



Jeb Bush
Governor

Department of Environmental Protection

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Colleen M. Castille
Secretary

October 3, 2005

The Honorable Allan Bense
Speaker, House of Representatives
Room 420, The Capitol
402 S. Monroe Street
Tallahassee, Florida 32399-1300

Dear Speaker Bense:

Enclosed is the Department of Environmental Protection's (DEP) report on streamlining the federal and state wetland permitting programs. The Florida Department of Environmental Protection is fully committed to implementing the most effective, efficient, and comprehensive wetlands protection in the United States. While we have pursued streamlining with the U.S. Army Corps of Engineers for years, this report addresses the particular directives of House Bill 759, passed during the 2005 Legislative Session.

House Bill 759 directs the Department to develop a strategy to consolidate, to the maximum extent practicable, federal and state wetland permitting and secure complete authority over dredge and fill activities impacting 10 acres or less of wetlands and other surface waters, including navigable waters, through the environmental resource permitting program.

Our report evaluates "assumption" of the federal program and expansion of the State Programmatic General Permit (SPGP). Assumption—the authority to issue state permits in lieu of federal permits—would require changes to the federal Clean Water Act, the federal Rivers and Harbors Act, and Florida law. We recommend further investigation of these issues with the Governor's Office, leadership in the Legislature, and Florida's Congressional delegation. An expanded SPGP can be pursued without changes to federal law. Under this option, the department issues permits on behalf of the federal government for projects of a defined and limited impact.

Florida is committed to streamlining state and federal wetlands permitting programs to increase protection for our sensitive natural resources. To meet that goal and the specific objectives of House Bill 759, DEP recommends pursuing a greatly expanded SPGP in the short-term, which will not require legislative action, while also pursuing federal and state legislative actions to obtain assumption for the long-term.

"More Protection, Less Process"

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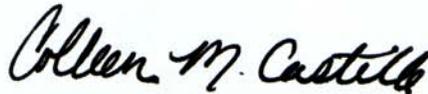
The Honorable Allan Bense

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Florida has among the most advanced wetlands protection programs in the United States, but we can do more. Streamlining federal and state permitting would enhance Florida's ability to preserve its unique water resources and wildlife habitats, increase public confidence and be more user friendly for permit applicants. I appreciate your consideration of this report and look forward to working to implement its recommendations.

Sincerely,



Colleen M. Castille
Secretary

CMC

Enclosures

cc: Senator Paula Dockery
Representative Trudi Williams
Representative Mitch Needelman
Mr. Michael Kliner, House Environmental Regulation Committee
Mr. Wayne Kiger, Senate Environmental Preservation Committee



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Department of Environmental Protection

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Tallahassee, Florida 32399-3000

Colleen M. Castille
Secretary

October 3, 2005

The Honorable Tom Lee
Florida Senate President
Room 404, Senate Office Building
402 S. Monroe Street
Tallahassee, Florida 32399-1100

Dear President Lee:

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**Consolidation of State and Federal Wetland Permitting Programs
Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)
Florida Department of Environmental Protection
September 30, 2005**

Consolidation of State and Federal Wetland Permitting Programs September 30, 2005

Introduction

The Florida Department of Environmental Protection is fully committed to implementing the most effective, efficient, and comprehensive wetlands protection in the United States. Florida's efforts to streamline wetlands permitting go back to 1992, when DEP first attempted to obtain the authority to administer some or all of the federal wetlands regulatory program, including testimony before the United States Congress.

Section 3 of House Bill 759 (chapter 2005-273, Laws of Florida, attached), requires the Department of Environmental Protection (DEP) to report on the federal and state statutory changes that would be required to consolidate, "to the maximum extent practicable," federal and state wetland permitting programs. The Legislature expresses its intent in the law that, "all dredge and fill activities impacting 10 acres or less of wetlands or waters, including navigable waters, be processed by the state as part of the environmental resource permitting program implemented by the department and the water management district."

This report, required by section 3 of chapter 2005-273, Laws of Florida (House Bill 759 during the 2005 Legislative Session), identifies options and outlines necessary next steps to streamline the federal and state wetlands permitting programs. The report analyzes two options: 1) "assumption" of the federal permitting program and 2) an expanded State Programmatic General Permit (SPGP).

Background: Federal and State Wetland Permitting Authorities

The **federal wetland regulatory program** is administered under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. The Rivers and Harbors Act is focused on maintaining navigable waters while the Clean Water Act governs the discharge of potential pollutants, including fill, into the nation's waters. The scope of federal wetlands authority has historically been broad, encompassing all wet landscapes. However, the U.S. Supreme Court's SWANCC (Solid Waste Agency of Northern Cook County) decision in January 2001 has narrowed this scope uncertainly, removing some isolated and headwaters wetlands from Clean Water Act jurisdiction, and confused the issues relative to navigable waters.

The U.S. Army Corps of Engineers (COE) administers the permitting provisions of both federal laws, with Environmental Protection Agency (EPA) oversight, in effect combining Clean Water Act and Rivers and Harbors Act permits into a single action. The Clean Water Act provides two mechanisms by which a state may obtain authority to issue permits under its provisions (the Rivers and Harbors Act has no mechanism to grant state authority):

- **Assumption**, whereby the state permit replaces the federal Clean Water Act permit. As noted, there is no similar provision relating to the Rivers and Harbors Act. Because all coastal waters and a significant number of inland waters in Florida are deemed navigable, they would be excluded from state assumption under current federal law with respect to issues bearing on federal navigation concerns.

- **State Programmatic General Permit**, whereby the COE issues an SPGP to a state that effectively authorizes the state to issue Clean Water Act and most Rivers and Harbors Act permits on the COE's behalf. The COE also could authorize a state to issue Regional General Permits on its behalf.

Florida's wetland regulatory program is administered primarily under part IV of chapter 373, F.S., and is commonly referred to as the Environmental Resource Permit (ERP) program. The single ERP permit addresses dredging and filling in all wetlands and other surface waters, including waters no longer subject to federal jurisdiction under the SWANCC decision. It also covers activities that impact the flow of water, such as stormwater, across the surface of the land.

In Northwest Florida, the state program regulates dredging and filling only in connected wetlands and other surface waters, excluding isolated wetlands, and regulates stormwater quality (but not quantity, i.e., flooding) using rules from the 1970s. The boundaries of wetlands and other surface waters everywhere in Florida are determined by the statewide delineation rule (chapter 62-340, F.A.C.), which is binding on all levels of Florida government.

Assumption

Effective consolidation of federal and state wetland permitting requires amendments to the federal Clean Water Act, Rivers and Harbors Act, and state law. The necessary changes are outlined below, while the specific amendatory language is included in the attachment.

Federal statutory changes

- Remove the prohibition that prevents states from assuming the entire Section 404 program so that DEP could assume the program for wetlands and surface waters throughout Florida.
- Change the Rivers and Harbors Act to allow state assumption of the Section 10 navigation-related permits.
- Remove the five-year limitation on state-issued Section 404 permits. There is no similar limitation on the COE's issuance of Section 404 permits and no compelling reason to limit states in this manner. Florida law allows issuance of up to 25-year permits, with an important five-year review cycle, which is critical to planning and permitting many large-scale multi-year developments.
- Delete the federal "clean break" provision, which requires transfer of all pending applications to the state at the time of assumption and instead require the COE to finish processing such permits. The wholesale transfer of pending applications could overwhelm the state, resulting in delays for applicants while state personnel became familiar with the applications (all the while accepting new applications). This change would make the state responsible only for applications received after assumption is approved.
 - This change to the "clean break" provision would be necessary unless substantial staff resources were provided to or secured by DEP and the water management districts in advance of assumption to manage the transferred federal permitting workload, which would amount to more than 9,700 permitting actions based on the number of actions in process at the COE at the present time, which is representative of the workload at any one time. (It is roughly estimated that 3,000

permit actions would transfer to DEP with the remaining 6,700 transferring to the water management districts.) These resources would be over and above the basic resources necessary to implement the assumed program, with its additional federal responsibilities, into the future.

- Require the COE to continue monitoring, enforcing and issuing modifications to previously issued COE permits, including Clean Water Act general permits. Retaining COE responsibility for these activities would afford applicants better continuity and prevent an excessive workload burden on the state.
 - This change would be necessary unless substantial staff resources were provided to the DEP and water management districts in advance of assumption to address the transferred federal compliance and enforcement workload relative to the permits issued by the COE over the last 30 years. These resources would be over and above the basic resources necessary to implement the assumed program, with its additional federal responsibilities, into the future.
- Allow the EPA Administrator, when considering authorizing state assumption, to discount minor differences between the federal and state programs as long as waters of the United States would be equally well protected. (For example, Florida’s wetland methodology is ecologically equivalent, in the field, to use of the COE’s 1987 wetland manual and should be accepted as such.)

State statutory changes – To assume the federal program the following changes are needed to state law, generally to part IV of chapter 373, F.S.

- Provide DEP, in its role as Florida’s lead state agency for wetland permitting, the authority to modify, revoke or rescind permits issued by the water management districts or any delegated local program. Such a provision previously existed in Florida law but was repealed by the Legislature in 1994; it would need to be recreated in statute.
- Amend Florida law to contain a clear "recapture" provision, equivalent to that contained in the Clean Water Act, addressing agriculture activities that convert wetlands to upland; and amend Florida law to be consistent with the Clean Water Act to exempt from permitting only agriculture closed systems—those that do not discharge to surface waters—constructed from uplands.
- Amend Florida law to explicitly address the same federal project criteria contained in 404(b)(1) Clean Water Act guidelines. (As a practical matter, Florida’s review criteria are quite similar.) For example, state law would have to be revised to include consideration of project alternatives, including a “no project alternative,” and account for economic considerations in the review of alternatives.
- Amend Florida law to eliminate the automatic “default” issuance of permits that are not processed within the state’s generic 90-day permitting clock. The Clean Water Act prohibits default permits. This same change has been made for other federally delegated or authorized programs; and, in reality, very few permits are issued by default.
- Revise the dock exemptions in s. 403.813(2), F.S., to account for water depth, endangered species protection, protection of on-site submerged resources, and other requirements of the COE and federal resource agencies or replace them with General Permits that contain the appropriate requirements.

Additional considerations

- Federal funding to the state or additional state funding would be needed to support the program.
- To ensure a truly streamlined process, amendments may be needed to the federal Endangered Species Act. Under Section 7 of the federal Endangered Species Act, impacts to listed species are addressed through a consultation process that results in "take" issues being addressed in the COE permit at the federal District level. If a state assumes the Section 404 program, this consultation process would no longer be available and applicants whose projects involve an actual or potential "take" would be required to apply to the applicable federal resource agency Regional office for authorization under Section 10 of the federal Endangered Species Act. The Section 10 process is substantially more time consuming than the process under Section 7.

State Programmatic General Permit

The COE may issue an SPGP to authorize a state to issue Clean Water Act and Rivers and Harbors Act permits in limited circumstances:

- An SPGP is limited to similar classes of projects that have minimal individual and cumulative impact. For example, an SPGP may cover boat ramp construction as a specific activity but may not cover the mere act of placing fill where no consideration is given to what activity is supported by that fill. Because projects authorized under the SPGP are limited to minimal individual and cumulative impacts, the complexity and physical size of projects are limited as well. Typical wetland impacts allowed in SPGPs range from 5,000 square feet to one acre. The Maryland SPGP at one time allowed impacts of up to three acres in tidal waters and five acres in non-tidal waters, but was revised in 2001 to reduce the amount of authorized impact.
- The SPGP authorizes the issuance of federal permits, which means federal resource agency coordination requirements remain. The net effect is that individual permits deemed likely to result in impacts to listed species must be forwarded to the COE for coordination with federal resource agencies. This coordination is often lengthy and cannot be accommodated within Florida's chapter 120, F.S., time clocks; therefore, the state does not take final action under the SPGP but must elevate the permit to the COE.

Florida's Experience with SPGP

The COE issued a pilot SPGP to the State of Florida covering Duval, Nassau, Clay, and St. Johns counties in August, 1995 (SPGP I). This SPGP was limited to four categories of activities: docks, piers, and marinas; shoreline stabilization; boat ramps; and maintenance dredging. The pilot SPGP was expanded to the balance of DEP's Northeast District in September 1996 (SPGP II) and to the areas of the other DEP Districts, except Northwest Florida and Monroe County, in September 1997 (SPGP III). This authorization included the addition of most state exemptions and noticed general permits. SPGP III remains in effect until December 2005 and covers a variety of activities, including:

- Construction of shoreline stabilization activities, such as riprap and seawalls; groins, jetties, breakwaters, and beach nourishment/re-nourishment are excluded;
- Boat ramps and launch areas and structures associated with such ramps or launch areas;
- Docks, piers, marinas, and associated facilities;

- Maintenance dredging of canals and channels;
- Most regulatory exemptions; and
- ERP noticed general permits.

Applications received for these activities by DEP are reviewed to determine if they meet all SPGP conditions. For those that meet the conditions, DEP's issuance of a permit constitutes issuance of the corresponding federal Clean Water Act and Rivers and Harbors Act permit. DEP forwards a copy of all applications that do not meet the SPGP conditions, or meet certain "kick-out" provisions, to the COE. The COE may return the permit application to DEP for processing, with or without additional federal conditions, or retain and process it at the federal level.

DEP has issued more than 28,000 authorizations under SPGPs I through III. However, federal endangered species coordination, including that required for manatees, has resulted in a substantial decline (1/3 or more) in the number of SPGP authorizations issued by the state over the last five years. It is worthwhile to note that any increase in the scope or volume of the current SPGP will require additional state resources to implement due to the additional actions and review criteria that are not part of Florida's normal ERP process and the corresponding increase in DEP's ERP permit workload (more than 50% since the late 1990s).

Recently the COE issued a public notice to replace SPGP III with a revised SPGP IV that substantially reduces the scope of projects covered based on the stated rationale that threatened and endangered species and fish habitat issues are consuming an unacceptable amount of COE staff time. The new SPGP IV reduces coverage to only the original four project categories (docks, piers, and marinas; shoreline stabilization; boat ramps; and maintenance dredging) contained in the 1995 pilot SPGP and the exemptions and noticed general permits directly associated with those activities. This change is an obstacle to streamlining wetland permitting and DEP believes its recommendations, below, can solve a variety of problems and allow expansion rather than narrowing of the SPGP.

Recommendations

Florida is committed to streamlining state and federal wetlands permitting programs to increase protection for our sensitive natural resources. To meet that goal and the specific objectives of House Bill 759, DEP recommends pursuing a greatly expanded SPGP in the short-term, which will not require legislative action, while also pursuing federal and state legislative actions to obtain assumption for the long-term.

Next steps:

- Continue to reduce differences between state and federal wetland delineations without altering the statutory definition of wetlands.
 - As a first step, DEP has initiated rulemaking to list slash pine and gallberry as "facultative" (neutral) in the state's delineation rule (62-340, F.A.C.), which is scientifically appropriate and would make the state and federal wetland boundary lines ecologically equivalent. While DEP has not received a formal federal response to its previous (1997) initiative along these lines, field-testing by state and federal agency staff and Phoenix Environmental at that time supports this conclusion. The proposed rule changes will require approval of the

Environmental Regulation Commission and ratification by the Legislature under s. 373.4211(26), F.S.

- Request the COE to expand the SPGP to a comprehensive list of activities with impacts to no more than a specified acreage of non-tidal wetlands based on Florida's wetland delineation methodology.
 - Discussions with the COE have indicated that the 10-acre upper limit proposed in HB 759 would be overly ambitious, at least initially.
 - Any expanded SPGP would require state applicants to waive the chapter 120, F.S., completeness review time clock to allow for federal coordination on endangered species.
- Request that the expanded SPGP include projects reviewed by the water management districts and local delegated programs.
- Review existing state statutory and rule exemptions and noticed general permits for modifications necessary to ensure that qualification for these authorizations would meet the requirements for authorization under the SPGP with no federal agency coordination requirements.
- Extend SPGP in Northwest Florida by expanding the state wetlands program to the Northwest Florida Water Management District.
- Seek the support of the Florida congressional delegation for streamlining the federal program and encouraging federal agencies to work productively with the states to make the SPGP effective.
- Consult with the Florida Congressional delegation on opportunities to amend the federal Clean Water Act and Rivers and Harbors Act to make assumption of the federal wetlands program viable.
- Consult with the Florida Legislature on the potential for appropriating to DEP the additional resources that would be necessary to assume the federal wetlands permitting program, and the transferred federal permitting and compliance workload, should assumption become a viable option. (Additional resources would also be necessary for the water management districts.)

Attachment
Federal and State Statutory Changes Necessary to Enable Assumption of Federal Wetland Permitting

Federal Statutory Changes

Florida has proposed amendments to the Clean Water Act (CWA) in past Congressional testimony to address the CWA legal issues as follows:

1. Amend Section 404(g)(1) to remove the prohibition on states assuming the entire Section 404 program. Without this amendment, Florida is not able to assume the federal program in large portions of the state. In addition, because the boundaries between navigable and non-navigable waters are not clearly defined in many waters, assumption would require a determination of which agency has jurisdiction. Both factors severely impede the goal of establishing a procedurally simplified program. The following changes are recommended:

Section 404(g)(1) is amended by striking language as follows:

(g)(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (~~other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto~~), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

2. Amend the CWA to remove the current five-year limitation on state-issued Section 404 permits. There is no similar limitation on the issuance of Section 404 permits by the COE and no compelling reason to limit states in this manner. Florida law allows issuance of up to 25-year permits, with an important five-year review cycle, which is critical to planning and permitting many large-scale multi-year developments. The following changes are recommended:

Clause (ii) of Section 404(h)(1)(A) is amended to read as follows:

"(ii) shall be -

"(I) issued for fixed terms not exceeding 25 years; and

"(II) if issued for a term that exceeds 5 years, reviewed by the State not later than 5 years after the date of issuance and every 5 years thereafter for the duration of the term to ensure that the conditions of the permit are being met by the permittee and to consider, and include as permit conditions where

appropriate, all applicable rule requirements adopted during the prior 5 year period.

3. Amend the CWA to delete the "clean break" provision that requires transfer of all pending applications to the state at the time of assumption. This wholesale transfer has adverse impacts on the state, the Corps of Engineers and applicants. The immediate transfer of large numbers of permits, already partially processed by the COE, to new processors could overwhelm the state system. This would result in delays for applicants, while the state processors become familiar with applications on which COE personnel have already spent considerable amount of time. In addition, the sudden transfer of the permits would not allow the Corps of Engineers adequate time to adjust personnel to other tasks and allow for phase out of positions, should that be necessary. This proposed provision would allow the COE to complete the processing on applications already before the agency, with the state being responsible for applications only after assumption is approved. This is especially important in states such as Florida, where there is a large number of permit applications pending at any one time.

In addition, the same section of the CWA would need to be amended to provide for the COE to continue monitoring, enforcing and issuing any modifications of previously issued COE permits. Allowing the COE to retain responsibility for such activities would relieve the potentially excessive burden on the state in enforcing unfamiliar permits, provide for a smoother transition for the COE, and afford applicants better continuity by allowing them to deal with the original permitting agency. The following changes are recommended:

Paragraph (4) of Section 404(h) is amended by striking and adding language as follows:

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits subject before the Secretary for activities with respect to which a permit may be issued pursuant to such State program and received after such notification to such State for appropriate action. The Secretary shall retain the authority to administer and enforce the permits issued by the Secretary, including the authority to issue and enforce modifications thereto.

4. On a related issue, the CWA general permit language should also be amended to allow the COE to enforce and administer previously issued permits. The following changes are recommended:

Paragraph (5) of Section 404(h) is amended by striking and adding language as follows:

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the issuance administration and enforcement of such general permit with respect to such activities but shall retain the authority

to administer and enforce the general permits previously issued by the Secretary with respect to such activities.

5. Finally the CWA should be amended to allow the Administrator the ability to discount minor differences in the proposed state program so long as the effectiveness of the protection of waters of the United States is not impaired. The following addition is suggested:

Paragraph (6) is added to section 404(h) to read:

"The Administrator may approve a program submitted under subsection (g)(1) that varies in minor respects from the requirements of this section if the Administrator determines, after review of the proposed state program, that the proposed state program will afford the same or greater degree of protection to waters of the United States as the federal program affords."

6. Changes to the federal Rivers and Harbors Act have not been proposed in the past. However, in order to make assumption of the federal wetlands program complete so that it results in streamlining, Section 10 of that law (33 U.S.C. 403) would have to be amended along the following lines:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. However, authority to issue authorizations on behalf of the Secretary of the Army shall be delegated to any state or tribe that assumes authority to administer Section 404 of the Clean Water Act.

State Statutory Changes

1. EPA in its capacity as the federal agency in charge of reviewing proposals to assume the CWA program and under its authority to review COE permits, such as an SPGP, has expressed a concern that DEP, in its role as the lead state agency for wetland permitting, lacks the authority to modify, revoke or rescind permits issued by the water management districts or any delegated local program. Such a provision previously existed in Florida law but was repealed by the Legislature in 1994. Therefore, a new paragraph (20) would need to be added to s. 373.414, F.S., reading "(20) The department shall have the authority to review and modify any district order to ensure consistency with federal law." EPA has, in the past, expressed a preference that delegated local programs be limited to permit review functions with actual final agency action and any subsequent enforcement authority be reserved to DEP or the applicable water management district. However, at this time it is by no means certain if this is EPA's final position.
2. Florida law does not clearly contain a "recapture" provision, equivalent to that contained in the CWA, addressing agriculture activities that convert wetlands to upland nor is it clear in Florida law, as provided in the CWA, that only agriculture closed systems constructed from uplands that do not discharge to surface waters are exempt from permitting. To address these concerns, amendments to portions of s. 373.406, F.S., would be necessary similar to the following:
 - (2) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters. This section shall not be construed to allow the conversion of a surface water or wetland to upland without an environmental resource permit.
 - (3) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to be applicable to construction, operation, or maintenance of any agricultural closed system that is constructed entirely from uplands and does not discharge to surface waters of the state. However, part II of this chapter shall be applicable as to the taking and discharging of water for filling, replenishing, and maintaining the water level in any such agricultural closed system. This subsection shall not be construed to eliminate the necessity to meet generally accepted engineering practices for construction, operation, and maintenance of dams, dikes, or levees.
3. As a practical matter the wetland permitting review criteria in Florida law are very similar to the federal review criteria in 404(b)(1) CWA guidelines. However, Florida law does not explicitly spell out these federal criteria. In particular, EPA and the COE have stated that the review by the state must include a consideration of alternatives, a presumption of an alternative for non-water dependent projects (e.g., the "no project alternative") and the inclusion of economic considerations in the review of alternatives. In order to address these issues a new s. 373.414(1)(d), F.S., would have to be created to read:

(d) An activity, which is in, on or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest, or is clearly in the public interest, only if:

1. the governing board or the department determines there are no practicable alternatives to dredging or filling in surface waters or wetlands. Alternatives considered shall include not dredging or filling in surface waters or wetlands, or dredging or filling in another area of surface waters or wetlands which will have less damaging consequences, so long as the alternative does not have significant adverse environmental consequences. For dredging or filling in wetlands, mud flats, vegetated shallows, coral reefs, or riffle and pool complexes, all as defined in 40 CFR 230.41 through 40 CFR 230.45, practical alternative sites are presumed to exist unless the activity associated with the dredging or filling requires access or proximity to, or siting within, that surface water or wetland to fulfill its basic purpose, i.e., is water dependent. An alternative is practicable if it is available and capable of being done considering the cost, existing technology, and logistics in light of overall project purposes; and

2. the applicant has made all appropriate and practicable changes to the project plan to minimize the environmental impact of the project. The applicant shall have the burden of proof of showing that there are no practicable alternatives. The department, in consultation with the districts, shall adopt rules by which the department and the districts shall implement this subsection.

4. The CWA does not contain provision that result in the issuance of a permit if the reviewing agency defaults on (i.e., does not meet) certain review time clock requirements as does Florida law. Therefore, where the state has authority to administer a federal program (Underground Injection Control, National Pollutant Discharge Elimination System, Air permitting, etc.), state legislation has been adopted to overcome the federal government's objection to the default permit provisions in Florida law. The simplest provisions are those adopted for the UIC program (s. 403.0876(2)(b), F.S.), which supersede the default permit provisions without further complications. Similar provisions should be adopted in s. 373.414, F.S., for the ERP program under Part IV of Chapter 373, F.S.
5. The COE and federal resource agencies have expressed concern regarding the dock exemptions contained in s. 403.813(2), F.S. These exemptions lack provisions for water depth, endangered species protection, protection of on-site submerged resources, etc. It is recommended that these exemptions be revised or repealed and replaced with General Permits with appropriate conditions.