

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 1664

SPONSOR: Judiciary Committee, Natural Resources Committee and Senator Laurent

SUBJECT: Environmental Control

DATE: April 18, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gee</u>	<u>Voigt</u>	<u>NR</u>	<u>Favorable/CS</u>
2.	<u>Johnson</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>AGG</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill provides administrative penalties for violation of environmental control laws and provides for a report to the Legislature. Additionally, the bill establishes the administrative hearing process for assessing fines under \$10,000.

This bill amends ss. 369.25, 403.121, 403.131, 403.727, and 403.860, F.S.

II. Present Situation:

Under current law, when the Department of Environmental Protection (DEP) seeks to enforce environmental laws and rules, it often must resort to the circuit court. Although the DEP tries to settle enforcement actions with violators, when this fails, its only recourse is to file an action in circuit court for the imposition of fines or other relief. Although a few specific statutes authorize the DEP to impose administrative fines, i.e., Beaches and Coastal Systems regarding coastal protection, and the Board of Trustees of the Internal Improvement Trust Fund regarding harm to state lands, for most of its regulatory program there is no such option.

Although the DEP generally cannot impose administrative penalties, the authority to do so appears readily available to other agencies. A few examples of this authority include:

- Pursuant to s. 370.13(2)(b), F.S., the Fish and Wildlife Conservation Commission may impose an administrative penalty of up to \$5,000 for offenses relating to stone crab traps.
- Pursuant to s. 597.0041, F.S., the Department of Agriculture and Consumer Services may impose an administrative penalty not to exceed \$1,000 per violation per day for aquaculture violations.

- Pursuant to s. 381.0061, F.S., the Department of Health may impose administrative penalties not exceeding \$500 per violation for violations of its environmental health programs.
- Pursuant to s. 492.113(3)(c), F.S., the Department of Business and Professional Regulation may impose an administrative penalty not to exceed \$1,000 per offense for violation of professional practices relating to geology.

Because it cannot rely on administrative penalties for enforcement, the DEP spends significant time and expense litigating smaller cases that otherwise could be disposed of through administrative practice. The DEP reports that its lawsuits in circuit court could be reduced by more than 70 percent if it had the ability to seek administrative penalties for small-to-moderate offenses. This would then allow the DEP the resources to prosecute major offenses more effectively. An additional benefit would be the quicker resolution of cases, as the administrative hearing process generally takes less time to resolve disputes than the state court system.

THE ADMINISTRATIVE HEARING PROCESS UNDER CHAPTER 120, F.S.

When an agency takes final agency action impacting the substantial interest of a party that party may request an administrative hearing to dispute the final agency action.¹ Where the request for hearing involves disputed issues of fact the issue is generally referred to the Division of Administrative Hearings (DOAH) for the appointment of an administrative law judge. Pursuant to chapter 120, F.S., the administrative law judge holds a hearing and prepares a recommended order of findings of fact and conclusions of law.² That order is then forwarded the agency for the agency to enter a final order. In the final order the agency may amend the finding of fact only where there is a determination that the findings of fact were not based on substantial competent evidence. The agency may alter the conclusion of law without such a finding. Once the agency has entered the final order an adversely impacted party may appeal to the First District Court of Appeal.³ In some instances the law does provide that the Administrative Law Judge will enter a final order, in those instances the judge enters the order in accordance with s. 120.57, F.S.

III. Effect of Proposed Changes:

Section 1. Section 369.25(3), F.S., relating to regulation of aquatic plants is amended to authorize the DEP to enforce ch. 369, F.S., in the same manner and to the same extent as provided in ss. 403.121, 403.131, 403.141, and 403.161, F.S.

Section 2. Section 403.121, F.S., is amended to provide the authority and procedures for the DEP to assess administrative penalties for violations of the Florida Air and Water Pollution Control Act. Except for violations involving hazardous wastes, asbestos, or underground injection, the DEP must proceed administratively in all cases in which the DEP seeks administrative penalties that do not exceed \$10,000 per assessment, as calculated in accordance with ss. 403.121(3), (4), (5), (6), and (7), F.S. The DEP may not impose administrative penalties

¹ Section 120.569, Florida Statutes.

² Section 120.57, Florida Statutes.

³ Id.

in excess of \$10,000 in a notice of violation. The DEP may not have more than one notice of violation seeking administrative penalties pending against the same party at the same time unless the violations occurred at different sites or later violations were discovered by the DEP after the filing of the previous notice of violation.

This section provides procedures for written notices to alleged violators, for respondents to opt out of the administrative process, for filing petitions challenging the notice, and entering and enforcing final orders.

The DEP bears the burden of proving by a preponderance of evidence that the respondent caused the violation. The bill specifies that the penalties should not be imposed absent satisfaction of that burden. The administrative law judge (ALJ) will enter the final order.

The bill provides procedures for a respondent challenging an administrative penalty to request the appointment of a private mediator to mediate the dispute. The Florida Conflict Resolution Consortium will pay up to \$1,200 per case and provide administrative support.

In any administrative proceeding brought by the DEP, the prevailing party will recover all costs. The costs must be included in the final order. The respondent is the prevailing party when an order is entered awarding no penalties to the DEP, the order has not been reversed on appeal or the time for seeking judicial review has expired. The respondent is entitled to an award of attorney's fees if the ALJ determines that the DEP's initiation of the notice of violation seeking the imposition of administrative penalties was not substantially justified as defined in s. 57.111(3)(e), F.S. An award of attorney's fees may not exceed \$15,000.

The DEP's authority to judicially pursue injunctive relief is continued. The DEP may enter into a settlement, either before or after initiating a notice of violation, and judicially pursue injunctive relief and damages prior to a notice of violation being issued. A settlement may include a penalty amount that departs from the administrative penalty schedule. The DEP also retains the authority to judicially pursue penalties in excess of \$10,000 for violations not specifically identified in the administrative penalty schedule, or for multiple or multi-day violations alleged to exceed a total of \$10,000. Any case filed in state court because the penalties are alleged to exceed a total of \$10,000 may be settled in the court action for less than \$10,000. The provisions of ch. 120, F.S., will apply to any administrative action taken by the DEP or any delegated program in pursuing administrative penalties.

Except for violations involving hazardous wastes, asbestos, or underground injection, administrative penalties must be calculated according to the following schedule:

- For a drinking water contamination violation, the DEP will assess a penalty of \$2,000 for a Maximum Containment Level violation, plus \$1,000 if the violation is for a primary inorganic, organic, or radiological Maximum Contaminant Level or if it is a fecal coliform bacteria violation; plus \$1,000 if the violation occurs at a community water system; and plus \$1,000 if any Maximum Contaminant Level is exceeded by more than 100 percent. The penalty for failure to obtain a clearance letter prior to placing a drinking water system into service when the system would not have been eligible for clearance is \$3,000.

- For failure to obtain a required wastewater permit, other than a permit required for surface water discharge, the penalty is \$1,000. For a domestic or industrial wastewater violation not involving a violation of surfacewater or groundwater quality, the DEP will assess a penalty of \$2,000 for an unpermitted or unauthorized discharge or effluent-limitation exceedance. For an unpermitted or unauthorized discharge or effluent-limitation exceedance that resulted in a violation of surfacewater or groundwater quality, the DEP will assess a penalty of \$5,000.
- For a dredge and fill or stormwater violation, the DEP will assess a penalty of \$1,000 for unpermitted or unauthorized dredging or filling or unauthorized construction of a stormwater management system against the persons responsible for the illegal dredging or filling or construction, plus \$2,000 if the dredging or filling occurs in an Aquatic Preserve, Outstanding Florida Water, Conservation Easement, or Class I or Class II surfacewater, plus \$1,000 if the area dredged or filled is greater than one-quarter acre but less than or equal to one-half acre, and plus \$1,000 if the area dredged or filled is greater than one-half acre but less than or equal to one acre. The administrative penalty schedule does not apply to a dredge and fill violation if the area dredged or filled exceeds one acre; the DEP retains the authority to seek judicial imposition of civil penalties for all dredge and fill violations involving more than one acre. A penalty of \$3,000 will be assessed for the failure to complete required mitigation or failure to record a required conservation easement or for a water quality violation resulting from dredge and filling activities, stormwater construction activities or failure of a stormwater treatment facility. The penalty is \$2,000 for the failure to properly construct a stormwater management system serving less than five acres within the designated time. In addition to the other penalties authorized in s. 403.12(3), F.S., the DEP will assess a penalty of \$5,000 per violation against the contractor or agent of the owner or tenant that conducts unpermitted or unauthorized dredging or filling.
- For mangrove trimming or altering violations, the DEP will assess a penalty of \$5,000 per violation against the contractor or agent of the owner or tenant that conducts mangrove trimming or alteration without a permit under s. 403.9332(3), F.S.
- For solid waste violations, the DEP will assess a penalty of \$2,000 for the unpermitted or unauthorized disposal or storage of solid waste; plus \$1,000 if the solid waste is Class I or Class III (excluding yard trash) or if the solid waste is construction and demolition debris in excess of 20 cubic yards, plus \$1,000 if the waste is disposed of or stored in any natural or artificial body of water or within 500 feet of a potable water well, plus \$1,000 if the waste contains PCB at a concentration of 50 parts per million or greater; untreated biomedical waste; friable asbestos greater than 1 cubic meter which is not wetted, bagged, and covered; used oil greater than 25 gallons; or 10 or more lead acid batteries. For failure to properly maintain leachate control; unauthorized burning; failure to have a trained spotter on duty at the working face when accepting waste; failure to provide access control for three consecutive inspections, the penalty is \$3,000. For failure to construct or maintain a required stormwater management system, the penalty is \$2,000.

- For an air emission violation, the DEP will assess a penalty of \$1,000 for an unpermitted or unauthorized air emission or an air-emission-permit exceedance, plus \$1,000 if the emission results in an air quality violation, plus \$3,000 if the emission was from a major source and the source was major for the pollutant in violation; plus \$1,000 if the emission was more than 150 percent of the allowable level.
- For storage tank system and petroleum contamination violations, the DEP will assess a penalty of \$5,000 for failure to empty a damaged storage system as necessary to ensure that a release does not occur until repairs to the system are completed; when a release has occurred from that storage tank system; for failure to timely recover free product; or for failure to conduct remediation or monitoring activities until a no-further-action or site-rehabilitation completion order has been issued. The penalty is \$3,000 for failure to timely upgrade a storage tank system. The DEP will also assess a penalty of \$2,000 for failure to conduct or maintain required release detection; for failure to timely investigate a suspected release from a storage system; for depositing motor fuel into an unregistered storage tank system; for failure to properly install a storage tank system; or failure to timely assess or remediate petroleum contamination; finally, a penalty of \$1,000 will be assessed for failure to properly operate, maintain, or close a storage tank system.

Authorization for the DEP to impose noncompliance fees for violation of wastewater treatment requirements is deleted.

The bill also provides an additional schedule for administrative penalties pursuant to s. 403.121(4), F.S., as follows:

- For failure to satisfy financial responsibility requirements or for violations of s. 377.371(1), F.S., relating to pollution as a result of drilling for petroleum products \$5,000.
- For failure to install, maintain, or use a required pollution control system or device, \$4,000.
- For failure to obtain a required permit prior to construction or modification, \$3,000.
- For failure to conduct required monitoring or testing; failure to conduct required release detection; failure to construct in compliance with a permit, \$2,000.
- For failure to maintain required staff to respond to emergencies; failure to conduct required training; failure to prepare, maintain, or update required contingency plans; failure to adequately respond to emergencies to bring an emergency situation under control; or failure to submit required notification to the DEP, \$1,000.
- For failure to prepare, submit, maintain, or use required reports or other required documentation, \$500.

- For failure to comply with any other departmental regulatory statute or rule requirement not otherwise identified in s. 403.121, F.S., the DEP may assess a penalty of \$500.

For each additional day during which a violation occurs, the administrative penalties in ss. 403.121(3),(4), or (5), F.S., may be assessed per day per violation.

The bill also provides increased penalties for repeat violators who have a previous violation resulting in a consent order with a finding of violation, final order or judgment involving the imposition of \$2,000 or more in penalties as follows:

- One previous violation within 5 years before the filing of the notice of violation will result in a 25 percent per day increase in the scheduled administrative penalty.
- Two previous violations within 5 years before the filing of the notice of violation will result in a 50 percent per day increase in the scheduled administrative penalty.
- Three or more previous violations within 5 years before the filing of the notice of violation will result in a 100 percent per day increase in the scheduled administrative penalty.

The bill requires that the direct economic benefit gained by the violator from the violation be added to the scheduled administrative penalty where consideration of the economic benefit is provided by Florida law or is required by federal law as part of a federal delegation or approval program. The total administrative penalty, including any economic benefit added to the scheduled administrative penalty, may not exceed \$10,000.

The bill limits the penalty for any particular violation to \$5,000 against any one violator, unless the violator has a history of noncompliance, the economic benefit of the violation to the violator exceeds \$5,000, or there are multi-day violations. The total administrative penalties may not exceed \$10,000 per assessment for all violations attributable to a specific person in the notice of violation.

The bill authorizes the administrative law judge to consider evidence in mitigation, and reduce penalties identified in ss. 403.121(3), (4), and (5), F.S., up to 50 percent for mitigating circumstances, including good faith efforts to comply prior to or after discovery of the violations by the DEP. Upon an affirmative finding that the violation was caused by circumstances beyond the reasonable control of the respondent and could not have been prevented by respondent's due diligence, the ALJ may further reduce the penalty.

All penalties collected will be deposited into the Ecosystem Management and Restoration Trust Fund or other designated trust fund. A portion of the fund may be used to fund conflict resolution.

The bill clarifies that ss. 403.121(3), (4), (5), (6), or (7), F.S., do not limit a state court in its assessment of damages. The bill clarifies that the administrative penalty schedule does not apply

to the judicial imposition of civil penalties in state court. Finally, the bill repeals existing law found in s. 403.121(3)(a)-(e), F.S., authorizing the DEP to assess noncompliance fees.

Section 3. Section 403.131, F.S., is amended to provide that the judicial and administrative remedies to recover damages and penalties under ss. 403.121 and 403.131, F.S., are alternative and mutually exclusive.

Section 4. Section 403.727(3)(c), F.S., relating to noncompliance fees, is deleted.

Section 5. Section 403.860, F.S., is amended to require approved county health departments to assess administrative penalties for violations of s. 403.859, F.S., relating to requirements to be met by water suppliers.

Provisions authorizing the assessment of noncompliance fees for failure to comply with DEP requirements for water suppliers are repealed.

Section 6. The DEP must report to the Legislature two years after the effective date of the bill, describing the number of notices of violations issued seeking imposition of administrative penalties, the amount of penalties recovered, and any efficiencies gained by the program.

Section 7. The act will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Although its impact on the public depends on the number and type of environmental offenses resolved through administrative practice, the bill creates a system of administrative penalties. A number of individual penalties are created, together with increased penalties for a variety of aggravating actions. Penalties range from \$500 to \$5,000 per violation.

Depending on circumstances, the administrative penalties could be beneficial to violators who do not want the expense of prolonged litigation.

C. Government Sector Impact:

The primary benefit to the DEP lies in the anticipated reduction in state court litigation. The DEP has estimated that the bill would result in a 70 percent reduction in the number of suits filed in state court. Even if the penalty schedule resulted in diminished receipts from enforcement action, as has been suggested, the slight loss of revenue would be more than offset by the increased legal resources made available for more major enforcement actions.

VI. Technical Deficiencies:

On page 9, line 18, the word “or” should precede “failure.”

VII. Related Issues:

The bill provides for use of the Florida Conflict Resolution Consortium and provides that the consortium will pay up to \$1,200 for a mediator but does not provide for how the consortium will be paid.

VIII. Amendments:

None.