



# The Florida Senate

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Committee on Environmental Preservation and Conservation

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## STATEWIDE ENVIRONMENTAL RESOURCE PERMIT

### Issue Description

Environmental resource permitting under part IV of chapter 373, F.S., is the main regulatory program shared by the Department of Environmental Protection (DEP, department) and the Water Management Districts (WMDs). Currently, there is no statewide rule that governs all environmental resource permits (ERPs) issued by the department or the WMDs. They have differing interpretations and implementation rules. The differences between the department and the WMDs create procedural and practical inconsistencies for applicants in applying for and complying with ERPs in different jurisdictions.

### Background

#### Water Resources in Florida

Florida has a complex and diverse landmass encompassing two distinct climate zones. The subtropical zone, often called the temperate zone, covers most of the peninsula. The tropical zone extends from south of Lake Okeechobee to the Florida Keys.<sup>1</sup> This leads to a great diversity of environments and plant and animal life. Florida is characterized by its water: surface, ground and precipitation. The state receives an average of over 54 inches of rainfall a year.<sup>2</sup> Rainfall totals were down in 2010 in most areas in Florida. Only the Miami area received higher than average rainfall totals.<sup>3</sup> Florida also has 7,700 lakes, 50,000 miles of rivers and streams and over 700 springs, including the greatest concentration of first magnitude springs in the world.<sup>4</sup> Florida is also covered by vast wetlands, including the Everglades.

#### History of Water Resource Regulation in Florida

In the past, Floridians viewed wetlands as an impediment to development. They were considered worthless swamps that needed to be drained, filled and put to productive use. One of the main efforts in Florida to drain the swamps was the Central and Southern Florida Project's authorization in 1948.<sup>5</sup> The purpose of the project was to drain and manage seasonal flooding in the Everglades. Nationwide wholesale destruction of wetlands remained relatively unregulated until passage of the federal Clean Water Act (CWA) in 1972.<sup>6</sup> Florida's regulatory framework consisted of the Wetlands Resource Permit (WRP) program, the Management and Storage of Surface Waters (MSSW) permit program and the Sovereign Submerged Lands program.<sup>7</sup>

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<sup>1</sup> National Oceanic and Atmospheric Administration, National Weather Service, *JetStream - Online School for Weather*, <http://www.srh.noaa.gov/jetstream/global/climate.htm> (last visited Aug. 11, 2011).

<sup>2</sup> DEP, *Florida Drought Conditions*, <http://www.dep.state.fl.us/Drought/faq.htm#01> (last visited Aug. 11, 2011).

<sup>3</sup> Florida Dep't of Agriculture and Consumer Services, Florida Forest Service, *Year-to-Date Rainfall*, [http://www.fl-dof.com/fire\\_weather/forecast/ytd\\_rainfall.html](http://www.fl-dof.com/fire_weather/forecast/ytd_rainfall.html) (last visited Aug. 15, 2011).

<sup>4</sup> Thomas M. Scott, et al., *Bulletin NO. 66, Springs of Florida* (2004), available at [http://publicfiles.dep.state.fl.us/FGS/WEB/springs/introduction\\_and\\_acknowledgements.pdf](http://publicfiles.dep.state.fl.us/FGS/WEB/springs/introduction_and_acknowledgements.pdf) (last visited Aug. 15, 2011).

<sup>5</sup> South Florida Water Management District, *Comprehensive Everglades Restoration Plan, Everglades: A Brief History*, [http://www.evergladesplan.org/about/learn\\_everglades.aspx](http://www.evergladesplan.org/about/learn_everglades.aspx) (last visited Aug. 15, 2011).

<sup>6</sup> U.S. Environmental Protection Agency, *Watershed Academy Web, Introduction to the Clean Water Act*, <http://www.epa.gov/owow/watershed/wacademy/acad2000/cwa/> (last visited Aug. 15, 2011).

<sup>7</sup> DEP, *Florida State of the Environment -- Wetlands: A Guide to Living with Florida's Wetlands*, available at <http://www.dep.state.fl.us/water/wetlands/docs/erp/fsewet.pdf> (last visited Aug. 19, 2011).

The WRP program regulated dredging, filling and construction activities in, on or over waters of the state. It was originally authorized pursuant to the Warren S. Henderson Wetlands Protection Act in 1984, found in sections 403.91 - 403.929, F.S.<sup>8</sup> “Waters of the state” included natural and artificial water bodies and contiguous wetlands to such water bodies but excluded isolated wetlands. The only impacts to isolated wetlands covered by the WRP program were those affecting endangered or threatened species related or tied to regulated wetlands impacts. The WRP program was further limited by excluding water quantity as part of the permit review process. Only water quality, fish and wildlife habitat and other public interest factors were within its purview.<sup>9</sup>

The MSSW permit program was administered by the WMDs. The program regulated work on stormwater treatment systems, water attenuation systems, dams, impoundments, reservoirs, and other works, including agricultural and forestry-related activities. It was broader than the WRP program and covered water quality, water quantity and other environmental criteria for activities in uplands and wetlands, including isolated wetlands.<sup>10</sup>

The Sovereign Submerged Lands program is still in operation today and is administered jointly with the ERP program. Sovereign submerged lands are owned by the state and held in Trust for its citizens.<sup>11</sup> Activities affecting those lands require permission from the state, which is called proprietary authorization.<sup>12</sup> Sovereign submerged land leases and easements are the most common form of authorization.

### Current ERP Program in Florida

Florida’s water resources are regulated by the ERP program. The program covers virtually all alterations to the landscape, including all tidal and freshwater wetlands and other surface waters (including isolated wetlands also subject to U.S. Army Corps of Engineers jurisdiction) and uplands. The ERP program regulates dredging and filling in wetlands and other surface waters, stormwater runoff quality and quantity, including runoff resulting from alterations of uplands, and direct, secondary and cumulative impacts.<sup>13</sup> The program’s purview includes everything from construction of residential and commercial buildings in wetlands and uplands, dredging and filling in both wetlands and other surface waters (including maintenance dredging), construction of roads, and agricultural alterations that impede or divert the flow of surface waters. Certain permitting thresholds exist within the WMDs and exemptions may be granted by rule or statute.<sup>14</sup> Common exemptions exist for agricultural and silviculture activities. A permitting threshold is the level of impact that triggers the requirement to apply for a permit.

Department issuance of an ERP also constitutes a water quality certification or waiver of such under section 401 of the CWA.<sup>15</sup> In addition, issuance of an ERP in coastal counties constitutes a finding of consistency under the Florida Coastal Zone Management Program under Section 307 of the federal Coastal Zone Management Act.<sup>16</sup> Proposed projects must meet all permit conditions and a public interest balancing test. The test is based on weighing the following criteria:<sup>17</sup>

<sup>8</sup> DEP, *Environmental Resource Permitting (ERP) and Sovereign Submerged Lands (SSL) Rules*, <http://www.dep.state.fl.us/water/wetlands/erp/wetperm.htm> (last visited Aug. 15, 2011).

<sup>9</sup> *Supra* note 5, at 7.

<sup>10</sup> Section 373.414, F.S. (1992). *See also*, Dionè Carroll, *Secondary Impacts in Environmental Permitting: Yesterday, Today and Tomorrow* (Mar. 1998), The Section Reporter, available at [http://www.eluls.org/mar1998\\_carroll.html](http://www.eluls.org/mar1998_carroll.html) (last visited Aug. 19, 2011).

<sup>11</sup> Sovereign submerged lands are those lands that lie waterward of the ordinary high water line (fresh water) or mean high water line (tidal waters) beneath navigable waters. The state submerged land boundary extends three nautical miles (3.45 miles) into the Atlantic Ocean and three marine leagues (10.36 miles) into the Gulf of Mexico.

<sup>12</sup> DEP, *Florida State of the Environment – Wetlands: A Guide to Living with Florida’s Wetlands*, available at <http://www.dep.state.fl.us/water/wetlands/docs/erp/fsewet.pdf> (last visited Aug. 18, 2011).

<sup>13</sup> DEP, *Summary of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida* (2011), available at <http://www.dep.state.fl.us/water/wetlands/docs/erp/overview.pdf> (last visited Aug. 15, 2011).

<sup>14</sup> *Id.*

<sup>15</sup> *See* 33 U.S.C. s. 1341.

<sup>16</sup> *See* 16 U.S.C. s. 1456.

<sup>17</sup> Section 373.414(1)(a), F.S.

- Whether the regulated activity will adversely affect public health, safety, or welfare, or the property of others;<sup>18</sup>
- Whether the regulated activity will adversely affect the conservation of fish and wildlife, including endangered and threatened species or their habitats;
- Whether the regulated activity will adversely affect navigation or the flow of water, or will cause harmful erosion or shoaling;
- Whether the regulated activity will adversely affect fishing or recreational values or marine productivity in the vicinity of the activity;
- Whether the regulated activity will be temporary or permanent;
- Whether the regulated activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061, F.S.; and
- The current condition and relative value of the functions being performed by areas affected by the proposed regulated activity.

### ***General ERP Administration in Florida***

The DEP and the WMDs jointly implement the ERP program. It is independent and in addition to federal regulatory permitting programs. ERPs are regulated under part IV of chapter 373, F.S., and through individual WMD rules and guidance documents. The program was adopted in 1995 in all WMDs except for Northwest Florida. In 2006, the Legislature directed the Northwest Florida WMD and the DEP to jointly develop and implement the ERP program in two phases in the district.<sup>19</sup> Phase I became effective in October 2007 and Phase II in November 2010.<sup>20</sup> The Northwest Florida WMD is now fully implementing the ERP program with the DEP.

Because of the ERP program's joint regulatory structure, the department and the WMDs have executed individual operating agreements to administer the program. The agreements set out who has regulatory authority for implementing the ERP program based on the type of permitted activity. The division of responsibilities contained in the operating agreements ensure that applicants need only apply for permits from the DEP or the individual WMD, not both.<sup>21</sup> The Department generally reviews permit applications that involve:<sup>22</sup>

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

The WMDs review all other ERP applications.

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

The DEP and all WMDs except for Northwest Florida, due to its recent adoption of the program, operate under separate ERP rules. The ERP rules for these districts were developed by using a combination of the department's environmental criteria and the WMDs' former MSSW rules. MSSW rules were independently adopted by each

<sup>18</sup> This part of the test considers only environmental factors, not economic or social factors.

<sup>19</sup> Chapter 2006-228, Laws of Fla.

<sup>20</sup> Northwest Florida Water Management District, *Environmental Resource Permits*, <http://www.nwfwmd.state.fl.us/permits/permits-ERP.html> (last visited Aug. 16, 2011).

<sup>21</sup> DEP, *Environmental Resource Permitting (ERP) and Sovereign Submerged Lands (SSL) Rules*, <http://www.dep.state.fl.us/water/wetlands/erp/wmd.htm> (last visited Aug. 17, 2011). The webpage includes links to all five WMD operating agreements.

<sup>22</sup> *Id.*

WMD. The WMDs continued this process when developing ERP rules and each adopted similar but not identical ERP rules. After the adoption of the four districts' ERP rules, the DEP subsequently incorporated by reference each of the WMDs rules. If it had not done so, the DEP would not have been able to use the WMDs' new ERP rules for DEP permitting activities in the districts. In order to incorporate the WMD rules by reference, the DEP must undertake rulemaking. This dual rulemaking process for a WMD ERP rule or any amendments to a WMD ERP rule must be completed before the DEP may implement the rule or any changes thereof for activities in respective districts. Additionally, the DEP must adopt the WMDs' Applicant's Handbooks and Basis of Review and any amendments to those guiding documents. In fact, department staff has indicated that the DEP is not up to date on the most recent amendments to some WMD rules, Applicant's Handbook and Basis of Review documents because it must undertake rulemaking to incorporate the changes.<sup>23</sup> The WMD ERP rules are contained in Chapter 40 of the Florida Administrative Code. Each WMD is assigned a specific letter A-E.<sup>24</sup> The department also has its own ERP rule and a separate ERP noticed general permit rule, Chapters 62-343 and 62-341 of the Florida Administrative Code, respectively.

### ***ERP Administration in the Northwest Florida WMD***

In contrast to DEP's administration of ERPs with the other four WMDs, the department's ERP administration and implementation ERPs within the Northwest Florida WMD is more streamlined and efficient. In this district, the ERP program is operated under a single substantive and procedural ERP rule, noticed general permit rule and Applicant's Handbook.<sup>25</sup> The Legislature directed the DEP and the Northwest Florida WMD to jointly develop rules for the ERP program in the district. The DEP was further directed to initiate rulemaking to implement the ERP program. Unlike the other four WMDs, the Legislature specifically authorized the Northwest Florida WMD to implement the jointly developed rules without adoption.<sup>26</sup> Consequently, both the department and the Northwest Florida WMD regulate ERPs under a unified rule and Applicant's Handbook. Any changes or amendments to the rule or Applicant's Handbook may be adopted by the department under the normal rulemaking process. The Northwest Florida WMD may then begin implementing any such changes without rulemaking.

### ***ERP Rule Inconsistencies Between WMDs***

ERP rules are critical to each WMD and the DEP. They identify:<sup>27</sup>

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

The WMDs' ERP rules were developed from the WMDs' previous MSSW rules, which were all developed and adopted individually and evolved over time. The result is many of the WMDs' current ERP rules differ, sometimes dramatically. In other instances, the rule language is substantially similar, yet the Applicant's Handbook or Basis of Review differs in its interpretation of the rule. Among the WMDs, regulation of wetlands and other surface waters are essentially identical. Stormwater management (water quality) differs significantly in both actual rule language and interpretation between districts and has no clear relationship to the unique water, topographical or geological characteristics in each district. Water quantity and flood protection differ between districts but are directly related to each district's physical characteristics.<sup>28</sup>

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<sup>23</sup> Telephone interview with Shelley Yaun, Program Administrator, Water Resources Management, DEP, in Tallahassee, FL. (Aug. 15, 2011).

<sup>24</sup> See generally Chapter 40, F.A.C. Northwest Florida is designated as "A," Suwannee River as "B," St. Johns River as "C," Southwest Florida as "D" and South Florida as "E."

<sup>25</sup> See generally Rule 62-346, F.A.C.

<sup>26</sup> Section 373.4145(1), F.S.

<sup>27</sup> *Supra* note 24.

<sup>28</sup> Email from Jon Steverson, Special Counsel on Policy and Legislative Affairs, DEP (July 12, 2011) (on file with the Committee on Environmental Preservation and Conservation).

Stakeholders in the business community have indicated that the differences in stormwater management are the most inconsistent from district to district. These inconsistencies lead to vast differences in costs of stormwater management. For example, owners of large tracts of land spanning two districts could face different criteria and permitting requirements in each district for a contiguous parcel. In addition, large national or statewide companies with many Florida franchises or corporate stores deal with up to five different permitting requirements and application procedures and forms. As a result, a company that opens three nearly identical stores near each other but in different districts will likely have to submit three completely separate ERP applications and may face wholly different construction and compliance costs.<sup>29</sup> The DEP has indicated that ERP rules have become increasingly less consistent overtime, especially in regard to stormwater management.

There are also increasing opportunities for inconsistent interpretation and application of similar rules. One example is the implementation and administration of the Uniform Mitigation and Assessment Method (UMAM). Subsection 373.414(18), F.S., directed the DEP and WMDs, in cooperation with local governments and relevant federal agencies, to develop a statewide method to determine the amount of mitigation required for regulatory permits. The UMAM rule became effective in February 2004.<sup>30</sup> Although only the DEP was required to adopt the method by rule, it is now the sole means for all state and local government entities to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters. It is also used to determine how to debit and credit mitigation bank credits.<sup>31</sup> The regulated community has expressed concerns over interpretations of the UMAM by some of the WMDs. Although the method is supposed to result in uniform outcomes statewide, the method is applied differently in each WMD based in part on interpretations of the rule. In fact, legislation was introduced during the 2011 Regular Session of the Legislature to provide DEP clearer oversight authority to ensure consistency in statewide application. Large parts of the UMAM rule were included in the legislation to avoid inconsistency in interpretation and application.<sup>32</sup> The legislation passed the House of Representatives but was not heard in the Senate.

## Findings and/or Conclusions

The ERP program benefits Florida in many ways. It prevents stormwater pollution from entering lakes, streams and wetlands. The program is used to regulate various activities that affect surface waters including dredging and filling, surface water impoundment and drainage structures and construction of facilities, to name a few.

The DEP and all WMDs operate under agreements that delineate which activities the district is responsible for and those the department handles. In addition, the DEP and all but the Northwest Florida WMD administer the ERP program using rules, as amended, that date to 1995. Under those rules and statutory authority, each of the WMDs and the DEP must undertake separate rulemaking processes to adopt the same rules or amendments to those rules. This same regulatory structure also applies to Applicant's Handbooks and Basis of Review documents.

DEP staff has conveyed that the department is not fully up to date with all the amendments to rules and changes to Applicant's Handbooks and Basis of Review documents. This is due, in large part, to the inability of the DEP to implement rule amendments and other changes without rulemaking. In fact, the DEP is still using the 1995 rule from the South Florida WMD. Many of the South Florida WMD's rules have been updated since then, with several as recent as 2010.

In 1995, the ERP program was not authorized for the Northwest Florida WMD. This led to an odd regulatory structure whereby only one WMD was operating under the old dredge and fill and MSSW split. In 2006, the

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<sup>29</sup> *Supra* note 23.

<sup>30</sup> See Rule 62-345, F.A.C.

<sup>31</sup> *Id.*

<sup>32</sup> See HB 991 (2011 Reg. Session). See also PCS/SB 1404 (2011 Reg. Session).

Legislature directed the DEP and the Northwest Florida WMD to implement an ERP program. This was completed in 2010. The new ERP program in Northwest Florida directs the DEP to adopt rules under normal rulemaking. However, the district may implement those rules without having to undertake its own rulemaking. This regulatory structure simplifies ERP permitting for applicants. It also allows amendments and changes to rules and other documents to be seamlessly implemented by both the Northwest Florida WMD and the department.

The ERP rules for the original four districts were based on existing DEP criteria and MSSW rules. The four districts independently developed and adopted their own MSSW rules. As a result, when the districts developed and adopted their new ERP rules, some inconsistencies were unavoidable. As the programs have grown and matured, further inconsistencies have developed in both actual rule language and interpretation of rules. One of the most varied programmatic ERP areas is stormwater management.

Another example of inconsistent rule application, due to interpretation and not actual language, is the UMAM rule. The rule was developed to ensure statewide consistency to determine mitigation needed to offset effects to surface waters and wetlands. While all WMDs use the rule as developed, they each interpret the rule differently, which yields different outcomes for mitigation depending in which district the mitigated activity occurs.

In order to address current limitations in the ERP regulatory framework, DEP staff has indicated the department needs statutory authority to begin rulemaking in development of a single statewide ERP rule. Staff has also conveyed that the department is interested and willing to begin the process.

## Options and/or Recommendations

The Legislature can eliminate many inconsistencies between the WMDs, especially those not based on unique characteristics within each district. Legislation is needed to accomplish the necessary changes. If the Legislature chooses to direct DEP to develop and adopt a statewide ERP rule, the following recommendations should be considered:

- Direct the DEP in coordination with the WMDs to adopt a statewide ERP rule. The rule should also encompass applicable Applicant's Handbooks and Basis of Review documents. The Legislature should authorize the WMDs to implement the rule without undertaking rulemaking once it is adopted by the DEP.
- Direct that the rule include consistent statewide criteria for permit issuance, higher thresholds for permits and noticed general permits, permit types, application and reporting forms and noticing requirements. If appropriate for the statewide rule, the rule should contain sufficient flexibility for the WMDs for both Applicant's Handbooks and Basis of Review to address unique characteristics in each WMD.
- Provide that the rule be based on the department's and the WMDs' existing rules. The department should be authorized to reconcile differences, conflicts and inconsistencies between its rules and the WMDs' rules that are not based on unique characteristics within the districts.
- May direct the WMDs, in coordination with the DEP, to be the primary entities for developing water quality criteria within their respective districts for inclusion in the statewide rule. In order to accomplish this, the Legislature may have to appropriate funds for both the Suwannee River and Northwest Florida WMDs. The three larger WMDs should be able to absorb these costs.

Overall, if such legislative changes were made, the new regulatory structure would greatly reduce inconsistencies in both actual rule language and interpretation while maintaining the necessary variability between districts. It would also eliminate the need for redundant rulemaking and make adoption and implementation of amendments and other changes more streamlined and efficient. A statewide ERP rule would reduce the number of ERP rules needed by each district and potentially improve the public's understanding of ERPs and their requirements. It would likely lead to more predictable outcomes for the regulated community. The streamlined process would allow the DEP, in cooperation with the WMDs, to propose additional exemptions, higher permit thresholds and new noticed general permits. A statewide ERP rule also opens up the possibility for a statewide e-permitting system. The recommended changes would ease the regulatory burden on applicants, lessen that amount of time it

takes to process permit applications, reduce inconsistencies between the districts and the DEP, and continue to protect the environment.