

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB ENRC 07-04 Environmental Gold Star Recognition
SPONSOR(S): Environment & Natural Resources Council
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Environment & Natural Resources Council	14 Y, 0 N	Valenstein	Hamby
1) _____	_____	_____	_____
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

PCB ENRC 07-04 creates the Florida Gold Star Permitting Act. Under current law, the Florida Department of Environmental Protection (DEP) has no comprehensive program to reward those in the regulated community who consistently meet or better their permit requirements. Moreover, the Department does not consistently consider applicants' past violations when reviewing requests for new permits. The bill establishes a comprehensive permitting program to provide incentives for permit renewals that meet specified criteria, while providing the DEP with clear statutory authority to consider the compliance history of an applicant when deciding whether to issue a new permit. In addition, the bill provides the DEP with rulemaking authority to implement the program.

The bill is not expected to have a significant fiscal impact.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote Personal Responsibility – The permitting system established by the bill provides incentives to regulated entities meeting or bettering the requirements of certain permits and provides the Department with statutory authority to consider the compliance history of an applicant when deciding whether to issue a new permit.

B. PRESENT SITUATION AND EFFECT OF PROPOSED CHANGES:

Present Situation – Florida

Currently, the DEP has no comprehensive program to reward those in the regulated community who consistently meet or better their permit requirements. Moreover, the Department does not consistently consider applicants' past violations when reviewing requests for new permits.

Pursuant to s. 403.087(2), F.S., the DEP has adopted rules describing the various requirements that must be met by permit applicants. These may include provisions such as equipment requirements, operating and maintenance requirements, and limitations on emissions or discharges from the permitted facility. In addition to listed permit requirements, pursuant to Rule 62-4.070(5), Florida Administrative Code (FAC), the DEP must consider environmental violations of the applicant, at any location in the state, when determining whether the applicant has provided the necessary "reasonable assurance" that it will be able to meet the permit requirements. However, the rule does not specify exactly which violations may be considered, leading to inconsistent application throughout the Department's permitting programs.

Within certain individual program areas of the Department, additional rules or statutes narrow the scope of Rule 62-620.320, F.A.C. For example, s. 403.707(8), F.S., authorizes the DEP to deny a permit application for a solid waste management facility if an applicant has repeatedly violated statutes, rules, orders, or permit terms or conditions relating to any solid waste management facility and is deemed to be irresponsible, as defined by Rule 62-701.320(3)(b), F.A.C. For wastewater facilities the DEP considers violations of rules related to wastewater facilities or activities when it makes the "reasonable assurance" determination¹, and for environmental resource permitting (ERP) the DEP considers specifically ERP rule and permit violations.² Similar to Rule 62-620.320, F.A.C., none of these programmatic rules or statutes provide guidance as to what type of violations should be considered or how far back into an applicant's history the Department should review.

In addition, the Department currently has statutory authority to adopt alternative permitting programs on a pilot project basis. Section 403.0611, F.S., directs the DEP to explore alternative methods of regulatory permitting, aimed at reducing transaction costs and providing economic incentives for reducing pollution. To date the DEP has not implemented a pilot program under this section.

Present Situation – Federal

In June of 2000, the federal Environmental Protection Agency established the National Environmental Performance Track (NEPT) program. The goal of the program is to encourage performance above and beyond legal requirements that results in measurable benefits to the environment³. Admittance to the program requires a record of sustained compliance with environmental laws, an independently

¹ Rule 62-620.320, F.A.C.

² Rule 40B-400.104(2), F.A.C.

³ EPA's Performance Track website, <http://www.epa.gov/performancetrack/downloads/backgrounder.htm> (last visited Feb. 27, 2007).

reviewed environmental management system (EMS), a commitment to continuous improvement with four measurable goals, a commitment to public outreach, and annual reporting⁴.

Once accepted, members remain in the program for three years, provided that they continue to meet the program criteria. After three years, members may reapply to the program⁵. The benefits of Performance Track membership include recognition, networking, and regulatory incentives. Regulatory incentives include reduced reporting requirements under the Maximum Available Control Technology provisions of the Clean Air Act (CAA), expedited review of federal NPDES permits, extended storage times for large-quantity generators of hazardous waste regulated by the Resource Conservation and Recovery Act (RCRA), and reduced RCRA self-inspections⁶. Both the CAA and the RCRA extended storage time incentives have been adopted in Florida by the DEP⁷. However, neither the NPDES incentives nor the reduced RCRA self-inspections⁸ are currently available in Florida. According to DEP, to date none of the 15 performance track facilities located in Florida has applied for a NEPT regulatory benefit.

Effect of the Proposed Changes

The bill creates the Florida Gold Star Permitting Act, s. 403.0874, F.S., which establishes incentives for those applicants seeking a permit renewal who meet a specified level of compliance with their existing permit and provides the DEP with clear statutory authority to consider the compliance history of an applicant when deciding whether to issue a new permit. With the exception of general permits, as defined in s. 403.814, F.S., the bill affects permits issued by the DEP. In addition, the bill affects similar permits issued by local governments operating an environmental permitting program delegated by the state and certain permits issued by water management districts under s. 373.413, F.S. The bill provides the DEP with authority to create a reporting form and rulemaking authority to implement this section. The bill does not affect the federal NEPT program.

INCENTIVES FOR COMPLIANCE:

The bill creates an incentive program for permit applicants meeting specified criteria. The incentives offered are limited to permit renewals and are divided into two levels. To be eligible for Level 1 incentives, an applicant must have conducted the regulated activity at the site for at least three years prior to the application for a renewal and not have had a formal enforcement action against it during the term of the permit being renewed. The bill defines formal enforcement action to include not only actions in which the DEP has issued or obtained an administrative or judicial final order, but also executed consent orders, and violations that are criminal or would be criminal if committed within Florida. Level 2 incentives require the applicant to meet all Level 1 criteria and in addition be a member of the National Environmental Performance Track program established by the United States Environmental Protection Agency. If eligible, an applicant for a permit renewal shall receive the following incentives upon request:

Level 1 incentives:

1. Short-form permit renewals.
2. Expedited permit review of short-form permit renewals.

⁴ EPA's Performance Track website, <http://www.epa.gov/performancetrack/program/index.htm> (last visited Feb. 27, 2007).

⁵ EPA's Performance Track website, <http://www.epa.gov/performancetrack/downloads/backgroundunder.htm> (last visited Feb. 27, 2007).

⁶ EPA's Performance Track website, <http://www.epa.gov/performancetrack/benefits/index.htm> (last visited Feb. 27, 2007).

⁷ Rule 62-730.160(1), F.A.C., providing for RCRA extended storage time and Rule 62-204.800, F.A.C., providing for CAA MACT reduced reporting.

⁸ A Notice of Proposed Rule for Chapter 62-730, F.A.C., was published in the Florida Administrative Weekly on February 16, 2007. This proposed rule would adopt the federal RCRA incentive allowing fewer self-inspections.

Level 2 incentives:

1. Ten year permits, provided that the applicant has conducted the permitted activity for four years.
2. A Gold Star public recognition program. The Department shall establish a recognition program to ensure the public is able to readily determine which entities permitted by the Department are eligible for Level 2 incentives.
3. Requests for additional information. The department may issue no more than two requests for additional information for a permit renewal under paragraph (b) of this subsection.
4. Other incentives to encourage performance beyond that required by law (to be developed during rulemaking.)

CONSIDERATIONS FOR ISSUING NEW PERMITS:

The bill creates 403.0874(5), F.S., to provide the DEP with clear statutory authority to consider the compliance history of an applicant when deciding whether to issue a new permit. The bill requires the DEP to only consider the applicant's compliance record during the five years preceding the receipt of the new permit application under review. The DEP shall issue a new permit only after the permit applicant affirmatively provides the department with reasonable assurance based on plans, test results, installation of pollution control equipment, or other information, that the construction, operation, or activity of the installation will not discharge, emit, or cause pollution in violation of any of the provisions of Chapter 161, Part IV of Chapter 373, or Chapter 403, F.S., or the rules promulgated thereunder. In reviewing an applicant's compliance history, the DEP shall consider any matter relevant to whether the applicant is willing or able to comply with the permit or any applicable environmental laws or rules, including:

1. The number of violations and the seriousness of such violations in relation to the industry norm and history for the department regulated activity;
2. The number of other similar facilities controlled by the applicant;
3. The number and complexity of any permits held by the applicant and the statistical potential for violations to occur;
4. Whether the violations involved regulatory programs that are the same as, or similar to, the regulatory program from which the permit is being requested;
5. Whether the violations involved activities that are the same as, similar to, or related to the regulated activity for which a permit is being requested;
6. Whether the violations resulted in harm to human health or the environment and the extent of such harm;
7. Whether the applicant has implemented an approach or remedial measure that is effectively designed to prevent a recurrence of the violations or crimes;
8. Whether the facility or operation for which a permit is being requested provides or proposes to provide utility services to the public or serves a similar public purpose;
9. Whether a denial of the permit will have an adverse effect on the public at large;
10. Any relevant evidence offered in mitigation by the applicant; and
11. Whether the applicant has acted reasonably to resolve previous violations and to prevent their recurrence.
12. Whether the violations are caused by acts, or are the result of circumstances, beyond the control of the applicant.

Lastly, the bill creates a presumption that a determination by the DEP, that a permit applicant's history of violations does not preclude permit issuance, is correct. Such a determination shall not be overturned unless shown to be clearly erroneous, based upon clear and convincing evidence.

C. SECTION DIRECTORY:

Section 1. Creates s. 403.0874, F.S., to establish a comprehensive permitting program to provide incentives for permit renewals that meet specified criteria and provide the DEP with clear statutory authority to consider the compliance history of an applicant when deciding whether the applicant has

reasonable assurance it will be able to meet the requirements of the permit, state law, and department rule; to provide for a reporting form, and; to provide rule-making authority.

Section 2. Amends s. 161.041, F.S., to make s. 403.0874, F.S., applicable to permits issued under ch. 161, F.S.

Section 3. Amends s. 373.413, F.S., to make s. 403.0874, F.S., applicable to individual, standard general, and conceptual permits issued under s. 373.413, F.S.

Section 4. Provides an effective date of October 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: See fiscal comments.
2. Expenditures: See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: See fiscal comments.
2. Expenditures: See fiscal comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides an opportunity for a cost savings associated with renewing a permit for an eligible permit applicant. The application for certain permits may be made on short-forms, the review of such applications may be expedited and, in some cases, permits may be issued for a longer period of time.

D. FISCAL COMMENTS:

The bill may reduce revenue received by the DEP. The bill provides for longer term permits which may reduce the funds the DEP receives through permit fees. In addition, longer term permits will change the expected cash flow the DEP receives through permit fees. These same possible revenue reductions and changes in cash flow may affect local governments operating an environmental permitting program delegated by the state. Any need for additional staff due to the requirement for expedited review of certain permits and the requirement to provide incentives may be offset by a reduced workload resulting from longer term permits and short-form renewals. Lastly, the bill includes rulemaking authority to implement the bill's provisions. Rulemaking costs will be insignificant and non-recurring. These costs include DEP's efforts to publicize a proposed rule through mail-outs and public workshops around the state, as well as costs associated with publication and process requirements pursuant to Chapter 120, F.S.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

Not applicable because the bill does not: require counties or municipalities to spend funds or to take an action requiring the expenditure of funds; reduce the percentage of a state tax shared with counties or municipalities; or reduce the authority that counties and municipalities have to raise revenue.

B. RULE-MAKING AUTHORITY:

The bill provides the DEP with authority to promulgate rules to implement this act.

C. STATEMENT OF THE SPONSOR

N/A

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On April 11, 2007, the Environment and Natural Resources Council favorably recommended PCB ENRC 07-04 with two amendments. The bill reported by the council differs from the PCB presented to the council in three ways.

First, the bill replaces the Level 2 incentive allowing for expedited permits, with an incentive limiting the DEP to two requests for additional information on permits that qualify for Level 2 incentives.

Second, the bill adds one factor to the list of factors the DEP is to take into consideration when reviewing an applicant's compliance history. This factor directs the DEP to consider whether a violation was caused by acts, or was the result of circumstances, beyond the control of the applicant.

Lastly, the bill creates a presumption that a determination by the DEP, that a permit applicant's history of violations does not preclude permit issuance, is correct. Such a determination shall not be overturned unless shown to be clearly erroneous, based upon clear and convincing evidence. The PCB did not address this issue.