

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB ANRS 12-02 Environmental Resource Permitting

SPONSOR(S): Agriculture & Natural Resources Subcommittee

TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Agriculture & Natural Resources Subcommittee		Deslatte	Blalock

SUMMARY ANALYSIS

Part IV of Chapter 373, F.S., establishes the Environmental Resource Permit (ERP) program, which is the primary tool used by the Department of Environmental Protection (DEP) and the Water Management Districts (WMDs) for preserving natural resources, fish and wildlife, minimizing degradation of water resources caused by stormwater discharges, and providing for the management of water and related land resources. The ERP program is a merging of much of DEP's dredge and fill permitting program, previously implemented under ss. 403.91 and 403.929, F.S., with the WMD's management and storage of surface waters (MSSW) permitting program under chapter 373, part IV.

ERP applications are processed by either the DEP or one of the state's WMDs in accordance with the division of responsibilities specified in operating agreements between the DEP and the WMDs. The agreements set out which entity has regulatory authority for implementing the ERP program based on the type of permitted activity. The division of responsibility ensures that applicants need only apply for permits from the DEP or the individual WMD, but not both.

The WMDs review all other ERP applications.

The bill directs the DEP, in coordination with the WMDs, to adopt statewide ERP rules that would be implemented by the DEP and the WMDs, without further rulemaking by the WMDs. The purpose of the rule is to improve statewide consistency in implementing criteria and standards for issuance of permits, permitting thresholds, permit types, application and reporting forms, procedural review, agency action, and noticing requirements. The rule is to be based on existing DEP and WMD rules, except to reconcile differences and conflicts that are not based on geographic differences in physical or natural characteristics.

The bill also provides that the DEP's Applicant's Handbook must contain, at a minimum, general program information, application and review procedures, a specific discussion of how environmental criteria are evaluated, and a discussion of stormwater quality and quantity criteria. The WMDs can continue to adopt rules governing the design and performance standards for stormwater quality and quantity, and the DEP can incorporate these design and performance standards by reference for use within the geographical jurisdiction of each WMD. When a stormwater management system is designed in accordance with the stormwater treatment requirements and criteria adopted by DEP or WMD rules, then that system design will be presumed to not cause or contribute to violations of applicable state water quality standards. When a stormwater management system is constructed, operated, and maintained for stormwater treatment in accordance with a valid permit or exemption, then there is a presumption that stormwater discharged from that system will not cause or contribute to violations of applicable state water quality standards.

Until the rules adopted become effective, existing rules adopted pursuant to part IV of chapter 373, F.S., remain in full force and effect. Existing rules that are superseded by the rules adopted pursuant to this section may be repealed without further rulemaking pursuant to s. 120.54, F.S.¹, by publication of a notice of repeal in the Florida Administrative Weekly and subsequent filing of a list of the rules repealed with the Department of State.

There does not appear to be a fiscal impact on state or local governments. According to the DEP, the ERP application fees would not be changed at this time. The permitting thresholds may cause some entities to have to obtain a permit where they currently do not, and other entities to not require a permit where they currently do.

¹ Chapter 120, F.S. is the Administrative Procedures Act.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Part IV of Chapter 373, F.S., establishes the Environmental Resource Permit (ERP) program, which is the primary tool used by the Department of Environmental Protection (DEP) and the Water Management Districts (WMDs) for preserving natural resources, fish and wildlife, minimizing degradation of water resources caused by stormwater discharges, and providing for the management of water and related land resources. The ERP program is a merging of much of DEP's dredge and fill permitting program, previously implemented under ss. 403.91 and 403.929, F.S., with the WMD's management and storage of surface waters (MSSW) permitting program under chapter 373, part IV.

The activities regulated under the ERP program include the construction, alteration, operation, maintenance, abandonment and removal of "stormwater management systems", "dams", "impoundments", "reservoirs", "appurtenant works", and "works". Individually and collectively these terms are referred to as "surface water management systems" or "systems". Common examples of surface water management systems which affect surface waters include ditches, canals, borrow pits, mines, buildings, parking lots, and roads with their associated culverts. The "dredging" and "filling" of wetlands or other surface waters is also regulated under the ERP program, just as it was under the MSSW program prior to the ERP consolidation. In addition to DEP, the "dredging and filling" of certain wetlands and navigable water bodies is also regulated by the U.S. Army Corps of Engineers and local governments. The term "filling" includes the placement or depositing of any material that is placed in wetlands or other surface waters. Dirt, sand, gravel, rocks, shell, pilings, and concrete are all considered fill if placed in wetlands. The term "dredging" refers to any type of excavation conducted in wetlands or other surface waters. Dredging includes digging, pulling up vegetation by the roots, leaving vehicular ruts, or any other activity that disturbs the soil.

Alteration of wetlands and other surface waters may have a detrimental impact on the environment. Such impacts can extend beyond the limits of the work site, affecting other public or private property. Polluted waters can be conveyed off-site through connecting water bodies. The elimination or degradation of wetlands causes a reduction of beneficial functions provided by the wetlands. A person proposing to construct a regulated surface water management system or a person seeking to dredge or fill wetlands must first receive an ERP.

ERP applications are processed by either the DEP or one of the state's WMDs in accordance with the division of responsibilities specified in operating agreements between the DEP and the WMDs. The agreements set out which entity has regulatory authority for implementing the ERP program based on the type of permitted activity. The division of responsibility ensures that applicants need only apply for permits from the DEP or the individual WMD, but not both. Generally, the DEP reviews permit applications that involve the following:

- 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.

To obtain an ERP, an applicant must provide reasonable assurance that:

- The construction or alteration of a surface water management system or “system” will not be harmful to the water resources of the district².
- The operation or maintenance of a surface water management system will not be harmful to the water resources of the district and will not be inconsistent with the overall objectives of the district³.
- The abandonment or removal of a surface water management system will not be inconsistent with the overall objectives of the district⁴.

In addition, proposed projects must meet all permit conditions and a public interest balancing test, pursuant to s. 373.414(1)(a), F.S. The public interest test is based on the following criteria:

- Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
- Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
- Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
- Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
- Whether the activity will be of a temporary or permanent nature;
- Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 367.061, F.S.; and
- The current condition and relative value of functions being performed by areas affected by the proposed activity.

The statutory standards described above, harm to the water resources and inconsistency with the overall objectives of the district, have been implemented by the DEP and WMDs through their rules. The rules of the WMDs are partly codified in the Florida Administrative Code, and partly contained in manuals published by the WMDs. The manuals of each of the WMDs are called either an Applicant’s Handbook or a Basis of Review. The relevant portions of each WMDs Applicant’s Handbook or Basis of Review are adopted as rules by reference in the Florida Administrative Code. Provisions of the St. Johns River Water Management District’s (SJRWMD) Applicant’s Handbook are adopted as rules by reference in Rule 40C–4.091. The other water management districts adopt provisions of their Applicant’s Handbooks or Basis of Review as rules by reference in Rules 40B–400.091(1), 40C–4.091, 40D–4.091, and 40E–4.091. These Applicant’s Handbooks provide detailed criteria and guidelines that permit applicants must follow, and that each WMD rely on when deciding whether to issue a permit or what conditions to place on a permit.

The ERP rules delineate the substantive conditions for issuance of a permit in two primary rule sections. One is entitled “Conditions for Issuance of Permits” and the other is “Additional Conditions for Issuance of Permits.” The criteria in the “Conditions for Issuance” rules were based primarily on the WMDs MSSW permitting rules in effect before the ERP rules became effective. There is no balancing of the criteria, and thus, an applicant must establish compliance with each criterion. The Suwannee River Water Management District (SRWMD), SJRWMD, Southwest Florida Water Management District (SWFWMD), and South Florida Water Management District (SFWMDD) have all adopted these rules; however, each WMD has certain variations⁵.

² Section 373.413(1), F.S.

³ Section 373.416(1), F.S.

⁴ Section 373.426(1), F.S.

⁵ Rules 40B-400.103, 40B-400.104, 40C-4.301, 40C-4.302, 40D-4.301, 40D-4.302, 40E-4.301, 40E-4.302, F.A.C.

The criteria in the rules entitled “Additional Conditions for Issuance of Permits” were based primarily on DEP’s dredge and fill permitting rules in existence before the ERP rules became effective. The rule criteria are derived from s. 373.414(1), F.S., detailed above.

Certain activities have been exempted by statute and rule from the need for obtaining an ERP under state law or by agency rule. To be exempt by rule, the activities have been previously determined by the agencies to be capable of causing no more than minimal individual and cumulative adverse impacts to wetlands and other surface waters. Examples of exempt activities include, but are not limited to:

- Construction, repair, and replacement of certain private docking facilities below certain size thresholds;
- Maintenance dredging of existing navigational channels and canals;
- Construction and alteration of boat ramps within certain size limits;
- Construction, repair, and replacement of seawalls and rip rap in artificial waters;
- Repair and replacement of structures; and
- Construction of certain agricultural activities.

In addition, the state has issued a number of “noticed general permits” for activities that are slightly larger than those that qualify for the above exemptions and that otherwise have been determined to have the potential for no more than minimal individual direct and secondary impacts. These include, but are not limited to:

- Construction and modification of boat ramps of certain sizes;
- Installation and repair of riprap at the base of existing seawalls;
- Installation of culverts associated with stormwater discharge facilities; and
- Construction and modification of certain utility and public roadway construction activities.

Anything that does not specifically qualify for an exemption or noticed general permit generally requires an ERP permit.

Each of the WMDs and the DEP operate under separate ERP rules and guidelines. This has resulted in different implementation and enforcement of the ERP criteria by the different WMDs causing confusion and inconsistency around the state for those applicants that seek permits from the various WMDs and DEP. The WMDs use a combination of the DEP’s environmental criteria and the WMD’s former MSSW rules, which were independently adopted by each WMD. After the four WMD’s adopted their own ERP rules, the DEP incorporated, by reference, each of the WMDs rules to be able to do DEP permitting activities in the WMDs. For the DEP to incorporate the WMD rules by reference, the DEP must undertake rulemaking. However, the DEP does not appear to be up to date on all WMD rules. Each of the WMDs have also established their own general permits for certain activities, which has led to the different WMDs having varying degrees of general permits and criteria resulting in an additional lack of uniformity throughout the state for applicants.

The ERP implementation in the Northwest Florida WMD was developed more recently than the other WMDs, with close coordination with the DEP, as directed by the Legislature. Pursuant to s. 373.4145, F.S., the Northwest Florida WMD is specifically authorized to implement the jointly developed rules without adoption. As a result, both the DEP and the WMD regulate ERPs under a unified rule. Any changes or amendments to the rules may be adopted by the DEP under normal rulemaking procedures. The Northwest Florida WMD may then begin implementing any such changes without rulemaking⁶.

Effect of Proposed Changes

The bill directs the Department of Environmental Protection (DEP), in coordination with the Water Management Districts (WMDs), to adopt statewide Environmental Resource Permitting (ERP) rules by

⁶ Senate Statewide Environmental Resource Permit interim report, 2011.

October 1, 2012, governing the construction, alteration, operation, maintenance, repair, abandonment, and removal of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works. The bill provides that the rules must provide for statewide, consistent regulation of these activities, and include, at a minimum:

- Criteria and thresholds for requiring permits.
- Types of permits.
- Procedures governing the review of applications and notices, duration and modification of permits, operational 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 for activities under part IV of chapter 373, F.S., to promote consistency. The DEP and WMDs are authorized to amend their fee rules to reflect these categories, but are not required to adopt identical fees for those categories.
- Application, notice, and reporting forms. To the maximum extent practicable, the DEP and WMDs shall provide for electronic submittal of forms and notices.
- An Applicant's Handbook that, at a minimum, contain general program information, application and review procedures, a specific discussion of how environmental criteria are evaluated, and discussion of stormwater quality and quantity criteria .

The bill also requires that the rules rely primarily on the existing rules of the DEP and the WMDs in effect immediately prior to the effective date of this section, except that the DEP can:

- Reconcile differences and conflicts to achieve a consistent statewide approach;
- Account for different physical or natural characteristics, including special basin considerations, of individual WMDs; and
- Implement additional permit streamlining measures.

The application of the rules are to continue to be governed by the first sentence of s. 70.001(12), F.S., which provides that no cause of action exists under the Bert Harris Private Property Rights Protection Act as to the application of any law enacted on or before May 11, 1005, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date.

Upon adoption of the rules, the WMDs and local governments delegated local pollution control program authority under s. 373.441, F.S.⁷, must implement the rules, but are not required to follow the rulemaking procedures under chapter 120.54, F.S.

A county, municipality, or local pollution control program that has a delegation of local pollution control program authority or proposes to be delegated of such authority under s. 373.441, F.S., must:

- Directly and without modification incorporate by reference and use the rules adopted to implement the provisions described above when reviewing and taking action on the department's behalf on a delegated permitting, compliance, or enforcement matter under this part.
- Amend its local ordinances or regulations to conform to the requirements of this bill within 12 months after the effective date of the rules adopted to implement the provisions described above.

⁷ Section 373.441, F.S., describes the process and requirements that must be met for a local government to obtain delegation of the state ERP program from the DEP.

The DEP and each local program with the authority to implement or seeking to implement a delegation of local pollution control program authority must identify and reconcile any duplicative permitting as part of the delegation.

Until the adopted rules required under this bill become effective, existing rules remain in full force and effect. Existing rules that are superseded by the rules adopted to implement the provisions in the bill can be repealed without further rulemaking under chapter 120, F.S., by publication of a notice of repeal in the Florida Administrative Weekly and subsequent filing of a list of the rules repealed with the Department of State.

The WMDs, with the DEP's oversight, can continue to adopt rules governing the design and performance standards for stormwater quality and quantity, and the DEP can incorporate the design and performance standards by reference for use within the geographical jurisdiction of each WMD. If a stormwater management system is designed in accordance with the stormwater treatment requirements and criteria adopted by the DEP or WMD rules, then that system design is presumed to not cause or contribute to violations of applicable state water quality standards. If a stormwater management system is constructed, operated, and maintained for stormwater treatment in accordance with a valid permit or exemption, then there is a presumption that stormwater discharged from that system does not cause or contribute to violations of applicable state water quality standards.

Regardless of the adoption of rules to implement the provisions in the bill, the following activities will continue to be governed by the rules of the DEP, the WMDs, and any delegated local program in effect before the effective date of such rules, unless the applicant elects review in accordance with the rules adopted pursuant to the provisions in the bill:

- The operation and maintenance of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works, or any combination thereof, legally in existence before the effective date of the rules adopted pursuant to this section if the terms and conditions of the permit, exemption, or other authorization for such activity continues to be met;
- Activities determined in writing by the DEP, a WMD, or a local government delegated under s. 373.441, F.S., to be exempt from, or not subject to, the permitting requirements of this part, including self-certifications submitted to the DEP, a WMD, or a delegated local government prior to the effective date of this section; and
- The activities approved in a permit issued pursuant to this part and the review of activities proposed in a permit application that is complete before the effective date of the rules adopted pursuant to this section. This paragraph also applies to any modification of the plans, terms, and conditions of the permit, including new activities, within the geographical area to which the permit applies; and to any modification that lessens or does not increase impacts. However, this paragraph does not apply to a modification that is reasonably expected to lead to additional or substantially different impacts.

Lastly, the bill provides that to ensure consistent implementation and interpretation of the rules adopted to implement the provisions in the bill, the DEP must conduct or oversee regular assessment and training of its staff and the staffs of the WMDs and local governments delegated local pollution control program authority.

B. SECTION DIRECTORY:

Section 1. Creates s. 373.4131, F.S.; requiring the DEP, in coordination with the WMDs, to adopt statewide environmental resource permitting rules for activities relating to the management and storage of surface waters; providing rule requirements; preserving an exemption from causes of action under the "Bert J. Harris, Jr., Private Property Rights Protection Act"; providing an exemption from the rulemaking provisions of ch. 120, F.S., for implementation of the rules by WMDs and delegated local programs; requiring counties, municipalities, and delegated local programs to amend ordinances and regulations within a specified timeframe to conform with the rules; providing for applicability, effect, and repeal of specified rules; authorizing WMDs to adopt and retain specified rules; authorizing the DEP to incorporate certain rules; providing a presumption of compliance for specified design, construction,

operation, and maintenance of certain stormwater management systems; providing exemptions for specified stormwater management systems and permitted activities; requiring the DEP to conduct or oversee staff assessment and training.

Section 2. Reenacts s. 70.001(12), F.S., relating the "Bert J. Harris, Jr., Private Property Rights Protection Act," for purposes of a cross-reference in s. 373.4131, F.S.

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

According to the DEP, the ERP permitting processes and procedures costs will likely be similar to those currently existing because the rules are expected to be based primarily on the existing rules of the DEP and the WMDs, except to reconcile differences and conflicts that are not based on geographic differences in physical or natural characteristics.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

According to the DEP, the ERP permitting processes and procedures costs will likely be similar to those currently existing because the rules are expected to be based primarily on the existing rules of the DEP and the WMDs, except to reconcile differences and conflicts that are not based on geographic differences in physical or natural characteristics.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to the DEP, existing application fees are not proposed to be changed at this time. The proposed rules are expected to be based primarily on the existing rules of the DEP and the WMDs, except to reconcile differences and conflicts that are not based on geographic differences in physical or natural characteristics. However, permitting thresholds, which currently differ throughout the state, are proposed to be unified to the maximum extent practical, which may cause some entities to have to obtain a permit where they currently do not, and other entities to not require a permit where they currently do.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill directs the DEP, in cooperating with the WMDs, to adopt a statewide ERP rule that would be implemented by the DEP and the WMDs without having to go through chapter 120, F.S. rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.