HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7065 PCB SAC 13-01 Everglades Improvement and Management
SPONSOR(S): State Affairs Committee, Caldwell
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: State Affairs Committee	17 Y, 0 N	Blalock	Camechis
1) Appropriations Committee		Helpling	Leznoff

SUMMARY ANALYSIS

The Everglades Forever Act (EFA) is the primary Florida law pertaining to the management, protection, and restoration of the Everglades.

The bill amends the Everglades Forever Act to:

1. Provide a legislative finding that implementation of best management practices (BMPs) funded by the owners and users of land in the Everglades Agricultural Area (EAA) effectively reduces nutrients in waters flowing into the Everglades Protection Area.

2. Update the definition of the "Long Term Plan" to include the South Florida Water Management District's (SFWMD's) "Restoration Strategies Regional Water Quality Plan" dated April 27, 2012, in addition to the SFWMD's "Everglades Protection Area Tributary Basin Conceptual Plan for Achieving Long-Term Water Quality Goals Final Report" dated March 2003.

3. Authorize the continued use of up to 0.1 mill of the SFWMD's ad valorem revenues within the Okeechobee Basin to implement the Long-Term Plan and delete obsolete references to the "interim phase" of the Long Term Plan.

4. Prohibit a permittee's discharge from being deemed to cause or contribute to any violation of water quality standards in the Everglades Protection Area if the discharge is in compliance with applicable permits and any associated orders.

5. Require the SFWMD, prior to the completion of all projects and improvements in the Long Term Plan, to complete a use attainability analysis to determine if those projects and improvements will achieve the water quality based effluent limits established in permits and orders authorizing the operation of those facilities.

6. Require payment of a $25 per acre agricultural privilege tax on property classified as agricultural within the Everglades Agricultural Area between November 2014 and November 2024. Thus, the tax rate will fall to $10 per acre beginning in 2025 rather than in 2017 as required by current law.

7. Provide that the Legislature intends that payment of the agricultural privilege tax, in addition to payment of the cost of continuing implementation of best management practices, fulfills the obligations of owners and users of land under Article II, Section 7(b) of the Florida Constitution.

The bill appears to have a positive fiscal impact on SFWMD of $6.6 million per year from 2017 through 2024 due to retention of the $25 per acre agricultural privilege tax. Conversely, landowners who pay the tax must pay the increased tax from 2017 through 2024. The SFWMD has also stated that it will expend a total of $520 million to implement the $880 million Everglades restoration plan referenced in the bill, and intends to seek $32 million from the Legislature each year throughout the plan's 12-year implementation period. If the Legislature approves this annual appropriation, it would result in a negative fiscal impact to state government expenditures.

The act takes effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Effect of Proposed Changes

The bill amends s. 373.4592(1)(g), F.S., to incorporate the finding that the implementation of best management practices (BMPs) funded by the owners and users of land in the Everglades Agricultural Area (EAA) effectively reduces nutrients in waters flowing into the Everglades Protection Area.

The bill also updates the definition of "Long-Term Plan" in s. 373.4592(2)(j), F.S., to include the "Restoration Strategies Regional Water Quality Plan" dated April 27, 2012, as may be subsequently modified in accordance with the Act, as well as the SFWMD's "Everglades Protection Area Tributary Basin Conceptual Plan for Achieving Long-Term Water Quality Goals Final Report" dated March 2003. The "Restoration Strategies Regional Water Quality Plan" dated April 27, 2012, being referenced in the definition of Long-Term Plan, is the new $880 million Everglades restoration plan described in more detail below.

In addition, the bill amends ss. 373.4592(3)(d) and 373.4592(3)(e), F.S., to remove outdated references to an initial phase and 10 year second phase of the previous Long-Term Plan.

The bill also amends s. 373.4592(4)(a), F.S., to authorize the continued use of up to 0.1 mill of the SFWMD's ad valorem revenues within the Okeechobee Basin for the purpose of implementing the Long-Term Plan.

The bill amends s. 373.4592(4)(f)4., F.S., to prohibit a permittee's discharge from being deemed to cause or contribute to any violation of water quality standards in the Everglades Protection Area if the discharge is in compliance with applicable permits and any associated orders.

The bill creates s. 373.4592(4)(h), F.S., which directs the SFWMD, prior to the completion of all projects and improvements in the Long Term Plan, to complete a use attainability analysis to determine if those projects and improvements will achieve the water quality based effluent limits established in permits and orders authorizing the operation of those facilities.

The bill amends s. 373.4592(6)(c)6., F.S., to require payment of a $25 per acre agricultural privilege tax on property classified as agricultural within the Everglades Agricultural Area between November 2014 and November 2024. Thus, the tax rate will fall to $10 per acre beginning in 2025 rather than in 2017 as required by current law.

Lastly, the bill amends s. 373.4592(6)(h), F.S., to provide that the Legislature intends that payment of the agricultural privilege tax, in addition to payment of the cost of continuing implementation of BMPs, fulfills the obligations of owners and users of land under Article II, Section 7(b) of the Florida Constitution.

Present Situation

2012 Restoration Strategies Regional Water Quality Plan

The SFWMD, Florida Department of Environmental Protection (FDEP), and United States Environmental Protection Agency (USEPA) engaged in technical discussions starting in 2010 and reached a consensus on new strategies for further improvement of water quality in America's Everglades in 2012. These agreed upon strategies will expand water quality improvement projects to achieve the low phosphorus water quality standard established for the Everglades. The primary objectives were to establish a Water Quality Based Effluent Limit (WQBEL) that would achieve

compliance with Florida's numeric phosphorus criterion in the Everglades Protection Area and to identify a suite of additional water quality projects to work in conjunction with the existing Everglades Stormwater Treatment Areas (STAs) to meet the WQBEL.

The SFWMD is implementing this technical plan to complete six projects that will create more than 6,500 acres of new STAs and 110,000 acre-feet of additional water storage through construction of flow equalization basins (FEBs) (Figure 1). The primary purpose of FEBs is to attenuate peak stormwater flows prior to delivery to STAs and provide dry season benefits, while the primary purpose of STAs is to utilize biological processes to reduce phosphorus concentrations in order to achieve the WQBEL. A FEB is a constructed storage feature used to capture and store peak stormwater flows. Water managers can move water from FEBs into STAs at a steady rate to optimize STA performance and achieve water quality improvement targets.

The projects have been divided into three flow paths (Eastern, Central and Western), which are delineated by the source basins that are tributary to the existing Everglades STAs. The identified projects primarily consist of Flow Equalization Basins (FEBs), STA expansions, and associated infrastructure and conveyance improvements.

The Eastern Flow Path contains STA-1E and STA-1W. The additional water quality projects for this flow path include an FEB in the S-5A Basin with approximately 45,000 acre-feet (ac-ft) of storage and an STA expansion of approximately 6,500 acres (5,900 acres of effective treatment area) that will operate in conjunction with STA-1W. The Central Flow Path contains STA-2, Compartment B and STA-3/4. The additional project is an FEB with approximately 54,000 ac-ft of storage that will attenuate peak flows to STA-3/4, and STA-2 and Compartment B. The Western Flow Path contains STA-5, Compartment C and STA-6. An FEB with approximately 11,000 ac-ft of storage and approximately 800 acres of effective treatment area (via internal earthwork) within STA-5 are being added to the Western Flow Path.

Design and construction of new projects will be achieved in the following phases to allow for stormwater treatment areas and flow equalization basins to mature and begin treating water as soon as possible:

<u>Phase One (2012-2016)</u>

- 45,000 acre-foot FEB in the eastern Everglades, close to the Loxahatchee National Wildlife Refuge, to work in conjunction with 11,500 acres of existing STAs (STA-1 East and STA-1-West).
- 54,000 acre-foot FEB in the central Everglades, adjacent to 31,800 acres of existing and newly completed STAs (STA-3/4, STA-2 and Compartment B) and utilizing construction already completed for the Everglades Agricultural Area-A1 Reservoir.

<u>Phase Two (2013-2018)</u>

- 4,700 acres of new STA in the eastern Everglades, adjacent to the Loxahatchee National Wildlife Refuge and adding to the treatment capacity of 11,500 acres of existing STAs (STA-1 East and STA-1-West).

<u>Phase Three (2018-2024)</u>

- 2018-2022: 1,800 acres of new STA in the eastern Everglades, adjacent to the Loxahatchee National Wildlife Refuge and adding to the treatment capacity of 11,500 acres of existing STAs (STA-1 East and STA-1-West) and 4,700 acres of STA added in Phase Two.
- 2018-2023: 11,000 acre-foot FEB in the western Everglades, adjacent to 13,700 acres of existing and newly completed STAs (STA-5, STA-6 and Compartment C).
- 2019-2024: 800 acres of earthwork in the existing STA-5 to maximize treatment in the western Everglades.

The strategies also include additional source controls – where pollution is reduced at the source – in areas of the eastern Everglades where phosphorus levels in stormwater runoff have been historically higher. In addition, a science plan will ensure continued research and monitoring to improve and optimize the performance of water quality treatment technologies.

Implementation of the technical plan is estimated to cost $880 million. The SFWMD is proposing to fund the plan through a three-part strategy that includes a combination of state and SFWMD revenues consisting of cash reserves from the SFWMD, ad valorem revenues collected by the SFWMD, and state appropriations. The SFWMD has proposed using $220 million in cash reserves, $300 million in anticipated ad valorem tax revenues from increased property values resulting from new construction estimated to increase by 1-1.5 percent, and a state appropriation of $32 million each year throughout the 12-year implementation period of the plan (Table 1).

The project construction schedule is intentionally planned over a 12-year period to balance timely and reasonable progress in improving Everglades water quality with the implementation of the SFWMD's ongoing core mission responsibilities for flood control, water supply and natural systems restoration. It also recognizes the economic and engineering realities associated with planning, permitting, designing, constructing and operating massive, biologically-based public works projects that rely on cutting-edge engineering, science and technology.

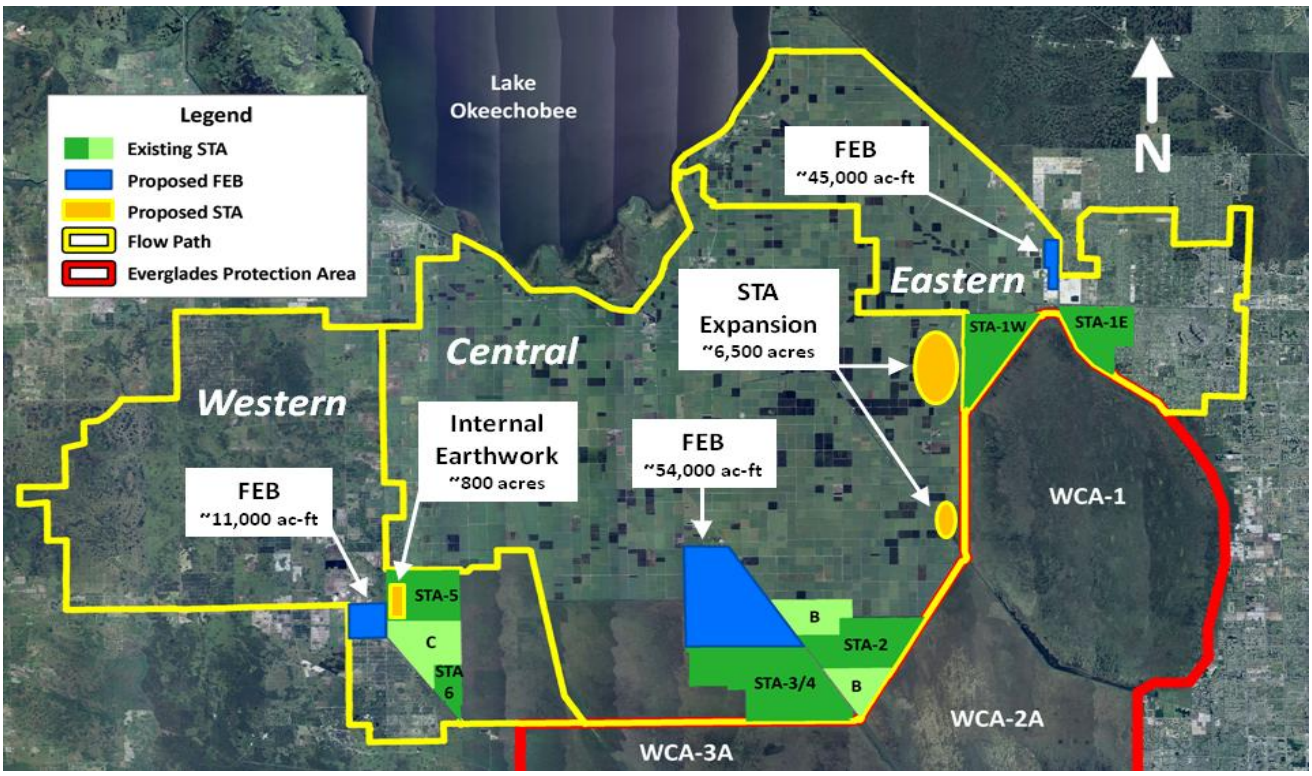

Figure 1. Restoration Strategies Flow Paths and Projects

SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Everglades Restoration Strategies Funding
Estimated Project Costs

Flow Path	Projects	Cost
Eastern Flow Path	FEB & STAs	$365M
Central Flow Path	FEB	$120M
Western Flow Path	FEB & Earthwork	$130M
	Replacement Features	$180M
	Science Plan	$ 55M
	Source Controls	$ 30M
	Total	**$880M**

Table 1. Restoration Strategies Project Costs

Section 373.4592, F.S., "Everglades Forever Act:" Goals and Findings

The Everglades Forever Act (EFA)[1] is the primary Florida law pertaining to the management, protection, and restoration of the Everglades. Originally enacted in 1994, the statute outlines the state's commitment to preserve and restore an ecosystem that is "unique in the world and one of Florida's great treasures."[2] The statue is also designed to function in concert with the Comprehensive Everglades Restoration Plan (CERP), a multi-billion, multi-decade plan jointly implemented and funded by the state and federal government. The foremost goals of the EFA include improving both the quantity and quality of waters discharged into the Everglades Protection Area, and protecting native plants and animals of the Everglades by stemming the proliferation of invasive, non-native species within the ecosystem.[3]

As indicated in the legislative findings made at the outset of the EFA, the legislature was particularly concerned with excessive phosphorous levels in the Everglades. The EFA states that, "the Legislature finds that waters flowing into the Everglades Protection Area contain excessive levels of phosphorus. A reduction in levels of phosphorus will benefit the ecology of the Everglades Protection Area."[4] This goes hand in hand with the other goals set forth in the EFA.

Non-point sources of pollution, such as from agricultural areas and suburban storm water runoff, are a contributor of phosphorous contamination in the Everglades.[5] The EFA addresses non-point nutrient pollution primarily via two methods: (1) requiring the implementation of best management practices (BMPs) in the Everglades Agricultural Area (EAA); and (2) mandating the construction of storm water treatment areas (STAs).[6]

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[1] Section 373.4592, F.S.
[2] Section 373.4592(1)(a), F.S.
[3] Section 373.4592(1)(e), F.S. *See also* Michael T. Olexa & Zachary Broome, Handbook of Florida Water Regulation: Florida Everglades Forever Act, University of Florida Institute of Food and Agricultural Services.
[4] Section 373.4592(1)(d), F.S.
[5] Michael T. Olexa & Zachary Broome, Handbook of Florida Water Regulation: Florida Everglades Forever Act, University of Florida Institute of Food and Agricultural Services.
[6] Section 373.4592(4), F.S.

Everglades Forever Act: Everglades Long-Term Plan

In 2003, the legislature substantially amended the EFA, creating the Everglades Long-Term Plan.[7] The statute establishes that a long-term planning process is the optimal means by which to reduce the flow of excess levels of phosphorous into the Everglades.[8] At the heart of this process is the utilization of STAs and BMPs.[9]

The 2003 amendments also provide that the Long-Term Plan be implemented over the course of an initial 13-year phase (2003-2016) "and shall, to the maximum extent practicable, achieve water quality standards relating to the phosphorous criterion in the Everglades Protection Area as determined by a network of monitoring stations established for this purpose."[10] For every five years thereafter, the Florida Department of Environmental Protection (FDEP) must "review and approve incremental phosphorous reduction measures to be implemented at the earliest practicable date."[11]

Everglades Forever Act: Everglades Program

Section 373.4592(4), F.S., establishes the core substantive programs of the EFA, which are to be implemented by the SFWMD. These include:

- The construction of a number of STAs currently in operation, as directed under the Everglades Construction Project set out in Section (4)(a).
- The implementation of a water supply management program designed to improve the quantity of water reaching the Everglades and improve hydroperiod deficiencies,[12] in part via a reduction in wasteful discharges of fresh water to tide and water conservation practices and reuse measures.
- Providing additional inflows to the Everglades Protection Area so as to realize an average annual increase of 28 percent compared to the baseline years of 1979 to 1988 without reducing water quality benefits.
- SFWMD is directed to develop a model to be used for quantifying the amount, timing, and distribution of water needed to account for all reductions in flow to the Everglades Protection Area from BMPs.
- The development, through cooperation with federal and state agencies, of other programs and methods designed to increase the water flow and improve the hydroperiod of the Everglades Protection Area.[13]

Everglades Forever Act: Funding

To fund the various projects called for as part of the Everglades Program, SFWMD is empowered to levy an ad valorem tax on property owners within the Okeechobee Basin not exceeding 0.1 mill.[14] The 0.1 mill ad valorem tax must be used for design, construction, and implementation of the initial phase of the long term plan, including operation, maintenance, and enhancements of the Everglades Construction Project.[15] Moreover, the 0.1 mill ad valorem tax must be the sole direct SFWMD contribution from SFWMD ad valorem taxes "appropriated or expended for the design, construction, and acquisition of the Everglades Construction Project, unless the Legislature by specific amendment to this section increases the 0.1 mill ad valorem tax contribution, increases the agricultural privilege taxes, or otherwise reallocates the relative contribution by ad valorem taxpayers and taxpayers paying

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[7] Section 373.4592(3), F.S.
[8] Section 373.4592(3)(a), F.S.
[9] Section 373.4592(3)(b), F.S.
[10] Section 373.4592(3)(d), F.S.
[11] Section 373.4592(3)(e), F.S.
[12] A hydroperiod is defined as "the number of days per year that an area of land is dry or the length of time there is standing water at a location."
[13] Section 373.4592(4)(b)5., F.S.
[14] Section 373.4592(4)(a) F.S.
[15] *Id.*

the agricultural privilege taxes toward the funding of the design, construction, and acquisition of the Everglades Construction Project."[16]

Everglades Forever Act: Research and Monitoring Program

Section 373.4592(4)(d), F.S., establishes an Everglades research and monitoring program requiring FDEP and SFWMD to review and evaluate water quality data for the Everglades Protection Area and tributary waters and to identify additional information necessary to adequately describe water quality.[17] The statute also requires FDEP and SFWMD to similarly monitor and gauge the effectiveness of STAs and BMPs.[18] The department must continue research intended to optimize the design and operation of STAs and to identify other treatment and management methods that may potentially provide superior water quality and quantity benefits to the Everglades.[19]

Furthermore, the statute requires that SFWMD "shall monitor all discharges into the Everglades Protection Area for purposes of determining compliance with state water quality standards."[20] The SFWMD and FDEP is required to annually issue a peer-reviewed report regarding the research and monitoring program that summarizes all of its data and findings.[21]

Everglades Forever Act: Evaluation of Water Quality Standards

With regard to phosphorous, the EFA states that "[i]n no case shall such phosphorus criterion allow waters in the Everglades Protection Area to be altered so as to cause an imbalance in the natural populations of aquatic flora or fauna."[22] In the event that FDEP did not adopt a phosphorous criterion before December 31, 2003, the statute sets the phosphorous criterion at 10 parts per billion (ppb) in the Everglades Protection Area.[23] The statute also establishes the method of evaluating compliance with the phosphorous criterion, which is based upon a long term mean of concentration levels measured at a number of sampling stations recognized as reasonably representative of receiving waters in the Everglades Protection Area.[24]

Everglades Forever Act: Florida's Phosphorous Rule

In 2005, FDEP utilized the rulemaking authority granted to it under the EFA to promulgate rule 62-302.540, F.A.C. (Rule). The Rule "implemented the requirements of the Everglades Forever Act by utilizing the powers and duties granted the FDEP under the EFA and other applicable provisions of Chapters 373 and 403, F.S., to establish water quality standards for phosphorus, including a numeric phosphorus criterion, within the Everglades Agricultural Area (EAA)."[25]

The Rule also sets a numeric phosphorous criterion for Class III waters (waters used for recreation and aquatic life support) at a "long-term geometric mean of 10 ppb, but shall not be lower than the natural conditions of the Everglades Protection Area, and shall take into account spatial and temporal variability."[26] Achievement of the phosphorus criterion within the Everglades Protection Area is gauged based on monthly data collected from monitoring stations in both impacted and unimpacted areas of four separate water bodies: Water Conservation Areas 1, 2 and 3, and the Everglades National Park.[27]

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[16] *Id.*
[17] Section 373.4592(4)(d), F.S.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Section 373.4592(4)(e), F.S.
[23] *Id.*
[24] *Id.*
[25] Rule 62-302.540, F.A.C.
[26] Rule 62-302.540(4)(a), F.A.C.
[27] Rule 62-302.540(4)(b), F.A.C

In both impacted and unimpacted areas, each water body "will have achieved the criterion if the five year geometric mean averaged across all stations is less than or equal to 10 ppb."[28] The following conditions must be met as well:

- The annual geometric mean averaged across all stations is less than or equal to 10 ppb for three of five years.
- The annual geometric mean averaged across all stations is less than or equal to 11 ppb.
- The annual geometric mean at all individual stations is less than or equal to 15 ppb. Individual station analyses are representative of only that station.

Everglades Forever Act: Best Management Practices (BMPs)

Section 373.4592(4)(f), F.S., outlines the BMP program to be applied to agricultural activities in the EAA. The statute requires SFWMD to enforce the BMP program and other requirements of chapter 40E-61 and 40E-63 (the administrative rules pertaining to BMPs) during the terms of the existing permits issued pursuant to those rules.[29] Those rules are to thereafter be amended to implement a comprehensive program consisting of testing, research, and implementation of BMPs that will address all water quality standards within the EAA and Everglades Protection Area.[30] A five-year permitting system is established as well. In accordance with this program:

- EAA landowners must sponsor a program of BMP research with experts to identify appropriate BMPs.
- BMPs must be field tested in the EAA to reflect soil and crop types.
- BMPs as required for varying crop and soil types must be included in permit conditions in the five year permits issued pursuant to the EFA.
- SFWMD must conduct research along with the cooperation of EAA landowners to identify water quality parameters not being significantly improved via STAs and BMPs, and to identify further BMP strategies to assist in meeting those parameters.
- As of December 31, 2006, all permits, including those issued prior to that date, must include additional water quality measures, taking into account the water quality treatment actually provided by the STAs and the effectiveness of the BMPs. As of that date, "no permittee's discharge shall cause or contribute to any violation of water quality standards in the Everglades Protection Area."[31]
- Landowners in the C-139 Basin (an area within the EAA described in detail in Section (16) of the statute) must not exceed an annual loading of phosphorus based proportionately on the historical rainfall for the C-139 Basin over the period of October 1, 1978, to September 30, 1988. New surface inflows must not increase the annual average loading of phosphorus stated above.[32]

The Everglades Forever Act: Agricultural Privilege Tax

Section 373.4592(6), F.S., of the EFA, establishes an annual agricultural privilege tax on those entities conducting an agricultural trade or business on real property located within the EAA.[33] The tax is collected "in the manner applied for ad valorem taxes."[34] For tax notices mailed between November 2006 and November 2013, the annual agricultural privilege tax is set at $35 per acre.[35] For November

[28] Rule 62-302.540(d)(1), F.A.C
[29] Section 373.4592(4)(f), F.S.
[30] *Id.*
[31] Section 373.4592(4)(f)4., F.S.
[32] Section 373.4592(4)(f), F.S.
[33] Section 373.4592(6), F.S.
[34] Section 373.4592(6)(b), F.S.
[35] Section 373.4592(6)(c)1., F.S.

2014 through November 2016, the annual tax rate is $25 per acre.[36] For November 2017 and beyond, the tax rate drops to $10 per acre.[37]

The statute also creates an incentive credit to be applied against the agricultural privilege tax based on a reduction of phosphorous loads via the utilization of BMPs at points of discharge within the EAA.[38] The total phosphorous load attributable to the EAA as a whole is to be measured for each annual period against the total phosphorous load that would have occurred during the 1979-1988 base period using a model described chapter 40E-63 of the Florida Administrative Code.[39] This method is intended to assist SFWMD in making an annual ministerial determination of whether any incentive credit will be available.[40] Incentive credits, if any, will reduce the tax only to the extent that the phosphorous load reduction exceeds 25 percent.[41] The reduction of phosphorous loads by each percentage point in excess of 25 percent creates a credit in the amount of $0.65 per acre from November 2006 through November 2013.[42] The statute does not provide an incentive credit rate beyond 2013.

In addition, incentive credits may not reduce the agricultural privilege tax to less than $24.89 per acre, which is defined by the statute as the "minimum tax."[43] To the extent that the application of credits would reduce the amount of the tax below the minimum tax level, any unused credits may be carried forward, on a phosphorous load percentage basis, for use in subsequent years.[44] Moreover, any property that achieves an annual flow weighted mean concentration of 50 ppb of phosphorous at each discharge structure serving the property is entitled to have the minimum tax "included on the annual tax notice mailed in November of the next ensuing calendar year."[45] Phosphorous reductions in excess of 50 ppb are carried forward to the subsequent year in determining whether the minimum tax is to be applied.[46] All unused or excess incentive credits will expire after tax notices are mailed in November 2013.[47]

Agricultural entities in the EAA are also entitled to have the agricultural privilege tax on their properties reduced to the minimum tax by participating in the baseline plan defined in chapter 40E-63, F.A.C, which consists of the implementation of BMPs and the monitoring of phosphorous levels at discharge points on the property.[48] To qualify for the minimum tax, participants must achieve phosphorous load reductions of 45 percent or greater for the period of November 2006 through November 2013.[49] A phosphorous load reduction schedule is not provided for beyond 2013.

If for any given year, the number of total acres subject to the agricultural privilege tax is less than the number of acres listed on the agricultural privilege tax roll certified in November 1994, the minimum tax is subject to increase.[50] For each tax year, SFWMD must determine the amount, if any, by which the sum of the following figures exceeds $12,367,000:

(1) The product of the minimum tax multiplied by the number of acres subject to the agricultural privilege tax.
(2) The "ad valorem tax increment," defined as "50 percent of the difference between the amount of ad valorem taxes actually imposed by the SFWMD for the immediate prior tax year against property included on the Everglades agricultural privilege tax roll certified for the tax notices mailed in November 1994 that was not subject to the Everglades agricultural privilege tax during

[36] Section 373.4592(6)(c)6., F.S.
[37] *Id.*
[38] Section 373.4592(6)(c)2., F.S.
[39] *Id.*
[40] *Id.*
[41] Section 373.4592(6)(c)3., F.S.
[42] *Id.*
[43] Section 373.4592(6)(c)4., F.S.
[44] *Id.*
[45] *Id.*
[46] Section 373.4592(6)(c)5., F.S.
[47] Section 373.4592(6)(c)4., F.S.
[48] Section 373.4592(6)(c)5., F.S.
[49] *Id.*
[50] Section 373.4592(6)(e), F.S.

the immediate prior tax year and the amount of ad valorem taxes that would have been imposed against such property for the immediate prior tax year if the taxable value of each acre had been equal to the average taxable value of all other land classified as agricultural within the EAA for such year; however, the ad valorem tax increment for any year shall not exceed the amount that would have been derived from such property from imposition of the minimum tax during the immediate prior tax year."[51]

The aggregate of these figures is referred to by the statute as the "excess tax amount."[52] If for any tax year, the amount computed in figure (1) above is less than $12,367,000, the excess tax amount is applied as follows: "If the excess tax amount exceeds such difference [the difference between $12,367,000 and the amount computed in Figure 1 above], an amount equal to the difference must be deducted from the excess tax amount and applied to eliminate any increase in the minimum tax. If such difference exceeds the excess tax amount, the excess tax amount must be applied to reduce any increase in the minimum tax. In such event, a new minimum tax shall be computed by subtracting the remaining excess tax amount from $12,367,000 and dividing the result by the number of acres subject to the Everglades agricultural privilege tax for such tax year."[53]

The statute also provides for a hardship exception, whereby if either the Governor, the President, or the U.S. Department of Agriculture declares a state of emergency or disaster "resulting from extreme natural conditions impairing the ability of vegetable acreage to produce crops," payment of the privilege taxes are to be deferred for a period of one year, with subsequent annual payments deferred as well depending on the time of year in which the declaration is made.[54]

Florida's "Polluter Pays Amendment" and the Meaning of "Primarily Responsible"

In 1996, Florida's voters approved a constitutional amendment, what is now Article II, Section 7(b), Florida Constitution ("Polluter Pays Amendment"), providing that "those in the EAA who cause water pollution within the Everglades Protection Area or the EAA shall be primarily responsible for paying the costs of the abatement of that pollution."[55] Prior to its passage, the initiative was deemed constitutional by the Supreme Court of Florida, which held that the initiative was "sufficiently clear and embraced but a single subject."[56]

Following its passage, the Governor sought guidance from the Florida Supreme Court on two questions pertaining the amendment's proper function and application:[57]

(1) Is the amendment self-executing, or does it require the legislature to enact implementing legislation to determine how to carry out its intended purposes?
(2) What does the term "primarily responsible" mean? For instance, does it mean responsible for more than half the costs of abatement, a substantial part of the costs of abatement, the entire cost, or something different?

In an advisory opinion, the Court answered the first question in the negative, stating that the amendment cannot be implemented without the aid of the legislation as it does not provide enough guidance for accomplishing its purpose.[58]

As to the meaning of "primarily responsible," the Court found that the words should be applied "in accordance with their ordinary meaning to require that individual polluters, while not bearing the total

[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Section 373.4592(6)(d), F.S.
[55] Article II, Section 7(b), Fl. Const.
[56] Advisory Opinion to Governor – 1996 Amendment 5 (Everglades), 706 So.2d 278, 279-80 (1997).
[57] *Id.*
[58] *Id.*

burden, would bear their share of the costs of abating the pollution found to be attributable to them."[59] The Court declined to specify an exact percentage of the costs polluters would be responsible for.

The issue was revisited by the Florida Supreme Court in the 2002 case *Barley v. South Florida Water Management Dist*.[60] The petitioners owned property within the Okeechobee Basin, wherein the SFWMD authorized by various statutory authority, including the EFA, to levy ad valorem taxes on property within the SFWMD.[61] The petitioners argued that because they were non-polluters, SFWMD's authority to levy taxes on them and similarly situated property owners was inconsistent with Article II, Section 7(b), Florida Constitution, which in their view, required polluters within the EAA to pay for 100 percent of the pollution they caused.[62] In finding against the petitioners, the Court echoed its own advisory opinion in stating that the words "primarily responsible" would be applied within their "ordinary meaning."[63] According to the Court, this "includes a recognition that individual polluters would not bear the 'total burden.'" The Court held that SFWMD's levy of an ad valorem tax on all property, including that of non-polluters, within Okeechobee Basin was thus constitutionally valid.[64] Lastly, the Court noted that the "polluter pays" provision does not expressly prohibit the state from taxing other persons or entities for the purpose of paying for pollution abatement in the EPA or EAA.

During the next regular session in 2003, the Legislature amended the law imposing the Everglades Agricultural Privilege Tax as follows:

> (6) EVERGLADES AGRICULTURAL PRIVILEGE TAX.—
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> (c) The initial Everglades agricultural privilege tax roll shall be certified for the tax notices mailed in November 1994. Incentive credits to the Everglades agricultural privilege taxes to be included on the initial Everglades agricultural privilege tax roll, if any, shall be based upon the total phosphorus load reduction for the year ending April 30, 1993. The Everglades agricultural privilege taxes for each year shall be computed in the following manner:
>
> 6. The annual Everglades agricultural privilege tax for the tax notices mailed in November 2014 <u>through November 2016 shall be $25 per acre and for tax notices mailed in November 2017</u> and thereafter shall be $10 per acre.
>
> (h) In recognition of the findings set forth in subsection (1), the Legislature finds that the assessment and use of the Everglades agricultural privilege tax is a matter of concern to all areas of Florida and the Legislature intends this act to be a general law authorization of the tax within the meaning of s. 9, Art. VII of the State Constitution <u>and that payment of the tax complies with the obligations of owners and users of land under s. 7(b), Art. II of the State Constitution.</u>

The 2002 Barley opinion and the 1997 advisory opinion discussed above are the only opinions in which the Florida Supreme Court has interpreted the "polluter pays" provision, and there are no additional lower appellate court decisions that address the issue. There are also no appellate court decisions directly interpreting the agricultural privilege tax provision in s. 373.4592(6), F.S., including language added during the 2003 session.

Recent Everglades Litigation

The current state of Everglades regulation has been heavily shaped by two separate but interrelated cases, the origins of which stretch back to 1988: *U.S. v. South Florida Water Management District* and *Miccosukee Tribe of Indians v. U.S.* In fact, an impetus behind the EFA was putting an end to such litigation.[65] Nonetheless, to quote Judge Gold from a ruling issued in 2011, "[i]t is now…eighteen years after EPA, [SFWMD], and [FDEP] recognized in 1993 that it was time to 'bring to a close 5 years of

[59] *Id*. at 81.
[60] 823 So.2d 73 (2002).
[61] *Id*. at 74.
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Miccosukee Tribe of Indians v. U.S*., 2011 WL 1264977 2011, at 17.

costly litigation,' which has now expanded to twenty-three years of costly litigation over many of the same issues… ."[66]

U.S. v. South Florida Water Management District (Moreno Case)

In 1988, the United States sued SFWMD and the Florida Department of Environmental Regulation (now FDEP) in federal district court alleging that waters entering the Loxahatchee National Wildlife Refuge ("Refuge") and Everglades National Park ("Park') were being polluted with phosphorus runoff from farms in the EAA.[67] After three years of costly and contentious litigation, the State Parties admitted liability and entered into settlement agreement with the federal government. That agreement was subsequently approved in a Consent Decree entered by then presiding Judge William Hoeveler.[68]

Under the Consent Decree, the State Parties agreed to implement a two part phosphorus control program. First, they agreed to build and operate by 2004 approximately 35,000 acres of constructed wetlands (known as Stormwater Treatment Areas ("STAs")) that remove phosphorus with plants (there were initially five STAs: STA-1W, STA-2, STA-3/4, STA-5 and STA-6). In addition, they would implement an agricultural best management practices regulatory program in the EAA designed to achieve a 25% reduction in phosphorus discharges from the basin. Finally, the State Parties committed to researching and adopting a numeric phosphorus water quality standard for the Everglades.

Under the Decree, the State Parties also had to meet initial interim phosphorus limits for the Refuge and Park and, by December 31, 2006, the lower of the new numeric phosphorus water quality standard or the long-term phosphorus limits described in Decree, whichever was lower. Pursuant to the Decree, a violation of an applicable phosphorus limit requires the State Parties to construct more STAs, impose more agricultural BMPs, or a combination of both.

Since the Decree was entered, it was amended to require the Army Corps of Engineers to build a 5,500 acre STA adjacent to the Refuge (known as STA-1E). In 2004, in response to a potential violation of the Refuge's interim limits, the State Parties agreed to build an additional 17,000 acres of STAs adjacent to STA-2 and STAs-5 and 6 (known as Compartment B and Compartment C STAs, respectively. The SFWMD also built pumps and canals that diverted untreated stormwater discharges from Wellington away from the Refuge. Finally, in 2005, FDEP adopted a numeric phosphorus water quality standard for the Everglades. Under the Rule, phosphorus levels in the Refuge and Water Concentration Areas 2 and 3 must be at or below a long-term geometric mean of 10 ppb, taking into account spatial and temporal variability. Phosphorus levels in the Park must meet the limits prescribed by the Consent Decree.

Today, after an investment of approximately $1.5 billion, the SFWMD is operating nearly 60,000 acres of STAs, which in 2011 treated 735,000 acre-feet of water and reduced total phosphorous loads to the Everglades Protection Area by 79%. In 1996, SFWMD also successfully implemented the EAA BMP program, with annual farm nutrient runoff having been reduced by approximately 55 percent over the programs 16-year history. Combined, these two control programs have reduced phosphorus levels in waters entering the Everglades from a high of 200 ppb to as low as 13 ppb, with some waters in the Everglades National Park achieving phosphorous levels below the 10 ppb goal.

Miccosukee Tribe of Indians v. U.S. (Gold Case)

In 2003, the Florida Legislature amended the EFA to allow rules creating new discharge limits for structures discharging into the Everglades, including the SFWMD's STAs. Rather than meet the phosphorus water quality standard by the EFA's 2006 deadline, the new rule would allow dischargers, including the SFWMD, to discharge at higher levels through 2016 provided they were implementing "Best Available Phosphorus Reduction Technology" (BAPRT), which the EFA amendments defined as the projects in the SFWMD's *Long-Term Plan for Achieving Water Quality Standards* (Long-Term Plan).

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[66] *Id.*.
[67] *See U.S. v. South Florida Water Management District*, 847 F. Supp 1567 (S.D. Fla. 1992).
[68] *Id.*

In 2004, the Miccosukee Tribe brought suit against the United States Environmental Protection Agency (EPA) claiming that the 2003 EFA amendments, and portions of the State's subsequently-adopted phosphorus water quality standard[69] (Phosphorus Rule) that implemented them, violated the Federal Clean Water Act (CWA). FDEP subsequently intervened as a defendant in the case. SFWMD was not a party to the lawsuit and FDEP never issued permits with moderating provisions.

In July 2008, Judge Alan Gold agreed with the Tribe and issued an order enjoining EPA and FDEP from issuing new permits containing moderating provisions.[70] In essence, the Court perceived the new variance procedure as creating a statutorily mandated "blanket variance," and not a typical variance which is generated on a case by-case analysis. The Court also directed EPA to conduct a thorough, written review of other provisions in the 2003 EFA amendments and Phosphorus Rule to determine if they complied with the CWA (what the Court refers to as a "Determination Letter"). Neither EPA nor FDEP appealed Judge Gold's ruling.

EPA never conducted the review, prompting the Tribe to file a motion for contempt against EPA. The Tribe subsequently broadened the scope of its motion to include claims against FDEP. The Tribe asserted that EPA and FDEP violated the July 2008 order by allowing the SFWMD to continue to operate under old permits *issued prior* to the Court's July 2008 order. Those permits authorized discharges above the phosphorus water quality standard; however, they did so in reliance upon existing regulations authorizing "administrative orders" and "compliance schedules" - frequently used devices that allow a discharger to bring itself into compliance with a water quality standard provided it implements new remedies within a certain timeframe.

On April 14, 2010, Judge Gold again agreed with the Tribe and ruled that EPA and FDEP violated his July 2008 order (but stopped short of holding them in contempt).[71] In so ruling, the Court clarified (and largely rewrote) the scope of his earlier injunction. In summary, the Court ordered:

- EPA "shall direct the State of Florida" to delete the 2003 EFA amendments and those portions of the Phosphorus Rule that implemented them. Attached to his order are underlined/strike through versions of the EFA and Phosphorus Rule reflecting the text the Court wants the Legislature and FDEP to remove from the EFA and Rule 62.302.540, F.A.C.
- EPA shall determine the remedies and strategies that the SFWMD must implement, "with specific milestones . . . that provide an enforceable framework" to ensure that discharges to the Everglades are in compliance with the Phosphorus Rule. The EPA shall then direct FDEP to amend the SFWMD's existing NPDES permits to include the new remedies and strategies.
- After FDEP issues the new NPDES permits, EPA is to revoke FDEP's authority to issue NPDES permits for discharges into the Everglades.

On September 3, 2010, the EPA issued its Amended Determination as required by the Court. The Amended Determination describes a two-part Water Quality Based Effluent Limit for STA discharges. Total phosphorus concentrations in STA discharges may not exceed either 10 parts per billion (ppb) as an annual geometric mean in more than two consecutive years or 18 ppb as an annual flow weighted mean. The Amended Determination also provides direction on how the SFWMD should achieve the STA discharge limits, including expanding existing STAs to provide an additional 42,000 acres of effective treatment area.

In April of 2011, Judge Gold again revisited the case to address several issues, such as, conforming the NPDES permitting program to meet the water quality based effluent limitations for phosphorous described in the Amended Determination. Judge Gold emphasized that “it is necessary to enact and enforce the appropriate water standard and [quality based effluent limitations] *now*, and to have *immediate* conformance of the permits for the purpose of enforcing all terms therein.”[72] To accomplish

[69] Rule 62-302.540, F.A.C
[70] *Miccosukee Tribe of Indians v. U.S.*, 2008 WL 2967654.
[71] *Miccosukee Tribe of Indians v. U.S.*, 2010 WL 9034624.
[72] *Miccosukee Tribe of Indians v. U.S.*, 2011 WL 1264977 2011, at *18.

this, Judge Gold ordered that permitting authority be primarily transferred to the EPA: "the EPA must now take the reins of the permitting issues and take action as to what it has committed itself to doing."[73] Specifically, the EPA was ordered to issue permits without compliance schedules so that the water quality based effluent limitations are immediately enforceable.[74] In June of 2011, the EPA rejected the amended NPDES permits for the SFWMD that had been submitted by FDEP.

Clean Water Act Variances and Use Attainability Analysis

Under section 303 of the federal Clean Water Act (CWA), states are required to adopt water quality standards (WQS) for their navigable waters, and to review and update those standards at least every three years. These standards must include:

- Designation of a waterbody's beneficial uses, such as water supply, recreation, fish propagation, or navigation;
- Water quality criteria that defines the amounts of pollutants in either numeric or narrative form, that the waterbody can contain without impairment of the designated beneficial uses; and
- Anti-degradation requirements.[75]

The CWA does provide some flexibility to permittees required to meet an established WQS by allowing the enforcing agency to revise the designated use for a specific waterbody or to grant an individual permittee a variance that temporarily modifies the water quality standards to the highest use and criteria that are currently available. A water quality variance is a temporary change in a State's water quality standards and its relevant criteria, usually regarding a specific pollutant. The underlying standards remain in place. In granting the variance, the State must follow its established variance policies and the variance is then subject to public and EPA review. Variances are based on a use attainability demonstration and target achievement of the highest attainable use and associated criteria during the variance period.

A Use Attainability Analysis (UAA) is a structured scientific assessment of the factors affecting the attainment of uses specified in Section 101(a)(2) of the CWA (the so called "fishable/swimmable" uses). The factors to be considered in such an analysis include the physical, chemical, biological, and economic use removal criteria described in EPA's water quality standards regulation.

Under 40 CFR 131.10(g) States can issue a variance or remove a designated use that is not an "existing use," as defined in § 131.3, C.F.R., or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible because:

1. Naturally occurring pollutant concentrations prevent the attainment of the use; or
2. Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or
3. Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
4. Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or
5. Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or
6. Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.

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[73] *Id.* at *20.
[74] *Id.*
[75] 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.6, 131.10-12.1.

B. SECTION DIRECTORY:

Section 1. Amends s. 373.4592, F.S., relating to the Everglades Forever Act.

Section 2. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill appears to have a positive fiscal impact on SFWMD revenues by extending, from 2017 to 2024, the year that the $25 per acre agricultural privilege tax is scheduled to be reduced to $10 per acre. Retaining the $25 per acre tax, rather than decreasing the tax to $10 after 2016, will result in a positive impact of $6.6 million per year from 2017 through 2024 when the tax rate will drop to $10 per acre.

2. Expenditures:

   The SFWMD has proposed using $220 million in cash reserves and $300 million in anticipated ad valorem tax revenues from increased property values resulting from new construction to fund the updated Everglades restoration plan. According to the SFWMD, completion of a use attainability analysis may be accomplished within existing resources.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill appears to have a negative fiscal impact on private landowners who pay the annual agricultural privilege tax, by extending the current tax rate of $25 per acre until 2024. Under current law, the tax rate is scheduled to fall to $10 per acre in 2017.

D. FISCAL COMMENTS:

To fund the $880 million updated Everglades restoration plan referenced in the bill, the SFWMD has stated that it will seek $32 million from the Legislature each year throughout the plan's 12-year implementation period. If the Legislature approves this annual appropriation, it would result in a negative fiscal impact to state government expenditures.

The current agriculture privilege tax assessment, as outlined in statute, was used in determining the funding of the Everglades restoration plan. The extension of the $25 per acre tax will provide funds used to ensure timely completion of projects and to provide available funding to meet unexpected project expenditures.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.