

Memorandum

Florida Department of Environmental Protection

To: DEP Submerged Lands and Environmental Resource Program Administrators
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From: Timothy Rach, Office of Submerged Lands & Environmental Resources

Date: June 2, 2009

Subject: Senate Bill 360 – extension of ERP permits

Senate Bill 360, as passed during the 2009 legislative session and signed by the Governor on June 1, 2009, (attached) automatically extends up to two years the expiration date of permits issued under Part IV of Chapter 373, F.S., that have an expiration date of September 1, 2008, through January 1, 2012, with the exception of:

- A permit issued in conjunction with an authorization under the State Programmatic General Permit or any Regional General Permit;
 - A permit or other authorization held by an owner or operator determined to be in significant non-compliance; or
 - An extension that would delay or prevent compliance with a court order.
- [See Section 14, subsection (4) for additional details]

To receive this extension, the holder of a valid, qualifying permit must notify the authorizing agency in writing no later than December 31, 2009, identifying the permit and the anticipated timeframe for acting on the activities authorized by the permit [see Section 14, subsection (3)]. Such persons do not have to reapply, and do not have to pay a fee for the extension. For purposes of tracking these extensions in the Department's Permit Application system, they will be coded as a time extension, with a fee of \$0 and an override code of "exempt".

The extension provision of SB 360 applies only to permits issued under Part IV of Chapter 373 and does not apply to permits or other authorizations that were issued by DEP or the WMDs under other statutes such as CUP permits under Part II of Chapter 373; mangrove trimming or

alteration; or mine reclamation, except as described below. It also does not apply to the duration of Jurisdictional Determinations or Formal Determinations.

Relationship to Associated Authorizations

SB 360 does not affect mine reclamation authorizations under Chapter 378, F.S, or Coastal Construction Permits issued under Chapter 62B-41, F.A.C., but does apply to mining permits issued under Part IV of Chapter 373, F.S., and Joint Coastal Permits under Chapter 62B-49, F.A.C. It also does not affect the expiration date of leases and easements under Chapter 253, F.S., regardless of whether such leases and easements are associated with a permit issued under Part IV of Chapter 373, F.S. Those leases and easements can be renewed in accordance with existing statutes, rules, and policies of the Board of Trustees. However, letters of consent can and should be extended to coincide with the extension of their associated permits (including noticed general permits, see below).

Effect on Exemptions

An exemption is not a permit, therefore the extension provisions of SB 360 do not apply to the expiration date of an exemption verification. Persons who want to renew an exemption verification must submit a new request with the \$100 fee required by Section 373.109, F.S.

Effect on Noticed General Permits

SB 360 will extend by two years the five-year expiration date of a noticed general permit when the holder of such permit submits the required notice no later than December 31, 2009.

Modifications

Subsection (5) limits the total time extensions and preservation of the applicability of existing rules to two years, except where it can be demonstrated that those rules would create an immediate threat to public safety or health. In such a case, new rule criteria will apply. Other modifications to permits during this extended duration will be limited to work that lessens environmental impacts. Any request to extend a permit beyond the two-year time frame provided in SB 360 will require an application with the applicable fee, and will be reviewed in accordance with applicable rule criteria including any applicable new rules.

Effect on Conceptual Approval Permits

Many conceptual approval permits require construction to start within a specified time period. Upon receipt of the notice required by subsection (3), the time period to begin construction will be extended by two years. When notice is received, a conceptual approval permit that has a specified expiration date will also be extended for two years.

The applicability of existing rules in subsection (5), discussed above, will apply to extension of the duration of the conceptual approval permit, but not automatically to subsequent construction permits that are required under the conceptual approval permit. The applicability of existing rules to subsequent construction permits is dependent on the specific rules of the water management district. The Southwest Florida Water Management District rules provide that construction permits must meet the rules in effect at the time the construction permit is reviewed. However, the South Florida Water Management District rules provide that rules in effect when a conceptual approval permit is issued will apply to the construction permit if the construction permit application is consistent with the terms and conditions of the conceptual approval permit; if the construction plans are not consistent, the construction permit will be subject to current rules.

Effect on Delegated Local Government Permits

Subsection (1) references permits issued by DEP or a WMD, and does not reference permits issued by a delegated program under Part IV of Chapter 373, F.S. However, because of language in this subsection that relates to other authorizations granted by local governments, it appears the legislature did not intend such a narrow interpretation. Therefore, the provisions of SB 360 are interpreted to also apply to permits issued by delegated local governments.

Kick-Out for Non-Compliance

Subsection (4)(b) provides that the extension provisions do not apply if a permit or other authorization held by an owner or operator is determined to be in significant non-compliance. It provides that such non-compliance must be established through the issuance of a warning letter or notice of violation, the initiation of formal enforcement, or other equivalent action by the authorizing agency.

Where we initiated one of the described enforcement remedies prior to receipt of the notice required by subsection (3), and the violation remains unresolved, the person requesting the extension automatically fails to qualify for the extension under SB 360.

However, if such action has not been taken at the time the notice required by subsection (3) is received, and we have knowledge of “significant” non-compliance, or significant non-compliance is documented during a compliance inspection as a result of the extension application, you should immediately initiate the appropriate enforcement action that documents the non-compliance. In this case, because the notice to extend the permit was received without *prima facie* documentation that the requestor did not qualify to use SB 360, our response letter should explain that the permit does not qualify for the requested extension, and *must* include Chapter 120, F.S., Notice of Rights language.

The term “significant” is not defined in SB 360. However, this term should be interpreted to mean a non-compliance issue involving one or more of the following: 1) actual or potential harm to human health or the environment as outlined in the DEP Directive 923, Part 6; 2) an activity that has complicated corrective actions; 3) one or more permit violations and a responsible party with a history of non-compliance; or 4) violations for which penalties are appropriate or necessary to resolve the non-compliance issue. Generally, actions such as Letters of Non-Compliance and Compliance without Enforcement will not be associated with significant non-compliance activities that would prevent use of the extension provisions of SB 360.

In addition to non-compliance with a permit, this provision will also apply to significant non-compliance with a Consent Order, Final Order, judgment, or other document resolving the enforcement action.

Response Letters

All requests to use the extension provisions of SB 360 shall receive a written response from the agency responsible for the original permit. A copy of the written response letter should be sent to the U.S. Army Corps of Engineers for their records. If the applicant requests and is granted an extension less than the two years allowed, the response should indicate that any future extension requests under SB 360 can cumulatively total only two years.

Applicant meets the provisions of SB 360

The written response should clearly state the new expiration date. The date is extended by up to two years from the date of the expiration stated in the permit, not based on the date the notice was received requesting the extension. Chapter 120, F.S., Notice of Rights language is not required when we are acknowledging that the permit can be extended. If there were objectors to the original permit we do not need to send them a copy of the extension verification. They would not have a point of entry under Chapter 120, F.S., as the legislation is self-executing for qualifying permits. The written response should also contain the following statement:

This extension does not affect: 1) the water quality certification determination pursuant to Section 401, Public Law 92-500, 33 U.S.C. Section 1341; or 2) the coastal zone consistency concurrence determination made under Florida’s Coastal Zone Management Program in Section 307 of the Coastal Zone Management Act and 15 CFR 930, Subpart D originally contained in the permit.

Applicant does not meet the provisions of SB 360

The written response should indicate the reasons for the denial (refer to subsection (4)) and Chapter 120, F.S. Notice of Rights language should be included in the response.

SB 360 Guidance

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Attachment



SB 360er.pdf

cc: Jim Stoutamire
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Betsy Hewitt