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****AS PASSED BY THE LEGISLATURE****
CHAPTER #: 96-370, Laws of Florida

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
Water Policy, Select
FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 1887

RELATING TO: Air and water resources

SPONSOR(S): Select Committee on Water Policy and Representatives Pruitt and Ritchie

STATUTE(S) AFFECTED: Sections 373.019, 373.406, 373.414, 373.4145, and 403.031 Florida Statutes

COMPANION BILL(S): SB 638

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) Water Policy, Select YEAS 15 NAYS 0
- (2) Appropriations WITHDRAWN
- (3)
- (4)
- (5)

I. SUMMARY:

The bill provides procedures to be followed by the state Department of Environmental Protection (DEP) and the water management districts (WMDs) when processing applications for permits under part IV, chapter 373, Florida Statutes (F.S.) (related to management and storage of surface waters (MSSW)). Specifically, the bill provides a new point of entry for administrative challenges to requests for additional information by the DEP or WMDs, as applicable, that is not currently available in chapter 373, F.S., or under section 120.60, F.S. It includes provisions for review of some MSSW permit applications for consistency with the federally approved Florida Coastal Management Program. The bill deletes references to the Land Use and Water Planning Task Force from sections 373.019 and 403.031, F.S. It amends section 373.406, F.S., to authorize exemptions from MSSW permits for applicants who propose projects that would cause little or no impact on water resources. The bill amends section 373.414, F.S., to exempt certain applicants from wetlands delineation standards set forth in section 373.4211, F.S.

The bill also includes two sections related to air pollution control. First, the bill limits the authority of the DEP to enter into interstate agreements or to amend its rules governing the transport of ozone precursor pollutants. Second, the bill permanently prohibits local governments from issuing permits regulating certain types of major industrial air pollution sources.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

An applicant for a permit under part IV, chapter 373, F.S., must follow procedures set out in section 120.60, F.S., the provision of the Florida Administrative Procedure Act which governs licensing, permitting and other adjudicatory administrative proceedings. Section 120.60, F.S., provides deadlines for processing permit applications and procedures for administrative challenges subsequent to final action on permit applications. Section 120.60, F.S., requires an agency to have taken proposed or final action on a permit application prior to administrative challenge.

Prior to enactment of chapter 93-213, Laws of Florida, the former Department of Environmental Regulation (DER), pursuant to the Henderson Wetlands Protection Act of 1984, permitted certain regulated activities in wetlands. The DER's wetlands jurisdiction applied to waters of the state and associated wetlands. Applications for wetlands permits were reviewed by DER pursuant to the provisions of chapter 403, F.S., which contained language regarding agency requests for additional information identical to the language of HB 1887.

Under part IV of chapter 373, F.S., the WMDs have jurisdiction to regulate the management and storage of surface waters, including stormwater control. The WMDs also have specific authority to regulate isolated wetlands. Under chapter 373, F.S., there are no specific procedural exceptions to the requirements set out in section 120.60, F.S.

In 1993, the Legislature consolidated the relevant sections of the Henderson Wetlands Protection Act into part IV of chapter 373, F.S., in order to streamline the permitting functions related to stormwater control, the management and storage of surface waters, and wetlands resource management. In doing so, all wetlands permitting is conducted pursuant to chapter 373, F.S., which does not provide specifically for challenges to requests for additional information.

Several other sections of chapter 373, F.S., have been amended to conform with the permit streamlining changes but retain a few requirements that may be administratively problematic. Among those are sections 373.414, F.S., which provides additional criteria for activities proposed in surface waters and wetlands, and section 373.4145, F.S., which provides an interim MSSW permitting program for the Northwest Florida Water Management District.

The Legislature enacted section 380.23, F.S., to ensure that Federal activities are consistent with state's federally approved coastal management program. Under those provisions, when a proposed federal action, including applications for certain federal permits, is located in a coastal county, the action must be reviewed by the appropriate state agencies to determine whether the proposed action is consistent with the Florida Coastal Management Program and other state laws.

In 1993, the Legislature created the Land Use and Water Planning Task Force to recommend ways the state could better coordinate land and water use planning and policy. The task force issued its final report in late 1994 and has since disbanded. Provisions creating the task force were in sections 373.019 and 403.031, F.S. Section 373.406, F.S., exempts specific activities from MSSW permitting requirements. The section includes authorization for WMDs to issue general permits instead of the more extensive MSSW permits for projects that will have minimal environmental impacts.

Major air pollution sources are regulated pursuant to the provisions of section 403.0872, F.S. This section requires operating permits for major air pollution sources defined in 42 U.S.C. §7412(a)(a). Major air pollution sources include many industrial manufacturing facilities, including pulp and paper mills, chemical plants and food processing facilities. Subsection 403.0872 (14), F.S., prohibits local governments from issuing permits regulating certain types of major industrial pollution sources, including sugar cane processing facilities, chemical products facilities, and paper and paper product facilities. The subsection provided that this limit of local government authority would be repealed on July 1, 1997.

B. EFFECT OF PROPOSED CHANGES:

This bill grants the WMDs or the DEP, as applicable, 30 days after receipt of a permit application to request submittal of additional information, if necessary. It also grants an applicant a mechanism to administratively challenge such a request under certain circumstances, prior to a final action on the permit by the WMD or DEP. The bill requires the WMDs or DEP to approve or deny all permit applications within 90 days of the receipt of the original application, the last item of additional material or the applicant's written request to begin processing the permit application.

CS/HB 1887 creates section 373.428, F.S., providing that when an activity regulated under MSSW provisions, including activities requiring federal permits, which is subject to a federal consistency review pursuant to section 380.23, F.S., the approval or denial of an MSSW permit shall constitute the state's determination of consistency with the state's federally approved coastal management program. This will, in effect, require DEP or the applicable WMD to conduct a consistency review for any MSSW permit application associated with activities subject to a federal consistency review pursuant to section 380.23, F.S., when the activity occurs in a coastal county. Under the bill, an agency that determines an application is not consistent with the federally approved state program is required to be an indispensable party to any administrative or judicial challenge and will be liable for damages and other costs incurred by the applicant, should any be awarded.

The bill amends section 373.406, F.S., to allow the DEP or the WMDs to exempt from MSSW permitting requirements proposed projects that will have inconsequential or de minimis impacts on water resources. The DEP or WMDs are authorized to determine on a case-by-case basis whether an activity constitutes an inconsequential or de minimis impact. The bill amends section 373.414, F.S., to exempt until May 1, 1998 any activities within the areas included in the petitions for declaratory statements of the extent of wetlands, submitted to the appropriate WMD prior to June 1, 1994, from wetlands delineation criteria enacted by the Legislature in 1994. The bill also amends section 373.4145, F.S., which provides an interim MSSW permitting program for the Northwest Florida Water Management District, to exempt MSSW permit applications pending on June 15, 1994 from the new wetland delineation criteria.

CS/HB 1887 also includes two amendments to air pollution control laws. First, the bill limits the authority of the DEP to enter into interstate agreements or to amend its rules governing the transport of ozone precursor pollutants. The bill prohibits the DEP from entering into interstate agreements related to the transport of ozone precursor pollutants without prior legislative approval. In addition, the DEP cannot amend its rules based on the recommendations of the Ozone Transport Assessment Group or other unofficial study groups, without prior legislative approval. The DEP may amend its rules governing the transport of ozone precursor pollutants if the rule implements a recommendation of

the US EPA, or is otherwise not based on the recommendations of an unofficial study group.

Second, CS/HB 1887 amends subsection 403.0872 (14), F.S. to eliminate the repealer provision. Consequently, the bill permanently prohibits local governments from issuing operation permits regulating certain types of major industrial air pollution sources, including sugar cane processing facilities, chemical products facilities, and paper and paper product facilities.

C. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends section 373.019, F.S., to delete language creating the Land Use and Water Planning Task Force.

Section 2. Amends section 373.406, F.S., to allow the DEP or the WMDs to exempt from MSSW permit requirements proposed activities that have inconsequential or de minimis impacts on water resources. The DEP or WMDs are authorized to determine on a case-by-case basis whether an activity constitutes an inconsequential or de minimis impact.

Section 3. Amends subsection 373.414 (12), F.S., to limit the time available to construct MSSW projects submitted to the WMDs prior to 1994 and to establish other time limitations and exemptions for certain permits applied for prior to June 1, 1994.

Section 3 also amends subsection 373.414 (13), F.S., to allow activities within areas included in petitions for declaratory statement of the extent of wetlands pending review by DEP on June 1, 1994, to be governed by sections 403.91 - 403.929 F.S. (1984), as amended, until May 1, 1998. This provision effectively exempts projects within these areas subject to a petition, from the wetlands delineation criteria enacted by the Legislature in 1994 until May 1, 1998. After this date any new activities would be governed by the laws and rules in effect at that time.

Section 4. Creates section 373.4141, F.S., to grant the WMDs or the DEP, as applicable, 30 days after receipt of a permit application to request submittal of additional information, if necessary. Grants an applicant a mechanism to administratively challenge such request if the applicant believes the request is not authorized by law or rule. Provides a 30-day time frame in which the DEP or WMDs, as applicable, may request specific information, after the applicant has supplied additional information. Provides an applicant need not answer this last set of questions and provides that the applicant can require the WMDs or DEP, as applicable, to proceed in processing the permit application.

Section 5. Amends section 373.4145, F.S., to allow certain applications for MSSW permits in the Northwest Florida Water Management District submitted prior to June 15, 1994, to be reviewed under wetlands delineation provisions existing at that time, instead of the provisions currently in section 373.4211, F.S.

Section 6. Creates section 373.428, F.S., to require the WMDs or DEP to review MSSW permit applications associated with activities subject to a federal consistency review, defined in section 380.23, F.S., for consistency with the federally approved Florida Coastal Management Program. This section also makes any agency finding an activity to be inconsistent with the Florida Coastal Management Program, an indispensable party to any litigation challenging the inconsistency determination, and imposes liability on the agency for damages and other costs incurred by the applicant, should any be awarded.

Section 7. Amends section 403.031, F.S., to delete language creating the Land Use and Water Planning Task Force.

Section 8. Amends subsection 403.061 (21), F.S., to limit the authority of the DEP to enter into interstate agreements or to amend its rules governing the transport of ozone precursor pollutants. This section prohibits the DEP from entering into interstate agreements related to the transport of ozone precursor pollutants without prior legislative approval. Furthermore, the DEP cannot amend its rules based on the recommendations of the Ozone Transport Assessment Group or other unofficial study groups, without prior legislative approval. The DEP may amend its rules governing the transport of ozone precursor pollutants if the rule implements a recommendation of the US EPA, or is otherwise not based on the recommendations of an unofficial study group.

Section 9. Amends chapter 95-295, Laws of Florida, to correct an incorrect internal cross-reference.

Section 10. Amends subsection 403.0872 (14), F.S., to eliminate the repealer provision. Consequently, the bill permanently prohibits local governments from issuing operation permits regulating certain types of major industrial air pollution sources, including sugar cane processing facilities, chemical products facilities, and paper and paper product facilities.

Section 11. Provides that the bill becomes effective upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

The language contained in section 4 of CS/HB 1887 has been adopted by the DEP as rule 62-4.055, Florida Administrative Code (FAC), which governs the agency's permitting processes. Therefore, the language of this bill should not affect agency practices and should have no fiscal impact.

Because the language contained in section 4 of the bill pertaining to administrative challenges prior to final action by the WMDs on a permit application is not contained in the WMDs' permit processing rules (found in sections 40A-E, FAC), the WMDs may incur additional legal costs in defending greater numbers of administrative challenges.

The WMDs' review of some MSSW permits for consistency with the federally approved Florida Coastal Management Program should only create minimal additional costs. However, the provision requiring agencies which find an activity to be inconsistent with the Florida Coastal Management Program to be indispensable parties to any related administrative or judicial proceedings will increase total state costs of defending challenges by requiring additional state agencies to be parties to the litigation. The provision shifting damages and attorneys' fees and costs will not

increase total costs to state agencies because the bill only shifts liability for the attorney's fees between state agencies.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Private sector intervenors or parties to an administrative action other than permit applicants may face additional costs if the numbers of additional administrative proceedings increases as a result of the additional point of entry provided by section 4 of the bill. Applicants may face additional legal costs in challenging determinations that their proposed projects are not consistent with the federal Florida Coastal Management Program.

2. Direct Private Sector Benefits:

Permit applicants may realize a faster process to decision on permit applications through the ability to challenge agency information requests. This could act to reduce permitting costs. Applicants whose proposed MSSW projects will have little or no impact on water resources may save costs by receiving an exemption from MSSW permitting requirements.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

The WMDs' permitting processes are set out in sections 40A-E, FAC. While the WMDs' rules include many of the provisions of section 4 of the bill, they do not include provisions for administrative challenges to requests for additional information. The rules currently

include provisions for administrative challenges only after proposed or final agency decisions on permit applications. The fiscal impact of any newly allowed administrative challenges on the WMDs' budgets will depend on the number of challenges filed.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Not applicable.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Not applicable.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

Not applicable.

V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

HB 1887 was amended in the Select Committee on Water Policy and made a committee substitute. Both amendments were technical and did not change the meaning, effect or intent of the original bill. Both amendments change language in the bill to make the wording consistent with language already in statute.

Several amendments to CS/HB 1887 were adopted on the House floor which made substantive changes to the bill. First, Section 3 of the bill was amended to allow activities within areas included in petitions for declaratory statements of the extent of wetlands pending review by DEP on June 1, 1994, to be governed by sections 403.91 - 403.929, F.S. (1984), as amended, until May 1, 1998. This provision effectively exempts projects within these areas subject to a petition, from the wetlands delineation criteria enacted by the Legislature in 1994.

Second, section 8 of the bill was amended to limit the authority of the DEP to enter into interstate agreements or to amend its rules governing the transport of ozone precursor pollutants. The amendment prohibits the DEP from entering into interstate agreements related to the transport of ozone precursor pollutants without prior legislative approval. Further, the DEP cannot amend its rules based on the recommendations of the Ozone Transport Assessment Group or other unofficial study groups without prior legislative approval. The DEP may amend its rules governing the transport of ozone precursor pollutants if the rule amendment implements a recommendation of the US EPA, or is otherwise not based on the recommendations of an unofficial study group.

Third, section 10 of the bill was added to eliminate the repealer provision of subsection 403.0872 (14), F.S. The amendment permanently prohibits local governments from issuing operation permits regulating certain types of major industrial pollution sources, including sugar cane processing facilities, chemical products facilities, and paper and paper product facilities.

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VII. SIGNATURES:

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