

**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.)

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Prepared By: The Professional Staff of the Committee on Environment and Natural Resources

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BILL: SB 910

INTRODUCER: Senator Burton

SUBJECT: Management and Storage of Surface Waters

DATE: March 13, 2023

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carroll	Rogers	EN	<b>Pre-meeting</b>
2.			CA	
3.			RC	

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**I. Summary:**

SB 910 adds exemptions to the management and storage of surface waters statutes for measures or practices implemented primarily for environmental habitat creation or enhancement activities on lands specifically classified as agricultural or government-owned lands. The bill removes language that limits this exemption to measures or practices determined to have a minimal or insignificant individual and cumulative adverse impact on the water resources of the state.

The bill provides that the measures or practices stated above may alter the topography of the land, including activities and improvements that divert the flow of surface waters or impact wetlands on the land, if the activities result in a net increase in wetland resource functions. They must be planned, designed, and implemented to result in a wetland habitat that resembles the characteristics of a functional wetland habitat in the same region. If the measures or practices result in a violation of water quality standards, they will not qualify for the exemption.

The bill removes language requiring the Department of Environmental Protection (DEP) or the water management districts (WMDs) to notify in writing whether the proposed activity qualifies for the exemption within 30 days after receipt of an exemption request. The bill also removes language requiring provision of the written notice prior to commencement of the activity.

The bill requires the owner of the property where the measures or practices will be implemented, or their designee, to provide written notification to DEP or the WMD within 30 days before commencing work. If the measures or practices will implement a mitigation bank or an offsite regional mitigation area, the property owner must show DEP or the WMD evidence of the required permit.

A property owner is not authorized to use mitigation to offset impacts except through compliance with statutes governing mitigation banks and offsite regional mitigation and the rules adopted pursuant to those statutes.

## II. Present Situation:

### Management and Storage of Surface Waters

The Department of Environmental Protection (DEP) and the water management districts (WMDs) are responsible for regulating the management and storage of surface waters in the state and are authorized to require the related permits and impose conditions on those permits.<sup>1</sup> This is the state environmental resource permit (ERP) program.<sup>2</sup> The statutes governing surface water management control the construction, operation, or alteration of any stormwater management system, dam, impoundment, reservoir, or appurtenant work.<sup>3</sup> Thus, DEP and the WMDs collectively regulate virtually every type of artificial or natural structure or construction used to connect to, draw water from, drain water into, or be placed in or across surface water. This includes all structures and constructions that have an effect on surface water, including dredging, filling, and activities that create canals, ditches, culverts, impoundments, fill roads, buildings, and other impervious surfaces.<sup>4</sup> ERPs are required for activities that impact wetlands as well. Wetlands are defined as areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soils.<sup>5</sup>

In 2018, the state assumed the administration of the federal dredge and fill permitting program under section 404 of the federal Clean Water Act.<sup>6</sup> Though projects within state waters require both an ERP and a state 404 permit, state assumption of the 404 program eliminated duplicative review because most review requirements overlap between the two programs.<sup>7</sup> Generally, a section 404 permit is not needed if discharges of dredged or fill material are associated with normal farming, ranching, or silviculture activities such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products or upland soil and water conservation practices.<sup>8</sup>

Florida Statutes provide exemptions from the laws governing the management and storage of surface waters for agriculture activities.<sup>9</sup> The laws may not affect the right of any person engaged in agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land.<sup>10</sup> This exemption includes alterations that may impede or divert the flow of surface waters or adversely impact wetlands when the purpose of such alteration is not to impede or divert the flow of surface waters or to adversely impact wetlands.<sup>11</sup> If there is a dispute as to the

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<sup>1</sup> The Institute of Food and Agricultural Sciences (IFAS), *2021 Handbook of Florida Water Regulation: Management and Storage of Surface Waters*, <https://edis.ifas.ufl.edu/publication/FE605> (last visited Mar. 8, 2023); s. 373.413, F.S.

<sup>2</sup> South Florida Water Management District, *Environmental Resource Permits*, <https://www.sfwmd.gov/doing-business-with-us/permits/environmental-resource-permits> (last visited Mar. 10, 2023).

<sup>3</sup> *Id.*

<sup>4</sup> IFAS, *Handbook of Florida Water Regulations*; s. 373.403, F.S.

<sup>5</sup> Section 373.019(27), F.S.

<sup>6</sup> DEP, *State 404 Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program> (last visited Mar. 10, 2023).

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Environmental Protection Agency (EPA), *Exemptions to Permit Requirements under CWA Section 404*, <https://www.epa.gov/cwa-404/exemptions-permit-requirements-under-cwa-section-404> (last visited Mar. 10, 2023).

<sup>9</sup> Section 373.406(2), (9), F.S.

<sup>10</sup> Section 373.406(2), F.S.

<sup>11</sup> *Id.*

applicability of the exemption, a WMD or landowner may request the Department of Agricultural and Consumer Services to make a binding determination as to whether an existing or proposed activity qualifies for the exemption.<sup>12</sup>

Construction, operation, or maintenance of any agricultural closed system is also exempt, except for laws concerning the taking and discharging of water for filling, replenishing, and maintaining the water level in any such agricultural closed system.<sup>13</sup>

Implementation of measures for environmental restoration or water quality improvement on agricultural lands is also exempt where the measures or practices are determined by DEP or a WMD, on a case-by-case basis, to have a minimal or insignificant individual and cumulative adverse impact on water resources.<sup>14</sup> Within 30 days following receipt of a written notice requesting an exemption, DEP or a WMD must provide written notice of the determination that the proposed activity does or does not qualify for the exemption.<sup>15</sup>

### **Agricultural Lands**

Agricultural lands in the state are classified annually by county property appraisers.<sup>16</sup> Only lands that are used primarily for bona fide agricultural purposes shall be classified as agricultural.<sup>17</sup> Bona fide agricultural purposes are good faith commercial agricultural uses of the land. In determining whether the use of land for agricultural purposes is bona fide, the property appraiser may consider:

- The length of time the land has been so used;
- Whether the use has been continuous;
- The purchase price paid;
- Size, as it relates to specific agricultural use, but a minimum acreage may not be required for agricultural assessment;
- Whether an indicated effort has been made to care sufficiently for the land in accordance with accepted commercial agricultural practices, including fertilizing, liming, tilling, mowing, and reforestation;
- Whether the land is under lease and, if so, the length, terms, and conditions of the lease; and
- Other factors as applicable.<sup>18</sup>

### **Water Quality and Nutrients**

Phosphorus and nitrogen are naturally present in water and are essential nutrients for the healthy growth of plant and animal life.<sup>19</sup> The correct balance of both nutrients is necessary for a healthy

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<sup>12</sup> Section 373.407, F.S.

<sup>13</sup> Section 373.406(3), F.S. A closed system is any reservoir or works located entirely within agricultural lands owned or controlled by the user and which requires water only for the filling, replenishing, and maintaining the water level thereof. Section 373.403(6), F.S.

<sup>14</sup> Section 373.406(9), F.S.

<sup>15</sup> *Id.*

<sup>16</sup> Section 193.461(1), F.S.

<sup>17</sup> Section 193.461(3), F.S.

<sup>18</sup> *Id.*

<sup>19</sup> EPA, *The Issue*, <https://www.epa.gov/nutrientpollution/issue> (last visited Feb. 10, 2023).

ecosystem; however, excessive nitrogen and phosphorus can cause significant water quality problems.<sup>20</sup>

Phosphorus and nitrogen are derived from natural and human-made sources.<sup>21</sup> Human-made sources include sewage disposal systems (wastewater treatment facilities and septic systems), overflows of storm and sanitary sewers (untreated sewage), agricultural production and irrigation practices, and stormwater runoff.<sup>22</sup> Excessive nutrient loads may result in harmful algal blooms, nuisance aquatic weeds, and the alteration of the natural community of plants and animals.<sup>23</sup>

Under section 303(d) of the federal Clean Water Act, states must establish water quality standards for waters within their borders and then develop a list of impaired waters that do not meet the established water quality standards and a list of threatened waters that may not meet water quality standards in the following reporting cycle.<sup>24</sup>

### Mitigation Banking

Generally, mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity to provide mitigation for unavoidable wetland impacts within a defined mitigation service area.<sup>25</sup> Offsite regional mitigation is mitigation on an area of land off the site of a permitted activity, where an applicant proposes to mitigate the adverse impacts of only the applicant's specific activity as a requirement of the permit, which provides regional ecological value and which is not a mitigation bank.<sup>26</sup> In mitigation banking, the bank is the site itself, and the currency sold by the banker to the impact permittee is a credit, representing the wetland ecological value equivalent to the complete restoration of one acre.<sup>27</sup> The number of potential credits permitted for the bank, and the credit debits required for impact permits, are determined by the permitting agencies.<sup>28</sup>

Creation of a mitigation bank in Florida requires both a permit from DEP or a WMD, and federal approval of a mitigation bank instrument from several agencies led by the U.S. Army Corps of Engineers (USACE), in a joint state/federal interagency review team.<sup>29</sup> Through this process,

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> EPA, *Sources and Solutions*, <https://www.epa.gov/nutrientpollution/sources-and-solutions> (last visited Feb 10, 2023).

<sup>23</sup> EPA, *The Issue*, <https://www.epa.gov/nutrientpollution/issue> (last visited Feb. 10, 2023).

<sup>24</sup> EPA, *Overview of Identifying and Restoring Impaired Waters under Section 303(d) of the CWA*, <https://www.epa.gov/tmdl/overview-identifying-and-restoring-impaired-waters-under-section-303d-cwa> (last visited Feb. 24, 2023); 40 C.F.R. 130.7. Following the development of the list of impaired waters, states must develop a total maximum daily load for every pollutant/waterbody combination on the list. A total maximum daily load is a scientific determination of the maximum amount of a given pollutant that can be absorbed by a waterbody and still meet water quality standards. DEP, *Total Maximum Daily Loads Program*, <https://floridadep.gov/dear/water-quality-evaluation-tmdl/content/total-maximum-daily-loads-tmdl-program> (last visited Feb. 10, 2023).

<sup>25</sup> DEP, *Mitigation and Mitigation Banking*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Mar. 8, 2023).

<sup>26</sup> Section 373.403, F.S.

<sup>27</sup> DEP, *Mitigation and Mitigation Banking*.

<sup>28</sup> *Id.*

<sup>29</sup> DEP, *Mitigation Banking Rule and Procedure Synopsis*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-banking-rule-and> (last visited Mar. 8, 2023).

depending on agency approval, a mitigation bank may provide mitigation for permittees under both the federal and state permitting programs.<sup>30</sup>

Requirements for permitting mitigation banks differ between mitigation bank instruments issued by the USACE and state permits issued by DEP or the WMDs. Under the federal process, a mitigation banking instrument serves as the legal document for the establishment, operation, and use of a mitigation bank.<sup>31</sup> They are approved by an interagency review team, through procedures involving public notice and comment.<sup>32</sup> Mitigation banking instruments must include certain detailed elements, such as a comprehensive mitigation plan including financial assurances, and a credit release schedule that is tied to the achievement of specific milestones.<sup>33</sup>

Under Florida law, to obtain a mitigation bank permit, the applicant must provide reasonable assurance that the mitigation bank will:

- Improve ecological conditions of the regional watershed;
- Provide viable and sustainable ecological and hydrological functions for the proposed mitigation service area;
- Be effectively managed in perpetuity;
- Not destroy areas with high ecological value;
- Achieve mitigation success; and
- Be adjacent to lands that will not adversely affect the long-term viability of the mitigation bank due to unsuitable land uses or conditions.<sup>34</sup>

The applicant must also provide reasonable assurance that:

- Any surface water management system that will be constructed, altered, operated, maintained, abandoned, or removed within a mitigation bank will meet the requirements of part IV of ch. 373, F.S., which regulates management and storage of surface waters, and rules adopted thereunder;
- The applicant has sufficient legal or equitable interest in the property to ensure perpetual protection and management of the land within a mitigation bank; and
- The applicant can meet the financial responsibility requirements prescribed for mitigation banks.<sup>35</sup>

### III. Effect of Proposed Changes:

**Section 1** amends s. 373.406, F.S., concerning exemptions to statutes governing the management and storage of surface waters, to add exemptions for the implementation of measures or practices for the primary purpose of environmental habitat creation or enhancement activities on lands specifically classified as agricultural pursuant to statute or government-owned lands.

The bill removes language that limits this exemption to measures or practices that are determined by the Department of Environmental Protection (DEP) or the water management district

<sup>30</sup> *Id.*

<sup>31</sup> 33 C.F.R. s. 332.2.

<sup>32</sup> 33 C.F.R. s. 332.8; 40 C.F.R. s. 230.98.

<sup>33</sup> *See generally* 33 C.F.R. s. 332.8(d)(6); *see also* 40 C.F.R. s. 230.98(d)(6).

<sup>34</sup> Section 373.4136(1), F.S.

<sup>35</sup> *Id.*; Fla. Admin. Code R. 62-342.400.

(WMD), on a case-by-case basis, to have a minimal or insignificant individual and cumulative adverse impact on the water resources of the state.

The bill provides that the measures or practices stated above may alter the topography of the land, including activities and improvements that divert the flow of surface waters or impact wetlands on the land, if the activities or improvements result in a net increase in wetland resource functions. The activities or improvements must be planned, designed, and implemented to result in a wetland habitat that resembles the characteristics of a functional wetland habitat in the same region, such as an herbaceous or forested wetland. The implementation of measures or practices that result in a permanent net loss of wetland functions or a violation of water quality standards do not qualify for an exemption pursuant to this subsection.

The bill removes language requiring DEP or the WMD to provide written notification as to whether the proposed activity qualifies for the exemption within 30 days after receipt of a written notice requesting the exemption. The bill also deletes language prohibiting activity under the exemption from commencing until DEP or the WMD has provided written notice that the activity qualifies for the exemption.

The bill replaces the language in the paragraph above with a provision requiring the owner of the property where the measures or practices will be implemented, or their designee, to provide written notification to DEP or the WMD within 30 days before commencing work pursuant to this subsection. The bill provides that if the measures or practices under this subsection are performed to implement a mitigation bank or an offsite regional mitigation area, before commencing such activities, the property owner must confirm compliance with statutes governing mitigation banks and offsite regional mitigation and the rules adopted pursuant to those statutes by providing DEP or the WMD with evidence of a permit issued pursuant to those statutes.

The bill provides that this subsection does not authorize a property owner to use mitigation to offset impacts except through compliance with statutes governing mitigation banks and offsite regional mitigation and the rules adopted pursuant to those statutes.

**Section 2** provides an effective date of July 1, 2023.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 373.406 of the Florida Statutes.

**IX. Additional Information:**

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.