

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 795 Dredge and Fill Activities
SPONSOR(S): Edwards
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1176

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|-----------|---------|--|
| 1) Agriculture & Natural Resources Subcommittee | 13 Y, 0 N | Moore | Harrington |
| 2) Agriculture & Natural Resources Appropriations Subcommittee | 13 Y, 0 N | Helping | Massengale |
| 3) State Affairs Committee | | | |

SUMMARY ANALYSIS

Under Section 10 of the Rivers and Harbors Act of 1899, the United States Army Corps of Engineers (Corps) has regulatory jurisdiction over all obstructions or alterations of any navigable water of the U.S., the construction of any structures in or over any navigable water of the U.S., and any work affecting the course, location, condition, or capacity of navigable waters of the U.S. Under Section 404 of the Clean Water Act, the Corps has regulatory jurisdiction over the discharge of dredged or fill material into waters of the U.S. Under these authorizations, the Corps has authority to issue general permits on a statewide, regional, or nationwide basis for specific categories of work. However, a state may seek to administer a general permit for categories of work by applying to the Corps. If approved, the Corps will suspend its issuance of permits and the administration and enforcement of activities with respect to the activities authorized under the general permit to the state. A state may also seek assumption of the Clean Water Act to regulate the discharge of dredged or fill material into certain waters.

The Legislature has specified that it is the policy of the state to provide efficient government services by consolidating, to the maximum extent practicable, federal and state permitting regarding wetlands and navigable waters within the state. The Legislature has authorized the Department of Environmental Protection (DEP) and water management districts (WMDs) to implement a voluntary state programmatic general permit (SPGP) for all dredge and fill activities impacting 3 acres or less of wetlands or other surface waters, including navigable waters, subject to agreement with the Corps. The Legislature has also authorized DEP to pursue assumption of federal permitting programs regulating the discharge of dredged or fill material under the Clean Water Act.

The bill increases the acreage of wetland or other surface water impacts, including navigable waters, DEP or WMDs are authorized to implement through a SPGP, subject to agreement with the Corp, from 3 acres or less to 10 acres or less. The bill provides that by seeking to use a SPGP, an applicant consents to applicable federal wetland jurisdiction criteria and for the limited purpose of implementing the SPGP.

In addition, the bill allows DEP to seek delegation of, in addition to assumption of, federal permitting programs regulating the discharge of dredged or fill material pursuant to the Clean Water Act and the Rivers and Harbors Act, so long as the delegation encompasses all dredge and fill activities in, on, or over jurisdictional wetlands or waters, including navigable waters, within the state.

The bill appears to have an insignificant fiscal impact on the state, a potential positive fiscal impact on the private sector, and no fiscal impact on local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Rivers and Harbors Act of 1899 and the Clean Water Act

Under Section 10 of the Rivers and Harbors Act of 1899, the United States Army Corps of Engineers (Corps) has regulatory jurisdiction over all obstructions or alterations of any navigable water of the U.S., the construction of any structures in or over any navigable water of the U.S., and any work affecting the course, location, condition, or capacity of navigable waters of the U.S.¹ Under Section 404 of the Clean Water Act, the Corps has regulatory jurisdiction over the discharge of dredged or fill material into waters of the U.S.²

General Permits

Under these authorizations, the Corps has authority to issue general permits on a statewide, regional, or nationwide basis for specific categories of work.³ General permits issued for activities involving discharges of dredged or fill material are authorized if:

- The category of activity is similar in nature;
- Will cause only minimal adverse impacts of the environment individually; and
- Will have only minimal cumulative adverse impacts on the environment.⁴

General permits are in effect for no more than five years. They may be revoked or modified if they are determined to have an adverse impact on the environment or are more appropriately authorized by individual permits.⁵

The Corps, Jacksonville District, administers the following general permits in Florida:

- SAJ-5, 4/5/2013 - 4/5/2018 Maintenance Dredging in Residential Canals;
- SAJ-13, 12/20/2013 -12/20/2018 Aerial Transmission Lines;
- SAJ-14, 12/20/2013 - 12/20/2018 Sub-aqueous Utility and Transmission Lines;
- SAJ-17, 4/08/2013 - 4/08/2018 Minor Structures;
- SAJ-20, 3/22/2013 - 3/22/2018 Private Single-Family Piers;
- SAJ-33, 4/08/2013 - 4/08/2018 Private Multi-Family or Government Piers;
- SAJ-34, 4/08/2013 - 4/08/2018 Private Commercial Piers;
- SAJ-72, 6/21/2013 - 6/21/2018 Residential Docks in Citrus County;
- SAJ-46, 3/21/2013 – 3/21/2018 Bulkheads and Backfill in Residential Canals;
- SAJ-82, 9/10/2014 - 9/10/2019 Single family residence projects including: lot fills, minor structures, riprap revetments, marginal docks, bulkheads and backfill in residential canals in Monroe County;
- SAJ-86, 3/25/2015 - 3/25/2020: Residential, Commercial, Recreational and Institutional Fill in the Choctawhatchee Bay, Lake Powell, and West Bay Basins, Bay and Walton Counties;
- SAJ-90, 4/05/11 - 4/05/16: Residential, Commercial & Institutional Developments in Northeast Florida;
- SAJ-92, 4/08/2015 - 4/08/2020: Improvements to existing Florida Department of Transportation or Florida's Turnpike Enterprise FTE roadways, excluding Monroe County;

¹ 33 U.S.C. §403.

² 33 U.S.C. §1344.

³ 33 U.S.C. §403 and §1344.

⁴ 33 U.S.C. §1344(e)(1).

⁵ 33 U.S.C. §1344(e)(2).

- SAJ-93, 2/16/11- 2/16/16: Maintenance dredging activities for the Atlantic Intracoastal Waterway, the Intracoastal Waterway, and the Okeechobee Waterway within the Florida Inland Navigation - East Coast;
- SAJ-103, 10/08/2010 - 10/08/15: Residential Fill in Holley By The Sea, a Subdivision in Santa Rosa County;
- SAJ-105, 11/12/2015 - 11/12/2020: Residential, Commercial, Recreational and Institutional Fill in the West Bay Watershed of Bay County; and
- SAJ-106, 2/14/2012 - 2/14/2017: Water Management services on ranchlands located within the Northern Everglades and Estuaries Region of Florida.⁶

A state desiring to administer a general permit may submit to the Corps a description of the program the state proposes to establish and administer under state law. The state must also submit a statement from the attorney general providing that the laws of the state provide adequate authority to carry out the program.⁷ If the state's program is approved, the Corps will suspend its issuance of permits and the administration and enforcement of activities with respect to the activities authorized under the general permit to the state.⁸

State Programmatic General Permit

The Legislature has specified that it is the policy of the state to provide efficient government services by consolidating, to the maximum extent practicable, federal and state permitting regarding wetlands⁹ and navigable waters within the state.¹⁰ It is the Legislature's intent, with regard to federal environmental permitting, to:

- Facilitate coordination and a more efficient process of implementing regulatory duties and functions between the Department of Environmental Protection (DEP), water management districts (WMDs),¹¹ the Corps, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the U.S. Environmental Protection Agency, the Fish and Wildlife Conservation Commission, and other relevant federal and state agencies;
- Authorize DEP to obtain issuance by the Corps of an expanded state programmatic general permit (SPGP), or a series of regional general permits, for categories of activities in waters of the U.S. governed by the Clean Water Act, and in navigable waters under the Rivers and Harbors Act of 1899 which are similar in nature, which will cause only minimal adverse environmental effects when performed separately, and which will have only minimal cumulative adverse effects on the environment;
- Use the mechanism of a SPGP or regional general permit 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 U.S., including navigable waters, thus eliminating, in appropriate cases, the need for a separate individual approval from the Corps while ensuring the most stringent protection of wetland resources; and
- Direct DEP to not issue or take action on a permit unless the conditions are at least as protective of the environment and natural resources as existing state and federal law.¹²

⁶ Corps, Jacksonville District, available at <http://www.saj.usace.army.mil/Missions/Regulatory/SourceBook.aspx>, last visited (Jan. 29, 2016).

⁷ 33 U.S.C. §1344(g)(1).

⁸ 33 U.S.C. §1344(h).

⁹ Section 373.019(27), F.S., provides this definition of "wetlands" for the sole purpose of serving as the basis for the unified statewide methodology adopted pursuant to s. 373.421(1), F.S., as amended. Wetlands are areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto.

¹⁰ Section 373.4143, F.S.

¹¹ Section 373.4145,(1)(c), F.S., provides that this includes the Northwest Florida WMD.

¹² Section 373.4144(1)(a)-(d), F.S.

The Legislature has authorized DEP and WMDs to implement a voluntary SPGP for all dredge¹³ and fill¹⁴ activities impacting 3 acres or less of wetlands¹⁵ 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.¹⁶

DEP is also authorized to pursue a series of regional general permits for construction activities in wetlands or surface waters or complete assumption of federal permitting programs regulating the discharge of dredged or fill material pursuant to the Clean Water Act, and the Rivers and Harbors Act of 1899, so long as the assumption encompasses all dredge and fill activities in, on, or over jurisdictional wetlands or waters, including navigable waters, within the state.¹⁷

SPGP IV-R1

The state has been authorized by the Corps to implement a SPGP since the 1990s.¹⁸ In July 2011, the Corps issued a revised SPGP (SPGP IV-R1) to the state that authorizes DEP, a WMD,¹⁹ or a local government with delegated authority²⁰ to issue a permit on behalf of the Corps for certain types of projects with relatively minor impacts to wetlands or surface waters.²¹ The SPGP IV-R1 expanded the state's geographic coverage to include the counties in the panhandle area, the area encompassed by the Northwest Florida WMD. The SPGP IV-R1 now encompasses the entire state, except for Monroe County, and the locations listed in Special Condition 5.²²

The SPGP IV-R1 includes only the following categories of work:

¹³ Section 373.403(13), F.S., defines “dredging” as excavation, by any means, in surface waters or wetlands. It also means the excavation, or creation, of a water body which is, or is to be, connected to surface waters or wetlands, directly or via an excavated water body or series of water bodies.

¹⁴ Section 373.403(14), F.S., defines “filling” as the deposition, by any means, of materials in surface waters or wetlands.

¹⁵ Section 373.019(27), F.S., defines “wetlands” as areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto; *See also* Section 373.421, F.S.

¹⁶ Section 373.4144(2), F.S.

¹⁷ Section 373.4144(3), F.S.

¹⁸ *DEP's Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759(Chapter 2005-273, Laws of Florida)* (Sept. 30, 2005), on file with the Agriculture & Natural Resources Subcommittee; DEP State Programmatic General Permit, available at <http://www.dep.state.fl.us/water/wetlands/erp/spgp.htm>, last visited (Jan. 29, 2016); The SPGP has gone through several iterations: SPGP I, SPGP II, SPGP III, SPGP III-R1, and SPGP IV.

¹⁹ In December 2013, the St. Johns River WMD entered into a coordination agreement with the Corps that allowed the WMD to issue permits on behalf of the Corps under the SPGP IV-R1.

²⁰ *See* Section 373.441, F.S.

²¹ SPGP IV-R1, available at

http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/permitting/general_permits/SPGP/SPGP_IV_Permit_Instrument.pdf; DEP's Coordination Agreement with the Corps, available at

http://www.dep.state.fl.us/water/wetlands/forms/spgp/SPGP_IV_Cooperative_Agreement.pdf.

²² Special Condition 5 of the SPGP IV-R1 provides that is not applicable in the geographical boundaries of: Monroe County; the Timucuan Ecological and Historical Preserve (Duval County); the St. Mary's River, from its headwaters to its confluence with the Bells River; the Wekiva River from its confluence with the St. Johns River to Wekiwa Springs, Rock Springs Run from its headwaters at Rock Springs to the confluence with the Wekiwa Springs Run, Black Water Creek from the outflow from Lake Norris to the confluence with the Wekiva River; canals at Garfield Point including Queens Cove (St. Lucie County); the Loxahatchee River from Riverbend Park downstream to Jonathan Dickinson State Park; the St. Lucie Impoundment (Martin County); all areas regulated under the Lake Okeechobee and Okeechobee Waterway Shoreline Management Plan, located between St. Lucie Lock (Martin County) and W.P. Franklin Lock (Lee County); American Crocodile designated critical habitat (Miami-Dade and Monroe Counties); Johnson's seagrass designated critical habitat (southeast Florida); piping plover designated critical habitat (throughout Florida); acroporid coral designated critical habitat (southeast Florida); Anastasia Island, Southeastern, Perdido Key, Choctawhatchee, or St. Andrews beach mice habitat (Florida east coast and panhandle coasts); the Biscayne Bay National Park Protection Zone (Miami-Dade County); Harbor Isles (Pinellas County); the Faka Union Canal (Collier County); the Florida panther consultation area (Southwest Florida), the Tampa Bypass Canal (Hillsborough County); canals in the Kings Bay/Crystal River/Homosassa/Salt River system (Citrus County); Lake Miccosukee (Jefferson County).

- Shoreline stabilization;
- Boat ramps and boat launch areas and structures associated with such ramps or launch areas;
- Docks, piers, associated facilities, and other minor piling supported structures; and
- Maintenance dredging of canals and channels, including removal of organic detrital material from freshwater lakes and rivers.²³

Programmatic General Permit

Programmatic general permits are a type of general permit founded on an existing state, local or federal agency program that is designed to avoid duplication with that program.²⁴ The Corps has issued the following programmatic general permits in Florida that are administered by others:

- SAJ-42, Miami-Dade County, 4/29/2013 - 4/29/2018: Minor Activities in Miami-Dade County;
- SAJ-75, Palm Beach County, 5/01/2009 - 5/01/2014: Fill for residential Lots in Royal Palm Beach Subdivision;
- SAJ-80, Miccosukee Tribe, 8/09/2012 - 8/09/2017: Residential Fill - Miccosukee Tribe Reservation Lands;
- SAJ-83, Seminole Tribe of Florida, 3/15/15 - 3/15/20: Discharge of fill material for minor activities within the Big Cypress Seminole Indian Reservation;
- SAJ-87, Broward County, 12/14/2010 - 12/14/2015: Residential, Commercial & Institutional Fill in Plantation Acres;
- SAJ-91, City of Cape Coral, 2/28/2013 - 2/28/2018: Minor activities in the canal system of the city of Cape Coral;
- SAJ-96, Pinellas County, 7/17/2014 - 7/17/2019: Minor Activities in Pinellas County;
- SAJ-99, State of Florida, Department of Agriculture and Consumer Services, 11/09/2012 - 11/09/2017: Live Rock and Marine Bivalve Aquaculture; and
- SAJ-111, St. Johns River WMD, 10/31/2014 - 10/31/2019: Residential, Commercial & Institutional Developments in Northeast Florida.²⁵

SAJ-111

In October 2014, the Corps issued a programmatic general permit to the St. Johns River WMD authorizing the issuance of a permit on behalf of the Corps for certain types of projects with relatively minor impacts to wetlands or surface waters (SAJ-111).²⁶ The SAJ-111 authorization is limited to residential, commercial or institutional projects in Northeast Florida with up to 3 acres of impacts to low quality or urbanized non-tidal wetlands of the following four types:

- Wetlands in pine plantations with raised beds in production over 20 years;
- Wetlands in improved pasture;
- Wetlands on parcels bordered by at least 75 percent development; and
- Wetlands covered by greater than 80 percent invasive or exotic vegetation.²⁷

Assumption

A state may seek assumption of Section 404 of the Clean Water Act to regulate the discharge of dredged or fill material into certain waters.²⁸ The state program must regulate all discharges of dredged or fill material into waters regulated by the state; partial state programs are not approvable.²⁹ A state

²³ SPGP IV-R1, available at

http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/permitting/general_permits/SPGP/SPGP_IV_Permit_Instrument.pdf.

²⁴ Corps, Jacksonville District, available at <http://www.saj.usace.army.mil/Missions/Regulatory/SourceBook.aspx>, last visited (Jan. 29, 2016).

²⁵ *Id.*

²⁶ SAJ-111, available at http://floridaswater.com/permitting/USACEfiles/SAJ-111_Permit_Instrument.pdf.

²⁷ *Id.*

²⁸ 40 C.F.R. §232.2(p); § 404(g)(1)

²⁹ 40 C.F.R. §233.1(b)

program may be more stringent and encompass a greater scope than required by federal law.³⁰ To apply, the state must submit to the U.S. Environmental Protection Agency at least three copies of the following:

- A letter from the Governor of the State requesting program approval;
- A complete program description;³¹
- An Attorney General's statement;³²
- A Memorandum of Agreement with the Regional Administrator;³³
- A Memorandum of Agreement with the Secretary;³⁴ and
- Copies of all applicable state statutes and regulations, including those governing applicable state administrative procedures.³⁵

Effect of Proposed Changes

The bill amends s. 373.4144, F.S., regarding federal environmental permitting to increase the acreage of wetland or other surface water impacts, including navigable waters, the state is authorized to implement through a SPGP, subject to agreement with the Corp. The bill increases the acreage from 3 acres or less to 10 acres or less.

The bill provides that by seeking to use a SPGP, an applicant consents to applicable federal wetland jurisdiction criteria, which are authorized by s. 404 of the Clean Water Act, Pub. L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq., and s. 10 of the Rivers and Harbors Act of 1899 as required by the Corps, notwithstanding s. 373.4145, F.S.,³⁶ and for the limited purpose of implementing the SPGP.

The bill allows DEP to seek delegation of, in addition to assumption of, federal permitting programs regulating the discharge of dredged or fill material pursuant to the Clean Water Act and the Rivers and Harbors Act, so long as the delegation encompasses all dredge and fill activities in, on, or over jurisdictional wetlands or waters, including navigable waters, within the state.

B. SECTION DIRECTORY:

Section 1. Amends s. 373.4144(2), F.S., regarding federal environmental permitting.

Section 2. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Currently, the SPGP agreement between the Corps and DEP does not include an acreage threshold on wetlands impacts. If an agreement is reached to include a threshold of ten acres or less, the costs are expected to be minor and can be absorbed within existing agency resources.³⁷

³⁰ 40 C.F.R. § 233.1(c)

³¹ 40 C.F.R. § 233.11

³² 40 C.F.R. § 233.12

³³ 40 C.F.R. § 233.13

³⁴ 40 C.F.R. § 233.14

³⁵ 40 C.F.R. § 233.10

³⁶ Section 373.4145(c), F.S., regards the environmental permitting program within the geographical jurisdiction of the Northwest Florida WMD.

³⁷ Email from Andrew Ketchel, Director of Legislative Affairs, Department of Environmental Protection, RE: HB795, (Feb. 5, 2016).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive fiscal impact on the private sector if the bill results in the Corps issuing an expanded SPGP, or the state is granted assumption or delegation of Section 404 of the Clean Water Act. An expanded SPGP or assumption or delegation of Section 404 of the Clean Water Act would result in a reduction of duplicative permitting processes.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.