

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 691 Beach Management

**SPONSOR(S):** Agriculture & Natural Resources Subcommittee, Frishe

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 758

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	12 Y, 0 N, As CS	Deslatte	Blalock
2) Rulemaking & Regulation Subcommittee	15 Y, 0 N	Rubottom	Rubottom
3) Agriculture & Natural Resources Appropriations Subcommittee	13 Y, 0 N	Helpling	Massengale
4) State Affairs Committee	15 Y, 0 N	Deslatte	Hamby

### SUMMARY ANALYSIS

Current law requires that a coastal construction permit be obtained from the Department of Environmental Protection (DEP) to make any coastal construction or reconstruction or change of existing structures, or any construction or physical activity undertaken specifically for shore protection purposes, or other structures and physical activity including groins, jetties, moles, breakwaters, seawalls, revetments, artificial nourishment, inlet sediment bypassing, excavation or maintenance dredging of inlet channels, or other deposition or removal of beach material, or construction of other structures if of a solid or highly impermeable design, upon sovereignty lands of Florida, below the mean high-water line of any tidal water of the state. The DEP can require engineer certifications as necessary to assure the adequacy of the design and construction of permitted projects.

The bill amends s. 161.041, F.S., specifying that demonstration to the DEP of the adequacy of a project's design and construction is supported by plans, studies, and credible expertise that accounts for naturally occurring variables that might be reasonably expected; authorizing the DEP to issue permits for an incidental take authorization provided under the Endangered Species Act and its implementing regulations if the permits and authorizations include a condition that requires that such authorized activities not begin until the incidental take authorization is issued; requiring the DEP to adopt certain rules involving the excavation and placement of sediment; requiring the DEP to justify items listed in a request for additional information; requiring the DEP to adopt guidelines by rule; providing legislative intent with regard to permitting for periodic maintenance of certain beach nourishment and inlet management projects; requiring the DEP to amend specified rules to streamline such permitting.

The bill amends s. 161.101, F.S., requiring the DEP to maintain certain beach management project information on its website; requiring the DEP to notify the Governor's Office and the Legislature concerning any significant changes in project funding levels.

The bill amends s. 403.813, F.S., providing a permit exception for certain specified exploratory activities relating to beach restoration and nourishment projects and inlet management activities.

The bill appears to be an insignificant negative fiscal impact on state government. The bill appears to have a positive fiscal impact on local governments (See Fiscal Analysis section.).

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Section 1. Amends s. 161.041, F.S.**

###### ***Current Situation***

Section 161.041(1), F.S., requires that a coastal construction permit be obtained from the Department of Environmental Protection (DEP) to make any coastal construction or reconstruction or change of existing structures, or any construction or physical activity undertaken specifically for shore protection purposes, or other structures and physical activity including groins, jetties, moles, breakwaters, seawalls, revetments, artificial nourishment, inlet sediment bypassing, excavation or maintenance dredging of inlet channels, or other deposition or removal of beach material, or construction of other structures if of a solid or highly impermeable design, upon sovereignty lands of Florida, below the mean high-water line of any tidal water of the state.

Section 161.041(2), F.S., specifies that the DEP can authorize an excavation or erection of a structure at any coastal location upon receipt of an application from a property or riparian owner and upon consideration of facts and circumstances, including;

- Adequate engineering data concerning inlet and shoreline stability and storm tides related to shoreline topography;
- Design features of the proposed structures or activities; and
- Potential impacts of the location of such structures or activities, including potential cumulative effects of any proposed structures or activities upon such beach-dune system or coastal inlet, which, in the opinion of the department, clearly justify such a permit.

Section 161.041(3), F.S., specifies that the DEP can also require engineer certifications as necessary to assure the adequacy of the design and construction of permitted projects.

In addition, section 161.041(4), F.S., authorizes the DEP, as a condition to the granting of a coastal construction permit, to require mitigation, financial or other assurances acceptable to the DEP to assure performance of conditions of a permit, or to enter into contractual agreements to best assure compliance with any permit conditions. Biological and environmental monitoring conditions included in the permit must be based upon clearly defined scientific principles.

Section 161.055(2), F.S., specifies that an applicant must submit all necessary information to satisfy the requirements for issuance of a permit. To obtain additional information that the DEP needs (and is not contained in the original permit application) to make a decision on whether to issue a permit, the DEP will submit a request for additional information (RAI) to the applicant for this information. The DEP is required to approve or deny every application within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. However, there is no time limit in current law in which the applicant must respond to the RAI, nor is there a limit for the number of times the DEP may request additional information before deeming an application complete.

In 2011, the Secretary of the DEP established an RAI policy for the permitting process with the following guidelines:

- 1<sup>st</sup> RAI- will require a mandatory review by the permitting supervisor. The RAI can be signed by the permit processor or the permitting supervisor.
- 2<sup>nd</sup> RAI- must be signed by the program administrator.

- 3<sup>rd</sup> RAI- must be signed by the district director or bureau chief. In addition, each district and division must submit a monthly report through the Deputy Secretary for Regulatory Programs of the 3<sup>rd</sup> RAIs issued and an explanation of why the RAI was issued.
- 4<sup>th</sup> RAI or more- will require the DEP Secretary's approval prior to issuing the 4<sup>th</sup> or more RAIs.

### **Effect of Proposed Changes**

The bill amends s. 161.041(3), F.S., to specify that reasonable assurance is demonstrated if the permit applicant provides competent substantial evidence that is based on plans, studies, and credible expertise that accounts for naturally occurring variables that might be reasonably expected.

The bill creates s. 161.041(5), F.S., authorizing the DEP to issue a coastal construction permit in advance of the issuance of any incidental take authorization provided under the Endangered Species Act and its implementing regulations if the permits and authorizations include a condition that requires that such authorized activities can not begin until the incidental take authorization is issued.

The bill creates s. 161.041(6), F.S., directing the DEP to adopt rules to address standard mixing zone criteria and antidegradation requirements for turbidity generation for beach management and inlet bypassing permits that involve the excavation and placement of sediment in order to eliminate the need for variances. The DEP must consider the legislative declaration that beach nourishment projects are in the public interest when processing variance requests.

The bill creates s. 161.041(7), F.S., to specify that applications for permits must be made to the DEP upon such terms and conditions as set forth by rule. If the DEP requests additional information as part of the permit process, the DEP must cite applicable statutory and rule provisions that justify any item listed in a request for additional information. The DEP cannot issue guidelines that are enforceable as standards for beach management, inlet management, and other erosion control projects without adopting such guidelines by rule.

The bill creates s. 161.041(8), F.S., to specify that the Legislature intends to simplify and expedite the permitting process for the periodic maintenance of previously permitted and constructed beach nourishment and inlet management projects under the joint coastal permit process. A detailed review of a previously permitted project is not required if there have been no substantial changes in project scope and past performance of the project indicates that it has performed according to design expectations. The bill also directs the DEP to amend certain chapters of the Florida Administrative Code to streamline the permitting process for periodic beach maintenance projects and inlet sand bypassing activities.

The bill creates s. 161.041(9), F.S., to specify that joint coastal permits issued for activities falling under this section and part IV of chapter 373 must allow for two maintenance or dredging disposal events or a permit life of 15 years, whichever is greater.

### **Section 2. Amends s. 161.101, F.S.**

#### ***Current Situation***

Section 161.101, F.S., requires the DEP to determine which beaches are critically eroded and in need of restoration and nourishment and can authorize appropriations to pay up to 75 percent of the actual costs for restoring and nourishing a critically eroded beach. The local government in which the beach is located will be responsible for the balance of such costs. Whenever a beach erosion control project has been authorized by Congress for federal financial participation in accordance with any Act of Congress relating to beach erosion control in which nonfederal participation is required, it is the policy of the state to assist with an equitable share of the funds to the extent that funds are available, as determined by the DEP. The DEP is also authorized to enter into cooperative agreements and otherwise cooperate with, and meet the requirements and conditions of federal, state, and other local governments and political entities, or any agencies or representatives thereof, for the purposes of improving, furthering, and expediting the beach management program.

With regard to a project approved in accordance with s. 161.161, F.S.,<sup>1</sup> the DEP is authorized to pay from legislative appropriations specifically provided for these purposes an amount up to 75 percent of the costs of contractual services, including, but not limited to, the costs for:

- Feasibility and related planning studies.
- Design.
- Construction.
- Monitoring. The state shall cost-share in all biological and physical monitoring requirements which are based upon scientifically based criteria.

Section 161.101(13), F.S., specifies that to receive state funds a project must provide for adequate public access, protect natural resources, and provide protection for endangered and threatened species. The DEP cannot fund projects that provide only recreational benefits. All funded activities must have an identifiable beach erosion control or beach preservation benefit directed toward maintaining or enhancing sand in the system. Activities ineligible for cost-sharing include, but are not limited to:

- Recreational structures such as piers, decks, and boardwalks.
- Park activities and facilities except for erosion control.
- Aesthetic vegetation.
- Water quality components of stormwater management systems.
- Experimental or demonstration projects unless favorably peer-reviewed or scientifically documented.
- Hard structures unless designed for erosion control or to enhance beach nourishment project longevity or bypassing performance.
- Operations and maintenance, with the exception of nourishment.
- Maintenance and repair of over-walks.
- Navigation construction, operation, and maintenance activities, except those elements whose purpose is to place or keep sand on adjacent beaches.

Section 161.101(14), F.S., also specifies that the intent of the Legislature in preserving and protecting Florida's sandy beaches is to direct beach erosion control appropriations to the state's most severely eroded beaches, and to prevent further adverse impact caused by improved, modified, or altered inlets, coastal armoring, or existing upland development. In establishing annual project funding priorities, the DEP shall seek formal input from local coastal governments, beach and general government interest groups, and university experts. Criteria to be considered by the DEP in determining annual funding priorities must include:

- The severity of erosion conditions, the threat to existing upland development, and recreational and/or economic benefits.
- The availability of federal matching dollars.
- The extent of local government sponsor financial and administrative commitment to the project, including a long-term financial plan with a designated funding source or sources for initial construction and periodic maintenance.
- Previous state commitment and involvement in the project.
- The anticipated physical performance of the proposed project, including the frequency of periodic planned nourishment.
- The extent to which the proposed project mitigates the adverse impact of improved, modified, or altered inlets on adjacent beaches.
- Innovative, cost-effective, and environmentally sensitive applications to reduce erosion.

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<sup>1</sup> Section 161.161, F.S., provides the procedure for approval of beach restoration and management projects and requires the DEP to develop and maintain a comprehensive long-term management plan for the restoration and maintenance of the state's critically eroded beaches.

- Projects that provide enhanced habitat within or adjacent to designated refuges of nesting sea turtles.
- The extent to which local or regional sponsors of beach erosion control projects agree to coordinate the planning, design, and construction of their projects to take advantage of identifiable cost savings.
- The degree to which the project addresses the state's most significant beach erosion problems.

In the event that more than one project qualifies equally under the provisions of this subsection, the DEP shall assign funding priority to those projects that are ready to proceed.

Section 161.101(20), F.S., requires the DEP to maintain a current project listing and may, in its discretion and depending upon the availability of local resources and changes in the criteria listed above, revise the project listing.

### ***Effect of Proposed Changes***

The bill amends s. 161.101(20), F.S., to require the DEP to maintain active project listings on its website by fiscal year to provide transparency regarding those projects receiving funding and the funding amounts, and to facilitate legislative reporting and oversight. The bill also specifies that in consideration of this intent:

- The DEP must notify the Executive Office of the Governor and the Legislature regarding any significant changes in the funding levels of a given project as initially requested in the DEP's budget submission and subsequently included in approved annual funding allocations. The bill defines the term "significant change" to mean those changes exceeding 25 percent of a project's original allocation. If there is surplus funding, notification must be provided to the Executive Office of the Governor and the Legislature to indicate whether additional dollars are intended to be used for inlet management, offered for reversion as part of the next appropriations process, or used for other specified priority projects on active project lists.
- The DEP must prepare a summary of specific project activities for the current fiscal year, funding status, and changes to annual project lists and the summary must be included with the DEP's submission of its annual legislative budget request.
- A local project sponsor can at any time release, in whole or in part, appropriated project dollars by formal notification to the DEP, which must notify the Executive office of the Governor and the Legislature. Notification must indicate how the project dollars are intended to be used.

### **Section 3. Amends s. 403.813, F.S.**

#### ***Current Situation***

Section 403.813, F.S., provides the criteria required for permitting exceptions under chapter 373, F.S.

#### ***Effect of Proposed Changes***

The bill amends s. 403.813, F.S., to create an additional permit exception, notwithstanding any other provision in chapter 403, chapter 373, or chapter 161, for the following exploratory activities associated with beach restoration and nourishment projects and inlet management activities:

- The collection of geotechnical, geophysical and cultural resource data, including surveys, mapping, acoustic soundings, benthic and other biologic sampling, and coring.
- Oceanographic instrument deployment, including temporary installation on the seabed of coastal and oceanographic data collection equipment.
- Incidental excavation associated with any of the activities listed under the two bullets above.

**Section 4. Provides an effective date of July 1, 2012.**

**B. SECTION DIRECTORY:**

Section 1. Amends s. 161.041, F.S., specifying that demonstration to the DEP of the adequacy of a project's design and construction is supported by certain evidence; authorizing the DEP to issue permits for an incidental take authorization under certain circumstances; requiring the DEP to adopt certain rules involving the excavation and placement of sediment; requiring the DEP to justify items listed in a request for additional information; requiring the DEP to adopt guidelines by rule; providing legislative intent with regard to permitting for periodic maintenance of certain beach nourishment and inlet management projects; requiring the DEP to amend specified rules to streamline such permitting.

Section 2. Amends s. 161.101, F.S., requiring the DEP to maintain certain beach management project information on its website; requiring the DEP to notify the Governor's Office and the Legislature concerning any significant changes in project funding levels.

Section 3. Amends s. 403.813, F.S., providing a permit exception for certain specified exploratory activities relating to beach restoration and nourishment projects and inlet management activities.

Section 4. Provides an effective date of July 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

	<b>FY 2012-13</b>	<b>FY 2013-14</b>
<b>Permit Fee Trust Fund</b>		
30 permits/year @ \$100	(\$3,000)	(\$3,000)
<b>General Revenue Fund</b>		
8% Service Charge	(\$240)	(\$240)

2. Expenditures:

According to the DEP, there could be a cost savings associated with issuing long-term permits for multiple events without the need of detailed review when there are no substantive changes to the project, but the savings are expected to be minimal. There will also be a minor cost associated with the DEP rulemaking. The cost is not currently known, however, the DEP can accomplish the rulemaking with its current resources.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

Local governments could see a cost savings associated with streamlining current regulations, including the issuance of long-term permits for multiple events without the need for detailed DEP review when there are no substantive changes to the project.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The private sector could see a cost savings associated with streamlining current regulations, including the issuance of long-term permits for multiple events without the need for detailed DEP review when there are no substantive changes to the project.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>2</sup> Rulemaking authority is delegated by the Legislature<sup>3</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>4</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>5</sup> To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>6</sup> The grant of rulemaking authority itself need not be detailed.<sup>7</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>8</sup>

Consistent with the above stated legal principles, the bill specifically prohibits the application of standard for beach management without adoption through rulemaking.

The bill directs the DEP to adopt rules to address standard mixing zone criteria and anti-degradation requirements for turbidity generation for permits that involve the excavation and placement of sediment for the purpose of eliminating variances. The bill appears to provide sufficient guidelines and standards to limit the department's discretion.

The bill moves the rulemaking provision related to application for coastal construction permits.<sup>9</sup> The section appears to provide sufficient guidance to limit the department's discretion.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 11, 2012, the Agriculture & Natural Resources Subcommittee amended and passed HB 691 as a committee substitute (CS). The CS:

- Deleted language requiring the DEP to work in good faith with permit applicants.

<sup>2</sup> Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So.2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>3</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So.2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>4</sup> Section 120.52(17), F.S.

<sup>5</sup> Section 120.54(1)(a), F.S.

<sup>6</sup> Sections 120.52(8) and 120.536(1), F.S.

<sup>7</sup> *Supra Save the Manatee Club, Inc.*, at 599.

<sup>8</sup> *Sloban v. Florida Board of Pharmacy*, 982 So.2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So.2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>9</sup> Rulemaking language is stricken in s. 161.041(1)(a), and added without substantive change to the new s. 161.041(7).

- Directs the DEP to adopt rules to address standard mixing zone criteria and anti-degradation requirements for turbidity generation for permits that involve excavation and placement of sediment in order to eliminate the need for variances.
- Deletes language authorizing the DEP to issue joint coastal permits for activities falling under s. 161.041 and part IV of chapter 373, F.S.
- Amends s. 403.813, F.S., to provide exceptions for exploratory activities and deletes *de minimis* language.

This analysis is drawn to CS/HB 691.