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 Committee on Fiscal Policy

BILL:	CS/CS/SB 738
INTRODUCER:	Judiciary Committee; Environmental and Natural Resources Committee; and Senator Burgess
SUBJECT:	Environmental Management
DATE:	February 13, 2024 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Barriero	Rogers	EN	**Fav/CS**
2.	Collazo	Cibula	JU	**Fav/CS**
3.	Barriero	Yeatman	FP	**Pre-meeting**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 738 requires the side slopes of nonindustrial stormwater management systems, in or adjacent to residential or urban areas that are accessible to the general public, to be designed with a horizontal-to-vertical ratio no steeper than 4:1 to a depth of at least two feet below the control elevation and be stabilized with vegetation. The bill provides an exception if the slope incorporates erosion and sediment control best management practices and is fenced, greenscaped, or has other barriers installed to prevent accidental incursion into the system. The bill supersedes all side slope rules that have been adopted by DEP, WMDs, or delegated programs as of July 1, 2024.

In addition, the bill clarifies that causes of action under the Water Quality Assurance Act must be limited to damages to real or personal property directly resulting from pollution that was not authorized by any government approval or permit. The bill provides that the strict liability exceptions to such causes of action include those specified in s. 376.82, F.S., regarding the rehabilitation of a brownfields site.

The bill also requires DEP and each WMD to conduct a holistic review of their respective agency's current coastal permitting processes and other permit programs to identify areas of improvement and to increase efficiency within each process and program. The bill specifies the factors DEP and WMDs must consider during their reviews. In addition, the bill provides that, by

December 31, 2025, DEP and each WMD must provide their findings and proposed solutions in a report to the Governor and Legislature.

II. Present Situation:

Stormwater Runoff

Nationwide, polluted stormwater runoff is considered to be the greatest threat to clean water.[1] More than 40 percent of waters assessed by the states are too polluted for fishing or swimming.[2] Nonpoint sources associated with stormwater account for more than 40 percent of these polluted waters.[3] Conversely, traditional point sources (*i.e.*, wastewater treatment plants) account for only about 10 percent of these polluted or "impaired" waters.[4] Hundreds of impaired water segments in Florida have lost their designated use due, in part, to stormwater pollution.[5]

Florida averages 40-60 inches of rainfall a year, depending on the location, with about two-thirds falling between June and October.[6] Stormwater runoff generated during these rain events flows over land or impervious surfaces, such as paved streets, parking lots, driveways, sidewalks, and rooftops, and picks up pollutants like trash, chemicals, oils, and sediment along the way. This unfiltered water ends up in streams, ponds, lakes, bays, wetlands, oceans, and ground water. Construction sites, lawns, improperly stored hazardous wastes, and illegal dumping are all potential sources of stormwater pollutants.[7]

Stormwater runoff can cause a multitude of problems:

- Excess nutrients, primarily nitrogen and phosphorus from lawn fertilizers or natural sources, such as manure, can cause algal and bacterial blooms that proliferate rapidly. Algae will consume oxygen, increase turbidity in the waterbody, and eventually die along with the fish and other aquatic life that need oxygen to live.[8]
- Pathogenic bacteria and microorganisms can be carried by stormwater into a waterbody. This creates health hazards and can cause lakes and beaches to close to the public.[9]

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[1] South Florida Water Management District (SFWMD), *Your Impact on the Environment*, https://www.sfwmd.gov/community-residents/what-can-you-do (last visited Jan. 23, 2024).
[2] Department of Environmental Protection (DEP), *Stormwater Support*, https://floridadep.gov/water/engineering-hydrology-geology/content/stormwater-support (last visited Jan. 23, 2024). A recent study examining water quality across the U.S. shows Florida ranks first in the nation for total acres of lakes classified as impaired for swimming and aquatic life (873,340 acres), and second for total lake acres listed as impaired for any use (935,808 acres). Environmental Integrity Project, *The Clean Water Act at 50*, 28 (2022), available at https://environmentalintegrity.org/wp-content/uploads/2022/03/CWA@50-report-3-17-22.pdf. Florida also has the second most total square miles of impaired estuaries (2,533 square miles). *Id.* at 29.
[3] DEP, *Stormwater Support*, https://floridadep.gov/water/engineering-hydrology-geology/content/stormwater-support (last visited Jan. 23, 2024).
[4] *Id.*
[5] *Id.*
[6] Meijing Zhang et al., *Florida Rainfall Data Sources and Types*, University of Florida Institute of Food and Agricultural Sciences (UF/IFAS), 1 (Oct. 9, 2023), available at https://edis.ifas.ufl.edu/publication/AE517.
[7] U.S. Environmental Protection Agency (EPA), *Urbanization and Stormwater Runoff*, https://www.epa.gov/sourcewaterprotection/urbanization-and-stormwater-runoff (last visited Jan. 23, 2024).
[8] Southwest Florida Water Management District (SWFWMD), *Stormwater Runoff*, https://www.swfwmd.state.fl.us/residents/education/kids/stormwater-runoff (last visited Jan. 23, 2024).
[9] *Id.*

- Sediment can increase the turbidity (a measure of water cloudiness) of a waterbody. Turbidity can block sunlight from reaching aquatic plants, making it impossible for them to grow. Without plants, animals lose a food source, and it is more difficult to filter pollutants from the water. Instead, pollutants collect at the bottom of the waterbody and remain there indefinitely.[10]
- Debris such as plastic bags, bottles, and cigarette butts can wash into a waterbody and interfere with aquatic life[11] and flood prevention and decrease water quality. When a stormwater drain gets clogged with debris, rainwater that normally would be collected cannot enter into the drainage system. Water will accumulate around the drain, causing flooded sidewalks or streets and increase the chances for flooding buildings.[12]
- Other hazardous wastes, such as insecticides, herbicides, paint, motor oil, and heavy metals, can be carried by stormwater runoff to waterbodies and cause illness to aquatic life and humans alike.[13]

In addition, inadequate stormwater management increases stormwater flows and velocities, contributes to erosion, overtaxes the carrying capacity of streams and other conveyances, reduces ground water recharge, threatens public health and safety, and is the primary source of pollutant loading entering Florida's rivers, lakes, and estuaries.[14]

Stormwater Management Systems

Stormwater management systems are engineered structures and strategies designed to control and mitigate the effects of stormwater runoff. There are many types of stormwater management systems, including constructed wetlands, bioswales, and stormwater ponds. Stormwater ponds are defined as either retention or detention ponds. Retention ponds retain all the water within them, allowing the water to percolate into the soil and preventing it from moving to other surface waters. In contrast, detention ponds capture stormwater runoff and temporarily store it before slowly releasing the water downstream.[15]

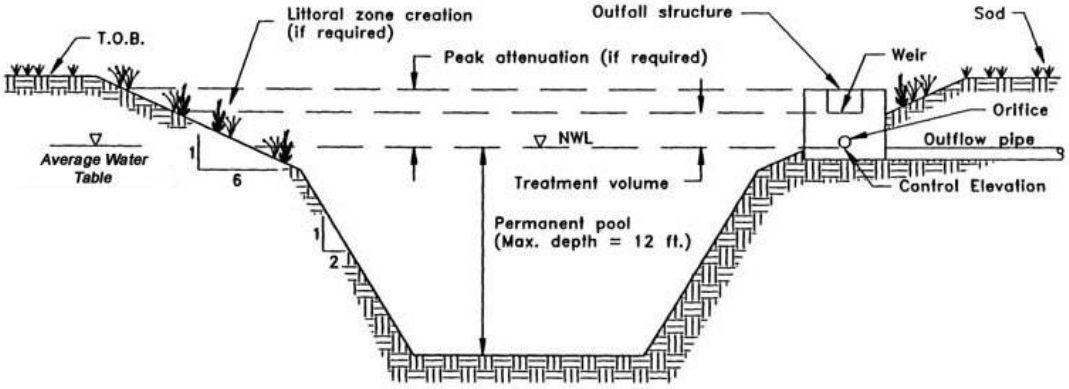
While a best management practice for pollutant removal, stormwater ponds may create safety hazards, including the risk of drowning.[16] Steep sides and slippery slopes can make it difficult for a person to climb back out if they happen to fall in.[17] In addition, retention ponds are often

[10] *Id.*
[11] *Id.*
[12] SFWMD, *Your Impact on the Environment*, https://www.sfwmd.gov/community-residents/what-can-you-do (last visited Jan. 23, 2024).
[13] SWFWMD, *Stormwater Runoff*, https://www.swfwmd.state.fl.us/residents/education/kids/stormwater-runoff (last visited Jan. 23, 2024).
[14] Fla. Admin. Code R. 62-40.431(2)(b).
[15] DEP, *Stormwater Management*, available at https://floridadep.gov/sites/default/files/stormwater-management.pdf (last visited Jan. 23, 2024); U.S. Environmental Protection Agency (EPA), *Stormwater Management Practices at EPA Facilities*, https://www.epa.gov/greeningepa/stormwater-management-practices-epa-facilities (last visited Jan. 23, 2024).
[16] City of Jacksonville, *Retention Pond Safety*, Jun. 1, 2020, https://www.jacksonville.gov/welcome/welcome-news/retention-pond-safety; *see also* EPA, *Stormwater Best Management Practice: Wet Ponds*, 4 (2021), available at https://www.epa.gov/system/files/documents/2021-11/bmp-wet-ponds.pdf.
[17] City of Jacksonville, *Retention Pond Safety*, Jun. 1, 2020, https://www.jacksonville.gov/welcome/welcome-news/retention-pond-safety.

deep because they are designed for maximum rainwater collection.[18] Strong currents at inlet and outlet areas of a pond can also pose a danger.[19]

Wet Detention Ponds

Wet detention ponds are one of the most common types of detention systems and consist of constructed basins that have a permanent pool of water into which stormwater runoff is directed.[20] The runoff is detained in the pond until it is released downstream or displaced by runoff from subsequent rain events.[21] By capturing and detaining runoff, wet detention ponds control both stormwater quantity and quality.[22] Sedimentation processes remove particulates, organic matter, and metals, while dissolved metals and nutrients are removed through biological uptake.[23]



Typical wet detention system[24]

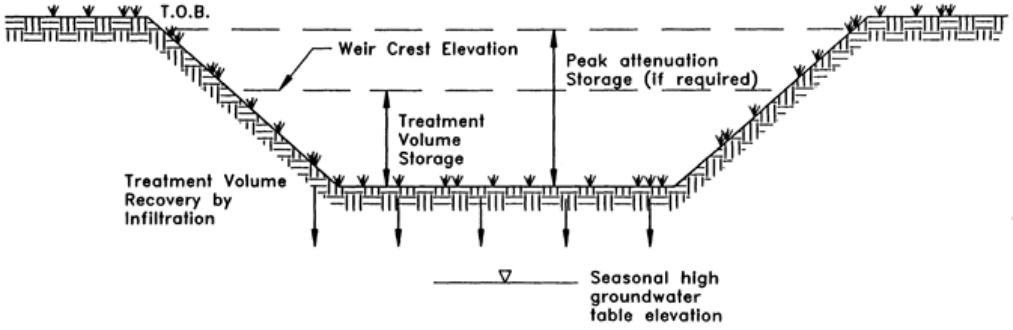
Specific designs may vary considerably, depending on site constraints, local regulations, and preferences of the designer or community.[25] However, as shown above and discussed in further detail below, the typical horizontal-to-vertical ratio for side slopes is 6:1 for littoral zones, no steeper than 4:1 to a depth of at least two feet below the control elevation, and 2:1 at greater depths. The littoral zone is that portion of a stormwater pond designed to contain rooted aquatic plants and is usually provided by extending and gently sloping the sides of the pond down to a

[18] *Id.*
[19] *Id.*
[20] EPA, *Stormwater Best Management Practice: Wet Ponds*, 1 (2021), available at https://www.epa.gov/system/files/documents/2021-11/bmp-wet-ponds.pdf.
[21] EPA, *Stormwater Technology Fact Sheet: Wet detention ponds*, 1 (1999), available at https://nepis.epa.gov/Exe/ZyPDF.cgi/200044D0.PDF?Dockey=200044D0.PDF.
[22] *Id.*
[23] *Id.*
[24] Northwest Florida Water Management District (NWFWMD), *ERP Applicant's Handbook: Vol. II*, figure 8.1-1 (2013), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03172. "T.O.B." means top of bank.
[25] EPA, *Stormwater Best Management Practice: Wet Ponds*, 2 (2021), available at https://www.epa.gov/system/files/documents/2021-11/bmp-wet-ponds.pdf.

depth of two to three feet below the normal water level or control elevation.[26] Vegetative littoral zones help stabilize the soil around the pond's edge and increase pollutant uptake.[27]

Dry Retention Ponds

Unlike wet stormwater ponds, dry retention ponds do not have permanent pools of water or discharge to downstream surface waters. [28] Instead, these systems remain dry until filled with water during rain events.[29] Substantial amounts of suspended solids, heavy metals, bacteria, and some varieties of pesticides and nutrients such as phosphorus are removed as runoff percolates through the vegetation and soil.[30] Retention systems also promote the recharge of ground water and help prevent saltwater intrusion in coastal areas.[31]



Typical dry retention system[32]

Stormwater Management System Design Criteria

Design criteria for stormwater management systems is regulated by the Department of Environmental Protection (DEP), water management districts (WMDs), and delegated local programs. Requirements vary by type of stormwater management system and regulating authority.

In general, stormwater ponds must be designed with side slopes no steeper than a 4:1 horizontal-to-vertical ratio to a depth of at least two feet below the control elevation.[33] However, certain

[26] NWFWMD, *ERP Applicant's Handbook: Vol. II*, s. 12.4 (2013), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03172.
[27] EPA, *Stormwater Best Management Practice: Wet Ponds*, 3 (2021), available at https://www.epa.gov/system/files/documents/2021-11/bmp-wet-ponds.pdf.
[28] NWFWMD, *ERP Applicant's Handbook: Vol. II*, s. 5.1 (2013), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03172.
[29] *Id.* Samantha T. Howley et al., *Stormwater Pond Management: What You Need to Know About Aeration*, UF/IFAS, 2 (2021), available at https://edis.ifas.ufl.edu/publication/SS695.
[30] NWFWMD, *ERP Applicant's Handbook: Vol. II*, s. 5.1 (2013), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03172.
[31] *Id.*
[32] *Id.* at s. 5.1, figure 5.1-1.
[33] *Id.* at s. 8.11; SFWMD, *ERP Applicant's Handbook: Vol. II*, s. 5.4.2(d) (2013) available at https://www.flrules.org/Gateway/reference.asp?No=Ref-02528; St. Johns River Water Management District (SJRWMD), *ERP Applicant's Handbook: Vol. II*, ss. 2.6.1 (2013), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03181; Suwannee River Water Management District (SRWMD), *ERP Applicant's Handbook: Vol. II*, s. 4.5.1 (2013), available at

exceptions may apply. For example, the South Florida Water Management District (SFWMD) provides alternative criteria for golf courses,[34] while other WMDs include exceptions for fenced ponds[35] or ponds with slopes that incorporate erosion and sediment control best management practices.[36] In addition, some WMDs require the stabilization of pond side slopes with vegetation[37] or the creation of vegetative littoral zones.[38] Where necessary, littoral zones are generally required to have slopes with a horizontal-to-vertical ratio of 6:1 or flatter.[39]

Other stormwater management systems have different requirements. For example, swales must have a top width-to-depth ratio of the cross-section equal to or greater than 6:1 or side slopes equal to or greater than a 3:1 horizontal-to-vertical ratio.[40]

DEP has proposed revisions to the stormwater rules within chapter 62-330 of the Florida Administrative Code that require legislative ratification before taking effect. The proposed revisions include some requirements for the design of stormwater ponds. For example, all side slopes and bottom areas of dry retention ponds must be seeded or sodded with water-tolerant grass species grown on sandy soils, and the permanent pool volume of wet detention ponds must meet certain parameters. [41] While the proposed rules do not include express requirements for the horizontal-to-vertical ratio of stormwater pond side slopes, they do include graphics similar to the ones shown above that depict a typical side slope ratio of 4:1 for dry retention systems, 6:1 for wet detention systems, and 2:1 for wet detention slopes below the control elevation.[42]

Infrastructure Permitting Process Review

Coastal Construction Permits

Coastal construction permits protect Florida's beaches and dunes from imprudent construction that may jeopardize the stability of Florida's natural resources.[43] The coastal construction control line (CCCL) defines the portion of the beach-dune system that is subject to severe fluctuations caused by a 100-year storm surge, storm waves, or other forces such as wind, wave, or water

https://www.flrules.org/Gateway/reference.asp?No=Ref-03182; SWFWMD, *ERP Applicant's Handbook: Vol. II*, s. 5.4.1(c) (2013) available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03176.

[34] SFWMD, *ERP Applicant's Handbook: Vol. II*, s. 5.4.2(e) (2013) available at https://www.flrules.org/Gateway/reference.asp?No=Ref-02528.

[35] SJRWMD, *ERP Applicant's Handbook: Vol. II*, s. 2.6.1 (2013), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03181.

[36] SRWMD, *ERP Applicant's Handbook: Vol. II*, s. 4.5.1 (2013), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03182.

[37] *Id.*

[38] SJRWMD, *ERP Applicant's Handbook: Vol. II*, s. 8.6 (2013), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03181; NWFWMD, *ERP Applicant's Handbook: Vol. II*, s. 8.6 (2013), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03172.

[39] *Id.*

[40] SJRWMD, *ERP Applicant's Handbook: Vol. II*, s. 2.1(u) (2013), available at https://www.flrules.org/Gateway/reference.asp?No=Ref-03181. This is also the statutory definition of "swale." Section 403.803(14)(a), F.S.

[41] *See* DEP, *ERP Applicant's Handbook: Vol. I*, appendices P-5 and P-6 (proposed 2023), available at https://floridadep.gov/water/engineering-hydrology-geology/documents/erp-applicants-handbook-volume-i-appendixes-rulemaking.

[42] *Id.*

[43] Section 161.053(1)(a), F.S.

level changes.[44] Seaward of the CCCL, new construction and improvements to existing structures require a CCCL permit from DEP.[45] The line defines the landward limit of DEP's authority to regulate construction.[46] DEP's CCCL Program regulates structures and activities which can cause beach erosion, destabilize dunes, damage upland properties, or interfere with public access.[47] CCCLs currently exist for large portions of Florida's coast.[48]

Due to the potential environmental impacts and greater risk of hazards from wind and flood, the standards for construction seaward of the CCCL are often more stringent than those applied in the rest of the coastal building zone.[49] Approval or denial of a permit application is based upon a review of factors such as the location of structures and their potential impacts on the surrounding area.[50] CCCLs are established by DEP on a county basis, but only after such a line has been determined necessary for protecting upland structures and controlling beach erosion, and after a public hearing has been held in the affected county.[51] These hearings are conducted in the manner described in s. 120.54(3)(c), F.S., must be published in the Florida Administrative Register in the same manner as a rule, and are subject to an invalidity challenge as described in s. 120.56(3), F.S. A petitioner may challenge a rule under s. 120.56(3), F.S., on the basis that it is an invalid delegation of legislative authority, and must substantiate this allegation by a preponderance of the evidence.[52]

Joint Coastal Permitting (JCP)

DEP implements a concurrent processing of applications for coastal construction permits, environmental resource permits and sovereign submerged lands authorizations.[53] A JCP is required for activities that meet all of the following criteria:

- Located on Florida's natural sandy beaches facing the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida or associated inlets.
- Activities extending seaward of the mean high water line.
- Activities extending into sovereign submerged lands.
- Activities likely to affect the distribution of sand along the beach.[54]

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[44] *Id.*; Fla. Admin. Code R. 62B-33.005(1); DEP, *The Homeowner's Guide to the Coastal Construction Control Line Program*, 3 (2017), *available at* https://floridadep.gov/sites/default/files/Homeowner%27s%20Guide%20to%20the%20CCCL%20Program%206_2012%20%28002%29_0.pdf.

[45] DEP, *The Homeowner's Guide to the Coastal Construction Control Line Program*, 2 (2017), *available at* https://floridadep.gov/sites/default/files/Homeowner%27s%20Guide%20to%20the%20CCCL%20Program%206_2012%20%28002%29_0.pdf.

[46] *Id.*

[47] DEP, *Coastal Construction Control Line Program*, https://floridadep.gov/water/coastal-construction-control-line (last visited Jan. 23, 2024).

[48] DEP, *Geospatial Open Data, CCCL*, https://geodata.dep.state.fl.us/datasets/4674ee6d93894168933e99aa2f14b923_2/explore (last visited Jan. 23, 2024).

[49] *See generally* Fla. Admin. Code Ch. 62B-33.

[50] *See generally* Fla. Admin. Code R. 62B-33.005.

[51] Section 161.053(2), F.S.

[52] *Id.*

[53] Section 161.055, F.S.; *see also* DEP, *Beaches, Inlets and Ports*, https://floridadep.gov/rcp/beaches-inlets-ports (last visited Jan. 23, 2024).

[54] DEP, *Beaches, Inlets and Ports*, https://floridadep.gov/rcp/beaches-inlets-ports (last visited Jan. 23, 2024).

JCPs are typically required for beach restoration or nourishment; construction of erosion control structures; public fishing piers; maintenance of inlets and inlet-related structures; and dredging of navigation channels that include disposal of dredged material onto the beach or in the nearshore area.[55]

Environmental Resource Permits (ERPs)

Part IV of chapter 373, F.S., and chapter 62-330 of the Florida Administrative Code regulate the statewide ERP program, which is the primary tool used by DEP and water management districts (WMDs) for preserving natural resources and fish and wildlife, minimizing degradation of water resources caused by stormwater discharges, and providing for the management of water and related land resources. The program governs the construction, alteration, operation, maintenance, repair, abandonment, and removal of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, and other works such as docks, piers, structures, dredging, and filling located in, on, or over wetlands or other surface waters.[56]

DEP has adopted a comprehensive chapter of rules for the permitting process.[57] These rules contain:

- Criteria and thresholds for requiring permits;
- Types of permits;
- Procedures governing the review of applications and notices, duration and modification of permits, operational maintenance requirements, transfers of permits, provisions for emergencies, and provisions for abandonment and removal of systems;
- Exemptions and general permits that do not allow significant adverse impacts to occur individually or cumulatively;
- Conditions for issuance;
- General permit conditions, including monitoring, inspection, and reporting requirements;
- Standardized fee categories to promote consistency;
- Application, notice, and reporting forms; and
- An Applicant's Handbook containing general program information, application and review procedures, stormwater quality and quantity criteria, erosion and sediment control requirements, and how environmental criteria are evaluated.[58]

State Administered Federal Section 404 Dredge and Fill Permits

In 2020, Florida assumed responsibility under section 404 of the federal Clean Water Act[59] for dredge and fill permitting.[60] The State 404 Program is responsible for overseeing the permitting for any project that proposes dredge or fill activities within state assumed waters.[61] DEP adopted

[55] *Id*.
[56] Fla. Admin. Code R. 62-330.010(2).
[57] Fla. Admin. Code Ch. 62-330.
[58] Section 373.4131(1)(a), F.S.
[59] 33 U.S.C. s. 1251 et seq.
[60] Section 373.4146, F.S.; *see also* Fla. Admin. Code Ch. 62-331; *see also* DEP, State *404 Program*, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program (last visited Jan. 23, 2024).
[61] DEP, *State 404 Program*, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program (last visited Jan. 23, 2024).

rules implementing this program are within chapter 62-331 of the Florida Administrative Code.[62] There is significant overlap between the federal 404 permitting program and the state ERP program. Provisions of state law that conflict with federal requirements under the Clean Water Act do not apply to state-administered section 404 permits.[63]

States administering programs under the Clean Water Act must provide an opportunity for judicial review in state court that is sufficient to provide for, encourage, and assist public participation in the permitting process.[64] A state fails to meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits.[65] In August 2023, EPA proposed a rule providing that a state does not "provide for, encourage, and assist" public participation in the permitting process if state law or regulation requires that attorneys' fees be imposed in favor of any prevailing party and against the losing party, notwithstanding the good faith or merit of the litigant's position.[66] The proposed rule provides that this form of fee-shifting would form a barrier to court access for litigants unable to risk an adverse fee award, no matter the strength of their case.[67]

Water Quality Assurance Act

The Water Quality Assurance Act (Act)[68] creates a private cause of action for all damages resulting from a discharge[69] or other condition of pollution covered under the Act if the discharge was not authorized pursuant to chapter 403, F.S., regarding environmental control.[70] The Act defines "pollution" as the presence on the land or in the waters of the state of pollutants in quantities that are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property, or that may unreasonably interfere with the enjoyment of life or property, including outdoor recreation.[71] "Pollutants" includes any commodity made from oil or gas, pesticides, ammonia, chlorine, and derivatives thereof, excluding liquefied petroleum gas.[72]

The Act imposes strict liability, meaning it is not necessary to show negligence; it is only necessary to show the prohibited discharge or other pollutive condition occurred.[73] The Act allows for joint and several liability and provides that the only defenses to such causes of action

[62] *See* Fla. Admin. Code Ch. 62-331.
[63] Section 373.4146(3), F.S.
[64] 40 C.F.R. s. 123.30.
[65] *Id*.
[66] 88 Fed. Reg. 55276, 55300 (Aug. 14, 2023).
[67] *Id*.
[68] *See* ss. 376.30-376.317, F.S.
[69] Section 376.301(13), F.S. "Discharge" includes, but is not limited to, any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, releasing, or dumping of any pollutant or hazardous substance which occurs and which affects lands and the surface and ground waters of the state not regulated by the Water Quality Assurance Act. *Id.*
[70] Section 376.313(3), F.S. Chapter 403, F.S., relates to environmental control, including pollution control, environmental regulation, water supply and water treatment plants, among other things.
[71] Section 376.301(37), F.S.
[72] Section 376.301(36), F.S.
[73] Section 376.313(3), F.S. Certain exceptions exist for suits involving petroleum storage systems, drycleaning facilities, or wholesale supply facilities. *See Irizarry v. Orlando Utilities Commission*, 393 F. Supp. 3d 1110, 1116 (M.D. Fla. 2019) (explaining that to state a plausible claim under s. 376.313(3), F.S., a plaintiff must allege: (1) a prohibited discharge or other pollutive condition occurred; and (2) damages).

are those specified in s. 376.308, F.S.:[74] an act of war, an act of government,[75] an act of God,[76] or an act or omission of a third party.[77]

However, the Act does not define the term "damages." In a 2010 case involving a claim arising under s. 376.313(3), F.S., the Florida Supreme Court applied a definition from a different section of chapter 376, F.S., which defines damages as "the documented extent of any destruction to or loss of any real or personal property, or the documented extent…of any destruction of the environment and natural resources, including all living things except human beings, as the direct result of the discharge of a pollutant."[78] In 2019, the Court receded from this definition, and held the meaning of "all damages" in s. 376.313(3), F.S., includes personal injury damages.[79]

III. Effect of Proposed Changes:

Section 1 amends s. 373.4131, F.S., regarding statewide environmental resource permitting rules. The bill provides that a side slope for a nonindustrial stormwater management system, in or adjacent to residential or urban areas that are accessible to the general public, must be designed with a horizontal-to-vertical ratio no steeper than 4:1 to a depth of at least two feet below the control elevation and must be stabilized with vegetation to prevent erosion and provide for pollutant removal.

The bill provides that a side slope for a nonindustrial stormwater management system, in or adjacent to residential or urban areas that are accessible to the general public, may be designed with a steeper 4:1 horizontal-to-vertical ratio if the slope incorporates adequate temporary and permanent erosion and sediment control best management practices. A system designed or authorized to be steeper than 4:1 must be fenced, be greenscaped, or have other barriers installed sufficiently to prevent accidental incursion into the system.

The bill provides that all side slope rules adopted by DEP, WMDs, or delegated local programs as of July 1, 2024, are superseded by this subsection and may be repealed without further rulemaking by publication of a notice of repeal in the Florida Administrative Register and subsequent filing of a list of the rules repealed with the Department of State.

Section 2 amends s. 376.313, F.S., regarding the nonexclusiveness of remedies and individual cause of action for damages under the Water Quality Assurance Act (Act).[80] Currently, this statute permits a person to bring a cause of action in a court of competent jurisdiction for *all*

[74] Section 376.313(3), F.S. Joint and several liability generally means liability that may be apportioned among two or more parties. *See* BLACK'S LAW DICTIONARY 997 (11th ed. 2019).
[75] This includes state, federal, or local acts of government, unless the person claiming the defense is a governmental body, in which case the defense is available only as against acts by other governmental bodies. Section 376.308(2)(b), F.S.
[76] This includes only unforeseeable acts exclusively occasioned by the violence of nature without the interference of any human agency. Section 376.308(2)(c), F.S.
[77] This does not include acts or omissions by an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship. An exception may apply when the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier or by rail. Section 376.308(2)(d), F.S.
[78] *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1221 (Fla. 2010); s. 376.031(5), F.S.
[79] *Charles L. Lieupo v. Simon's Trucking, Inc.*, 286 So. 3d 143, 147 (Fla. 2019).
[80] *See* ss. 376.30-376.317, F.S.

damages resulting from a discharge[81] or other condition of pollution covered by the Act if the discharge was not authorized pursuant to chapter 403, F.S., regarding environmental control.[82] In 2019, the Supreme Court of Florida held that "all damages" includes personal injury damages.[83] The bill amends the statute to permit causes of action for all damages *to real or personal property* directly resulting from a discharge or other condition of pollution covered under the Act and which was not authorized by any government approval or permit issues pursuant to *chapters 373, 376,* or 403, F.S., regarding water resources, pollutant discharge prevention and removal, and environmental control, respectively.

Currently, s. 376.313(3), F.S., provides that the only defenses to strict liability causes of action under this section are those specified in s. 376.308, F.S., namely, an act of war, an act of government,[84] an act of God,[85] or an act or omission of a third party.[86] The bill changes this language to provide that the only *strict-liability exceptions* to causes of action under this section include those specified in s. 376.308, F.S. *and* s. 376.82, F.S., regarding eligibility criteria and liability protection for the successful completion of a brownfield site rehabilitation agreement.

Section 3 creates an undesignated section of law requiring the holistic review of coastal permitting processes. The bill provides that the Legislature intends to do all of the following:

- Build a more resilient and responsive government infrastructure to allow for quick recovery after natural disasters, including hurricanes and tropical storms.
- Promote efficiency in state government across all branches, agencies, and other governmental entities and identify any area of improvement within each entity which allows for a quick and effective delivery of services.
- Seek out ways to improve the state's administrative procedures in relevant fields to build a streamlined permitting process that withstands disruptions caused by natural disasters, including hurricanes and tropical storms.

The bill requires DEP and each WMD to conduct a holistic review of their respective agency's current coastal permitting processes and other permit programs. The review must, at a minimum, include coastal construction control line permits; joint coastal permits; environmental resource permits; state-administered section 404 permits consistent with the terms of the U.S. Environmental Protection Agency's approval; and permitting processes related to water supply infrastructure, wastewater infrastructure, and onsite sewage treatment and disposal systems.

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[81] Section 376.301(13), F.S. "Discharge" includes, but is not limited to, any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, releasing, or dumping of any pollutant or hazardous substance which occurs and which affects lands and the surface and ground waters of the state not regulated by the Water Quality Assurance Act. *Id.*

[82] Chapter 403, F.S., relates to environmental control, including pollution control, environmental regulation, water supply and water treatment plants, among other things.

[83] *Charles L. Lieupo v. Simon's Trucking, Inc.*, 286 So. 3d 143, 147 (Fla. 2019).

[84] This includes state, federal, or local acts of government, unless the person claiming the defense is a governmental body, in which case the defense is available only as against acts by other governmental bodies. Section 376.308(2)(b), F.S.

[85] This includes only unforeseeable acts exclusively occasioned by the violence of nature without the interference of any human agency. Section 376.308(2)(c), F.S.

[86] This does not include acts or omissions by an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship. An exception may apply when the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier or by rail. Section 376.308(2)(d), F.S.

The bill provides that the purpose of these reviews is to identify areas of improvement and to increase efficiency within each process and program. Factors that must be considered in the review include all of the following:

- The requirements to obtain a permit.
- Time periods for review, including those of commenting agencies, and approval of a permit application.
- Areas for improved efficiency and decision-point consolidation within a single project's purpose.
- Areas of duplication across one or more permit programs.
- The methods of requesting a permit.
- Potential modifications to memoranda of agreements between the state and the Federal Government governing delegated or approved federal permitting programs, which modifications would improve the efficiency and predictability of the program's administration, including allowing consistent administration of a permit by a state or federal entity over the lifetime of a permitted project.[87]
- Any other factors that may increase the efficiency of a permitting process and may allow for improved storm recovery.

The bill provides that, by December 31, 2025, DEP and each WMD must provide their findings and proposed solutions in a report to the Governor and Legislature.

Section 4 provides an effective date of July 1, 2024.

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.

[87] Memoranda of agreements between DEP and federal agencies are available on DEP's website. *See* DEP, *Operating Agreements*, https://floridadep.gov/ogc/ogc/content/operating-agreements#federal (last visited Jan. 23, 2024).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

DEP and WMDs will likely incur costs related to the permit review process required in this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Department of Environmental Protection has proposed revisions to the stormwater rules within chapter 62-330 of the Florida Administrative Code. The proposed revisions do not include express requirements for the side slopes of stormwater ponds. The water management districts have existing rules regarding the design of pond side slopes that may be superseded by this bill.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 373.4131 and 376.313.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on January 29, 2024:

- Eliminates the provision entitling prevailing parties in challenges filed against the Department of Environmental Protection or water management district authorizations to costs and attorney fees.
- Clarifies that the side slope requirements in the bill apply to stormwater management systems that are accessible to the public, and that such systems that are authorized to be steeper than 4:1 may be greenscaped or have barriers other than fencing installed that sufficiently prevent accidental incursions.
- Extends, in connection with the holistic review of coastal permitting processes required by the bill, the time the department and each water management district has to provide the required report to the Governor and Legislature, from December 31, 2024, to December 31, 2025.

CS by Environment and Natural Resources on January 10, 2023:
The committee substitute changed the phrase "strict-liability exception defenses" to "strict-liability exceptions."

B. Amendments:

None.