - Abandonment and removal of systems;

¹⁷ See rule 62-345, F.A.C.

¹⁸ *Id.*

¹⁹ Comm. on Environmental Preservation and Conservation, The Florida Senate, *Statewide Environmental Resource Permit* (Interim Report 2012-121) (Sep. 2011).

- Exemptions and general permits for activities that do not cause significant adverse impacts either individually or cumulatively;
- Conditions for permit issuance;
- General permit conditions, including requirements for monitoring, inspection and reporting;
- Standardized fee categories, allowing for some flexibility;
- Standardized application, notice and reporting forms and allowing such documents, as appropriate and practical, to be submitted electronically; and
- An applicant's handbook containing:
 - General program information;
 - Application and review procedures;
 - A discussion on how environmental criteria are evaluated; and
 - A discussion of stormwater quality and quantity criteria.

The bill directs the statewide ERP rules to be primarily based on the DEP and WMD rules in effect as of June 30, 2012. The DEP has the authority to reconcile differences and conflicts between existing rules to achieve consistent statewide ERP rules and implement additional ERP streamlining measures. The DEP may allow differences in the statewide ERP rules to account for the unique physical and natural characteristics of each WMD.

The bill directs that application of statewide ERP rules continue to be governed by the first sentence of s. 70.001(12), F.S., which is an exemption from the "Bert J. Harris Jr. Property Rights Protection Act" for laws, rules and ordinances in effect on or formally noticed for adoption on or before May 11, 1995.

The bill directs the WMDs and local governments that have received delegated ERP authority under s. 373.441, F.S., to implement the statewide rule without the need for rulemaking. The bill specifies the statewide ERP rules are the rules of the WMDs and local governments with delegated authority. It gives the WMDs and local governments the jurisdiction and authority to implement and interpret the statewide ERP rules provided they are consistent with DEP guidance. The bill requires local governments that have or may be granted delegated authority under s. 373.441, F.S., to incorporate by reference the exact statewide rules when taking action on the DEP's behalf. The local governments with delegated authority must also amend their ordinances to conform to the statewide ERP rules within one year of the effective date of the adopted rule and make any changes to reconcile duplicative permitting.

The bill clarifies that existing rules currently in effect may be enforced until statewide ERP rules become effective. All superseded rules may be repealed without rulemaking pursuant to s. 120.54, F.S., by publication in the Florida Administrative Weekly and notifying the Department of State.

The bill authorizes the WMDs, with the DEP oversight, to continue to adopt rules governing design and performance standards for stormwater management. The DEP may incorporate those standards by reference for use within the geographic area of each WMD. The bill specifies that if a stormwater management system is designed, constructed, operated and maintained in accordance with adopted criteria and requirements and a valid permit or exemption, it is presumed not to cause or contribute to violations of applicable state water quality standards.

The bill provides a “grandfather clause” for the following activities unless an applicant requests review under the adopted statewide ERP rules:

- Stormwater management systems, dams, impoundments, reservoirs, appurtenant works, works or any combination of the above as long as they were legally in existence before adoption of statewide ERP rules and continue to meet their conditions;
- Activities determined in writing by the DEP, WMDs or local governments with delegated authority that are exempt from permitting as of the effective date of adopted statewide ERP rules; and
- Activities approved in a permit and the review of activities proposed in a completed permit application that is complete before the effective date of adopted statewide ERP rules. This exemption applies to modification of plans, terms, conditions and new activities within the geographical area to which the permit applies and modifications that lessen or do not increase impacts to the area. It does not apply to a modification that is reasonably expected to lead to additional or substantially different impacts.

The bill directs the DEP to conduct or oversee regular assessment and training of the DEP, WMD and local government staff to ensure consistent implementation and interpretation of adopted statewide ERP rules.

Section 2 reenacts s. 70.001(12), F.S., to clarify the adoption of statewide ERP rules is not subject to certain provisions of the Bert J. Harris Jr. Private Property Rights Protection Act. That particular section of statute had not been repealed.

Section 3 provides an effective date of July 1, 2012.

Other Potential Implications:

To the extent that some current rules and rule interpretations are more stringent than the eventual statewide rule, greater environmental impacts will be allowed in those areas. Conversely, those that are less stringent than the eventual statewide rule will allow fewer environmental impacts in those areas.

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:

The private sector is not expected to incur any significant costs. However, with any consolidation of inconsistent rules, fees and procedures, some applicants may pay more or be subject to additional rules and procedures, while others will pay less and be subject to less. On the other hand, improving consistency in implementation and interpretation of ERP rules and expanding electronic document submission will likely lead to both cost and time savings. The impact cannot be determined but may be significant for applicants with large, multi-district projects and applicants that have multiple projects in multiple WMDs.

C. Government Sector Impact:

Local governments with delegated authority or that have applied for delegated authority and receive the delegation before the effective date of adopted statewide ERP rules will incur some costs to amend their local ordinances to comply with this bill. The actual costs cannot be determined but will likely be absorbed by existing staff and resources.

The DEP will incur certain costs with the passage of this bill. It will have to undertake rulemaking and may have to prepare a statement of estimated regulatory costs pursuant to s. 120.541, F.S. The DEP will also incur additional costs for training and assessment of WMD and local government staff. The DEP will also be responsible for providing additional support to the WMDs for permitting, compliance and enforcement. In addition, the bill requires the DEP to expand the capability for electronic submissions for documentation. The DEP has estimated it can absorb these expenses within existing staff and resources and efficiencies gained through the consolidation process.

The WMDs may experience either a minor loss or minor gain from permit application fees due to the standardization of application fee categories. The bill does allow for some variability within the categories, thus the impact is expected to be insignificant. Lastly, the WMDs are also required to expand electronic document processing. They are all currently working on their systems to allow for easier electronic submissions. Therefore, estimated costs will be absorbed by existing staff and resources.

VI. Technical Deficiencies:

It should be noted that this bill creates s. 373.4131, F.S., which is the same section created by CS/SB 602. If both bills were to pass and be signed into law, one of the sections would require a different number within part IV, ch. 373, F.S.

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 Budget Subcommittee on General Government Appropriations on February 2, 2012:

- Clarifies that current law and rule allow for stricter local government standards if they do not conflict with the state rule.

- B. **Amendments:**

None.