



# The Florida Senate

*Interim Project Summary 98-38*

*October 1998*

Committee on Natural Resources

Senator Jack Latvala, Chairman

## REVIEW OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

### SUMMARY

In 1993, the Legislature enacted ch. 93-218, L.O.F., which combined the Department of Environmental Regulation and the Department of Natural Resources into one department--the Department of Environmental Protection (DEP). The primary goal of the act was to eliminate the duplication and overlapping regulatory programs to enhance the provision of services to the public.

During the last 5 years, the DEP has been reorganized internally and concerns have been raised publicly regarding the agency's enforcement of environmental laws. This project presents an overview of the DEP's divisions and programs but focuses in more detail on environmental permitting and the DEP's law enforcement program.

Overall, staff found that the available performance information is inconclusive for fiscal year 1993-1994 through fiscal year 1997-1998 to determine whether the DEP is operating its programs more efficiently or whether costs savings have been realized. Further, consideration should be given to integrating certain program-related functions in the Office of the Secretary with the line divisions so that these functions will be aligned with program performance measures to assure more accountability for these functions and to reduce the number of positions that are budgeted in an administrative component.

While the process for issuing Environmental Resource Permits (ERPs) is somewhat consolidated, there continues to be many inconsistencies in the way the ERP process is administered on a statewide basis, which raises questions about whether legislative efforts and intent to consolidate and streamline environmental permitting is being fully realized.

Since the prohibition against the DEP implementing an ERP program in the Northwest Florida Water Management District expires on July 1, 1999, there

needs to be legislative clarification of the situation that will exist in the Northwest District after that date regarding environmental permitting.

It was found that the National Pollutant Discharge Elimination System (NPDES) program fees were not covering the cost of the program. Since no federal funds are available to offset the program costs, fees need to be adjusted to support the program. Furthermore a 1998 Auditor General report, Report No. 13104, found that the DEP had not established a defined methodology for consistently determining the extent of permitting costs associated with the various types of permits it issues. This was due, in part, from the lack of an adequate cost accounting system which includes sufficient details for developing cost breakdowns by function for each type of permit issued by the department.

For the law enforcement program in DEP, it was found that the Florida Marine Patrol was only spending 17 percent of its time on water patrol. Consideration should be given to statutorily allowing the DEP to use non-sworn personnel for a variety of inspections and noncriminal investigative duties that are currently being performed by sworn law enforcement personnel. This arrangement could allow the sworn field officers to spend more time on water patrol and other areas where only sworn personnel can be used.

### BACKGROUND

In 1993, the Legislature combined the Department of Environmental Regulation and the Department of Natural Resources into a single entity, the Department of Environmental Protection. Chapter 93-213, L.O.F., was intended to provide a framework in which Florida's ecological systems would be protected and managed in their entirety. In addition, a primary goal of the act was to eliminate the duplication and overlapping regulatory programs to enhance the provision of services to the public.

Since that time, the DEP has been reorganized internally and concerns have been raised publicly regarding the agency's enforcement of environmental laws. Today, the agency employs over 4,000 employees and has a budget of \$1.3 billion. This project is intended to give an overview of the changes that have occurred in the past 5 years and to determine if the issues relating to permitting, enforcement, and compliance need further legislative attention.

## METHODOLOGY

The committee staff worked closely with the staff of the Department of Environmental Protection and the staff of Subcommittee A of the Senate Ways and Means Committee to obtain the necessary budget information so that staff could obtain certain trend information regarding department workload and program budget activity over the last 5 years. In addition, staff found some useful information in reports prepared by the Office of Program Policy Analysis and Government Accountability (OPPAGA) as part of their "*Florida Government Accountability Reports*" which provide some insight about program workload. These reports, however, do not cover the full 5-year period.

Staff also met on several occasions with the three Senators from the committee that were assigned to oversee the project. Those Senators, Senator Latvala, Senator Kirkpatrick, and Senator Kurth, provided significant direction for this project.

## FINDINGS

In 1993, the Department of Natural Resources had seven major divisions and 2,556 positions and an operating budget of \$161,690,078. The Department of Environmental Regulation had six major divisions and 1,536 positions and an operating budget of \$278,685,116. Together, these two agencies had 4,092 positions and a combined operating budget of \$440,375,194. After the merger, the new Department of Environmental Protection was organized into nine divisions and had 4,268 positions and an operating budget of \$471,657,938.

For the period fiscal year 1993-94 through fiscal year 1997-98, the operating budget for the Department of Environmental Protection experienced mild increases and decreases, but reflected an overall average annual gain of 2.8 percent for the period.

For the review period, total authorized positions increased from 4,115 to 4,269 reflecting an average annual gain of 0.8 percent.

The operations budget for the Department of Environmental Protection represents 1.47 percent of the total State of Florida budget for agency operations.

A comparison of Florida's expenditures for natural resources functions reveals that Florida spends a greater percentage of its total state budget on management of natural resources and expenditures per capita are larger than California, Texas, and several other large urban states.

For the review period, the fixed capital outlay portion of the department's budget experienced a 9.8 percent decrease in fiscal year 1995-96, but experienced a 16.3 percent increase in 1997-98. Overall, the FCO budget had an average annual increase of 5.6 percent.

Staff reviewed the workload and performance information in the Legislative Budget Request documents for the review period but found inconsistent and incomplete data to make comparisons for efficiency and cost savings determination. Instead, staff found some workload and performance information from OPPAGA's "*Florida Government Accountability Reports*" which contained information about DEP programs prepared by the Government Accountability Commission. Staff believes that available information is inconclusive for fiscal year 1993-94 through fiscal year 1997-98 to determine whether the department is operating its programs more efficiently or whether costs savings have been realized.

The DEP began in September, 1997, publishing a quarterly performance report known as the "*Secretary's Quarterly Performance Report*." These reports provide a consistent set of activities that will allow in the future an opportunity to observe changes in program performance and workload changes.

In examining the staffing and budget components during the review period, the most dramatic changes in staffing appears to exist in the budget components of "Administrative Direction and Support Services" and "Executive Direction." Essentially, the "Executive Direction" Legislative Budget Request (LBR) component was used by the old DNR for budgeting purposes for the Marine Fisheries Commission with 11 positions. Under the new DEP, this component was increased to 188 positions which included approximately 100 positions assigned to the General Counsel's Office and other positions assigned to the Office of the

Secretary. There was a change in the “Administrative Direction and Support Services” component from 548 to 309 in fiscal year 1995-96 reflected the overall adjustment of other administrative activities within these two budget components such that the functions of payroll, personnel, and accounting, are now budgeted in this component. On balance, it appears to legislative staff that DEP currently has an overly large number of positions (586) budgeted in an administrative component which historically has not had established performance measures to evaluate such a large allocation of financial resources. Consideration should be given to integrating the program-related functions in the Office of the Secretary with the line divisions so that these functions will be aligned with program performance measures to assure more accountability for these functions and to reduce the number of positions that are budgeted in an administrative component.

The Office of Water Policy, which currently is located in the Office of the Secretary, could be integrated into the Division of Water Facilities, which should be renamed as the Division of Water Resources to reflect recent department reorganization of certain bureau functions. For example, the Executive Coordinator for Ecosystem Management and the Office of Ecosystem management were initially created in 1993 to focus attention on a new approach to environmental regulation and management. After 5 years the approach should now be integrated and phased out of the Secretary’s Office and absorbed into the philosophy of all operating divisions or, at least, treated equally with all other program divisions.

The stated policy of the Florida Environmental Reorganization Act of 1993 was to provide efficient governmental services to the public; and to streamline governmental services, providing for delivery of such services to the public in a timely, cost-efficient manner. As a result, a provision was included in the act which was intended to streamline the environmental permitting process relating to wetland and stormwater requirements. The act stated that it was the intent of the Legislature to transfer the protection of wetlands and the permitting of wetlands impacts encompassed by the Warren S. Henderson Wetlands Act of 1984 to ch. 373, F.S. Furthermore, the DER and the water management districts shall consolidate all permits for activities involving dredging and filling, management and storage of surface water (MSSW) including stormwater control, into a single type of permit which would be known as the **“environmental resource permit.”**

The provision in the 1993 Environmental Reorganizational Act which created a new Environmental Resource Permit (ERP) generally

designated the lead role for such permits to the water management districts. However, the department would retain the responsibility for permitting those activities which, because of their complexity and magnitude, need to be economically and efficiently evaluated at the state level. Such activities include, but are not limited to, permits for mining, hazardous waste management facilities and solid waste management facilities that do not qualify for a general permit under ch. 403, F.S. The water management districts assumed the ERP responsibilities based on their individual technical and fiscal ability to implement some or all of the provisions of part IV of ch. 373, F.S. The ERP was an attempt to consolidate responsibilities and requirements for former dredge and fill permits issued by the old DER with the management and storage of surface water permits issued by the water management districts. Also, decisions relating to the use of sovereign submerged lands (the responsibility of the old Department of Natural Resources and the Governor and Cabinet sitting as the Board of Trustees of the Internal Improvement Trust Fund) was included in the ERP.

While the process for issuing ERPs is somewhat consolidated, there continues to be many inconsistencies in the way the ERP process is administered on a statewide basis which raises questions about whether legislative efforts and intent to consolidate and streamline environmental permitting is being fully realized.

While the Northwest Florida Water Management District has had the authority to operate a MSSW program pursuant to ch. 373, F.S., the district has never fully operated such a program due to funding limitations. The Northwest Florida Water Management District has a constitutional millage cap of .05 mill, while the remaining four water management districts have a millage cap of 1.0 mill. Over the years, there have been several attempts to place the issue on the ballot to amend the State Constitution to bring the Northwest Florida Water Management District’s constitutional millage rate on a par with the other districts, but all efforts to get the item on the ballot have failed.

Because of its funding limitations, the Northwest District has historically operated a limited permitting program that dealt with agricultural and silvicultural activities and a dam safety program. The DEP had operated the dredge and fill program and the stormwater program for this district, subsidized by taxpayers in other parts of the state through the General Revenue Fund.

Section 373.4145, F.S., was created in 1993 to provide for an interim permitting program for the Northwest Florida Water Management District. The department operates a limited permitting program in this district with state financial subsidies for the district. Section 373.4145, F.S., provides that within this district, the department's permitting authority is limited to wetlands permitting rules which were in effect under the Henderson Wetlands Act of 1984. The department was, therefore, prohibited from implementing a complete ERP program on behalf of the district. This section provided a 5-year period in which the DEP would implement the old dredge and fill provisions and the stormwater permitting provisions in lieu of the streamlined ERP provisions.

The interim provisions expire on July 1, 1999, or sooner if the DEP received delegation of the federal 404 program of the Clean Water Act, or the millage cap is revised for this district. Neither of these events have transpired; therefore the expiration date is July 1, 1999. It is not entirely clear what impact this will have on environmental permitting in this district. The authority for the department to issue dredge and fill permits pursuant to rules adopted under the Henderson Wetland Act would expire. Essentially, these rules remained applicable only for the Northwest District and only until July 1, 1999. After that date, rules would no longer exist to implement the Henderson Wetlands Act. Does the expiration of this prohibition authorize the DEP to implement a ERP program in the Northwest District that is comparable to the other districts? The answer may be yes, however, it is not clear as to the department's authority to adopt ERP rules for the Northwest District. The department has adopted rules and implemented the ERP on an activity-based basis with the other water management districts. Presumably, if the funding situation is not remedied for the Northwest District, the district itself would still be unable to implement such a program.

There is also some concern that any new rulemaking for environmental resource permitting or stormwater management by the DEP or the Northwest Florida Water Management District in 1999 may create opportunities for a cause of action pursuant to the "Bert J. Harris, Jr. Private Property Rights Protection Act." The other water management districts had noticed their rules for adoption for environmental resource permitting prior to the May 11, 1995 date specified in the Bert Harris Private Property Rights Protection Act which prevented a cause of action against such rules.

Implementation of an ERP program in the Northwest District would probably increase the workload of either the DEP or the Northwest District. This is because the ERP program would extend the permitting program to include isolated wetlands and a flood control program which does not currently exist in the Northwest District. In recent years, the Northwest District has experienced a significant increase in development activity which has increased the effects caused by flooding.

Another issue contained in s. 373.4145, F.S., has to do with the issue of grandfathering certain projects using the wetland delineation methods ratified under the Henderson Wetlands Act in lieu of the new wetland delineation methodology adopted by the Environmental Regulation Commission on January 13, 1994, and subsequently amended and ratified by the Legislature in the 1994 session using the single statewide wetland definition. Certain development and mining activities were grandfathered in and could use the wetland jurisdictional determinations made under the Henderson Wetlands Act. Also grandfathered in were certain activities that prior to July 1, 1994, were exempted from regulation under the Henderson Wetlands Act.

Based on information received from the water management districts regarding the average number of days to process an ERP permit varies significantly from district to district, with the South Florida Water Management District and the Southwest Florida Water Management District averaging longer to process such permits. Further, the number of permits processed and average time to process does not reveal significant time savings from streamlining the process.

The data received from the water management districts indicates an overall trend toward increased wetland loss each year and fewer wetland acres being created by mitigation each year.

Section 402(a)(1) of the federal Clean Water Act requires wastewater dischargers to have a permit establishing pollution limits. This act also provides that the authority to issue NPDES permits may be delegated by the EPA to states which meet certain technical, administrative, and legal requirements which are described in Title 40, CFR, Part 123. As of May 1, 1995, Florida had an approved NPDES permit program but does not yet have approval to issue NPDES stormwater permits. No Federal funds are available to the states for administration of the NPDES program; therefore, the permit fees must cover the costs of the

program or be subsidized by the state General Revenue Fund as now occurs.

Pursuant to s. 403.0885(1), F.S., the Legislature intended for NPDES permit fees charged by the department to be adequate to cover the entire cost of surveillance and other field services required for permits issued. The department followed these guidelines when it established permit fees for the NPDES program, including a 14 percent supplemental fee for the stated purpose of recovering the funds necessary to repay \$3.2 million that was appropriated from the Pollution Recovery Trust Fund to cover the NPDES program start-up costs.

Subsequent to the establishment of the department's fee schedule, several events occurred which negatively impacted the annual NPDES fee revenue. These events had the effect of reducing the inventory of facilities subject to annual fees. As a result, the department estimates an annual cumulative loss of \$947,000 for the NPDES program. A preliminary analysis prepared by the department indicates that NPDES revenues covers only 60 percent of program costs. In fiscal year 1996-1997, the actual revenues totaled \$4.2 million while program operating costs (including indirect costs) totaled \$7.1 million.

A detailed review of the law enforcement program in the DEP was conducted. The Environmental Reorganization Act of 1993 added significant new responsibilities to the Division of Law Enforcement. The Division of Law Enforcement has four bureaus charged with providing marine and park law enforcement, protection of marine resources, boating safety, search and rescue operations, investigation of marine theft, coastal protection, public safety and general law enforcement. The division recently established an Office of Investigations to assume the responsibility of investigating serious or serialized environmental crimes that could have great impact.

The activity report for June, 1997 to June, 1998 for field officers seems to reflect an inordinately small number of hours for boat patrol to provide an effective deterrent for the multitude of environmental violations that can occur in marine waters. The Division of Law Enforcement should be authorized to use non-sworn personnel to assist with the many non-criminal activities like boat safety inspections and seafood house quality control inspections. In recent years, city and county law enforcement and the Florida Highway Patrol have begun to use Traffic Accident Investigation Officers for certain

duties and have realized significant cost savings. A recent report by the Office of Program Policy and Government Accountability (OPPAGA) noted that the Miami Police Department uses non-sworn personnel to investigate traffic accidents. Their estimated first full year of service cost is \$27,275 in salary and benefits and \$5,653 in non-security training and vehicle acquisition costs. In contrast, the Florida Highway Patrol's cost for a trooper's first full year of service is \$69,320 in salaries and benefits and \$32,827 in non-recurring costs for training and vehicle acquisition costs. Committee staff believes there could be similar savings if a similar program was authorized for the Florida Marine Patrol. Since such a program would involve more than accident investigations, staff believes a new statute is needed to specifically authorize the use of personnel for a variety of inspections and investigative duties and to specifically authorize such personnel to issue citations for violation of laws administered by the Department of Environmental Protection.

In the Legislative Budget Request for fiscal year 1999-2000 by the Division of Law Enforcement, there are two major funding issues. One is the request for 40 additional law enforcement personnel and the other is for \$12.8 million for additional replacement of equipment. The budget request notes that the division's appropriations for replacement equipment has averaged \$1.8 million annually since 1992 or less than 12 percent of the total cost of equipment that is past due for replacement. Perhaps some of these manpower and equipment needs could be met with less expense if some of that manpower was non-sworn personnel performing non-criminal inspections and using vehicles that are not high performance equipped.

Among the many changes and additions to marine and environmental law, perhaps the greatest challenge faced by this division recently has been the responsibility for enforcement and education in the recent implementation of Article X, Section 16 of the Florida Constitution, Limiting Marine Net Fishing. Netting activity, made illegal by this amendment, occurs mostly at night. Specialized enforcement details have been initiated to place officers in areas where illegal net fishing is suspected. Since July 1995, officers have logged as many as 16,750 hours in this effort. Officers are responsible for patrolling over 8,400 miles of shoreline statewide.

The division is also responsible for enforcement and administration of Florida's Boating Safety Act. The magnitude of this task becomes clear with the presence

of over 755,000 registered vessels operating year-round within our coastal waters and another 400,000 out-of-state boats visiting Florida each year. Vessel registrations were at an all time high in 1988 when an average of 100 additional boats was registered by the state each day. Over the past two years, this figure has averaged 50 per day. It has been estimated that there may be over 1.1 million boats registered in Florida by the year 2000. These numbers do not account for an estimated 500,000 boats without motors that are not registered, such as houseboats, canoes and sailboats.

The Division of Law Enforcement is responsible for public safety and environmental protection in the Florida State Park System and other state-owned lands. The Park Patrol includes 76 law enforcement officers. There are over 150 parks and preserves within the Florida State Park System and 500,000 acres of state-owned uplands. Eighty five percent of the parks and preserves include water-related patrol activities.

An analysis of the division's arrest and warning data shows that the emphasis of enforcement activities over the past five years has continued to be focused on boating safety -- first and foremost. Marine Resource Protection represents the next priority for the Division's enforcement effort.

## RECOMMENDATIONS

Consideration should be given to integrating the program-related functions in the Office of the Secretary with the line divisions so that these functions will be aligned with program performance measures to assure more accountability for these functions and to reduce the number of positions that are budgeted in an administrative component. The Office of Water Policy could be integrated into the Division of Water Resources to reflect recent department reorganization of certain bureau functions. The approach to ecosystem management should be integrated and phased out of the Secretary's Office and absorbed into the philosophy of all operating divisions, or at least, treated equally with all other program divisions. Section 20.255, F.S., should be amended to reflect the latest major divisions in the department.

The administration of the Environmental Resource Permitting Program has not resulted in significant savings of time in obtaining permits and there are significant inconsistencies that keep the program from

operating uniformly statewide. Consideration should be given to transferring the responsibility of issuing permits for wetland impacts from small single family projects from the DEP to the water management districts to correspond with the philosophy and intent expressed in ch. 93-213, L.O.F., that provides that the DEP would retain only the permitting responsibilities for those large projects that are of statewide concern, such as mining, hazardous waste facilities, and solid waste facilities.

Currently the authority in s. 373.4145, F.S., for the DEP to implement a dredge and fill program and a stormwater program in the Northwest Florida Water Management District in lieu of an ERP program expires on July 1, 1999. To insure that there will continue to be an environmental permitting program in the Northwest Florida Water Management District, there needs to be legislative clarification of the situation that will exist after portions of s. 373.4145, F.S., expire on July 1, 1999. Options include extending the expiration date to continue the existing dredge and fill program and stormwater program or clarifying the provisions relating to the implementation of an ERP program for the Northwest District. Also, there no longer appears to be a need to continue the provisions which grandfather certain activities using the wetland delineation methods pursuant to the Henderson Wetlands Act.

The DEP should consider adjusting the fees charged for permits so that such programs become more self-sufficient, or consider amending the statute to more accurately reflect the level of self-sufficiency expected from permit fees. This would help relieve the cash shortages that have occurred in the Permit Fee Trust Fund. Also, adjustments should be made to assure that the NPDES program pays for itself since no funds are available from the EPA to offset administrative costs.

According to activity reports for field officers of the Florida Marine Patrol, only 17 percent of their time was spent in 1997-1998 in water patrol. Consideration should be given to statutorily allowing the DEP to use non-sworn personnel for a variety of inspections and investigative duties that are currently being performed by sworn law enforcement personnel. Such non-sworn personnel would also be authorized to issue citations for violation of laws administered by the DEP. That arrangement could allow field officers to spend more time on water patrol.

**COMMITTEE(S) INVOLVED IN REPORT** (*Contact first committee for more information.*)

Committee on Natural Resources, 404 South Monroe Street, Tallahassee, FL 32399-1100, (850) 487-5372 SunCom 277-5372

**MEMBER OVERSIGHT**

Senators Jack Latvala, George Kirkpatrick, and Patsy Kurth