HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 761 Agriculture
SPONSOR(S): Pickens
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Agribusiness	7 Y, 0 N	Kaiser	Reese
2) Environment & Natural Resources Council		Kaiser / Smith	Dixon / Hamby
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

HB 761 addresses various issues relating to agriculture. The bill prohibits counties from imposing a tax, assessment, or fee for stormwater management on land classified as agricultural if the agricultural operation has an agricultural discharge permit or implements best management practices (BMPs)[1]. The bill also prohibits counties from enforcing any regulations on land classified as agricultural if the activity is regulated by BMPs, interim measures or regulations.[2]

The bill exempts any person, rather than any "natural person" as in current law, involved in the sale of agricultural products, which were grown by said person in the state, from obtaining an occupational license from the county.

The bill requires a water management district to indemnify and save harmless a private landowner[3] providing an easement to allow public access to land owned by the water management district. The exemption of liability for the private landowner includes the general public, as well as the employees and agents of the water management districts or other regulatory agencies. The bill provides that a water management district that enters into such an easement owes no duty of care to keep the access area safe for entry or use by others or to give notice to persons using the easement of any hazardous conditions and is not responsible for any injury to persons or property caused by an act of omission of a person who uses the access area. Neither the private landowner nor the water management district is relieved of liability in cases of gross negligence or deliberate, willful or malicious injury to a person or property.

HB 761 affirms that a tomato farmer, packer, repacker or handler implementing Tomato Good Agricultural Practices (T-GAP) and BMPs is considered to be in compliance with state food safety standards unless a violation or noncompliance can be shown through inspections. The bill also gives the department rule-making authority to implement the BMP program.

The bill reverses legislation enacted in 2005 to return tropical foliage to exempt status from the provisions of the License and Bond law. The bill also exempts nonresidential farm buildings from permits or impact fees. And lastly, the bill amends Chapter 823, F.S., to mirror the language in Chapter 403, F.S., regarding the materials used in agricultural production allowed to be burned in the open.

This legislation appears to reduce state revenues by $147,500 in FY 2009-10 and by $237,300 in FY 2010-11. The mandate provision appears to apply because the bill prohibits counties from imposing certain taxes, assessments, or fees relating to stormwater management on land classified as agricultural if the agricultural operation has an agricultural discharge permit or implements BMPs. The bill also exempts non-residential farm building from impact fees. The Revenue Estimating Conference has not yet determined if the fiscal impact is significant or if an exemption to the mandate provision applies. The effective date of this legislation is July 1, 2008.

There are five amendments traveling with the bill. The amendments are described in "Section IV. Amendment/Council Substitute Changes" of the analysis.

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[1] The BMPs interim measures or regulations must have been developed by the Department of Environmental Protection, the Department of Agriculture and Consumer Services or a water management district and adopted under Chapter 120, F.S., as part of a statewide or regional program.
[2] *Id*
[3] The private land providing the easement must be classified as agricultural land pursuant to s. 193.461, F.S.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Ensure lower taxes: The bill prohibits counties from imposing a tax, assessment or fee for stormwater management on certain agricultural lands. The bill also provides for the current exemption of agricultural producers from obtaining an occupational license to sell products they grow or produce to apply to all persons rather than natural persons. The bill exempts nonresidential farm buildings from municipal permits and/or impact fees.

Safeguard individual liberty: The bill provides for water management districts to indemnify and hold harmless private landowners who provide access easements to water management district lands designated for public use. The bill exempts producers of tropical foliage from Florida's License and Bond Law.

Promote personal responsibility: By implementing Tomato Good Agricultural Practices (T-GAPs) and Best Management Practices (BMPs), tomato growers, packers, repackers and handlers are considered to be in compliance with food safety standards.

B. EFFECT OF PROPOSED CHANGES:

Section 1:
In 2003, the Legislature passed CS/CS/SB 1660, which prohibited counties from adopting any ordinance, resolution, regulation, rule, or policy to prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm or farm operation on land that is classified as agricultural[4], if such activity is regulated through BMPs or by an existing state, regional, or federal regulatory program. Prior to the enactment of this legislation, several counties had proposed regulations on various agricultural operations in the state that were duplicative and more restrictive than those already dictated through BMPs or an existing governmental regulatory program. The bill did not explicitly prohibit the enforcement of existing measures. Some counties are imposing stormwater utility fees on agricultural lands even if the stormwater from such agricultural lands does not enter the urban stormwater infrastructure.

HB 761 prohibits counties from enforcing regulations on activities currently meeting state, regional or federal regulations on a bona fide farm operation on land classified as agricultural. Additionally, the bill prohibits counties from imposing a tax, assessment, or fee for stormwater management on land classified as agricultural if the agricultural operation has an agricultural discharge permit or implements BMPs developed by the Department of Environmental Protection (DEP), the Department of Agriculture and Consumer Services (department) or a water management district[5].

Section 2:
Florida law[6] exempts any natural person from obtaining an occupational license to sell agricultural products[7] that were grown in the state by said natural person. While the statutes provide a definition for "person," no definition is provided for "natural person." Hence, the statute is interpreted differently in different counties in regards to the exemption. The bill strikes the word "natural" to exempt any "person" from obtaining an occupational license.

[4] Section 193.461, F.S.
[5] The BMPs must have been adopted under Chapter 120, F.S., as part of a statewide or regional program.
[6] Section 205.064, F.S.
[7] Agricultural products include grove, horticultural, floricultural, tropical piscicultural, or tropical fish farm products, with the exception of intoxicating liquors, wine or beer.

Section 3:
The water management districts in Florida provide over five million acres of state-owned land for public recreational purposes[8]. In some cases, an easement is provided by a private landowner allowing the public to access the land owned by the water management district.

Currently, the statutes[9] provide that "*….A water management district that provides the public with a park area or land for outdoor recreational purposes does not, by providing that park area or land, extend any assurance that the park area or land is safe for any purpose, does not incur any duty of care toward a person who goes on that park area or land and is not responsible for any injury to persons or property caused by an act or omission of a person who goes on that park area or land."* This exemption from liability does not apply to park areas or lands where there is a charge or fee for entering or using the park area or land, or in instances where a profit is derived from a commercial activity through the patronage of the public in the park area or land.

The bill requires a water management district to indemnify and save harmless a private landowner[10] providing an easement to allow public access to land owned by the water management district. The exemption of liability for the private landowner includes the general public, as well as the employees and agents of the water management districts or other regulatory agencies. The bill provides that a water management district that enters into such an easement owes no duty of care to keep the access area safe for entry or use by others or to give notice to persons using the easement of any hazardous conditions and is not responsible for any injury to persons or property caused by an act of omission of a person who uses the access area. Neither the private landowner nor the water management district is relieved of liability in cases of gross negligence or deliberate, willful or malicious injury to a person or property.

Sections 4 & 5:
During the 2007 legislative session, CS/HB 651 was enacted authorizing the Division of Food Safety (division) within the department to perform food safety inspections, under the Tomato Good Agricultural Practices (T-GAP) inspection program, on tomato farms, in tomato greenhouses, and in tomato packing houses and repackers. Over the past year, the division has been working with the Florida tomato industry to create and implement good agricultural practices, guidelines and standards, as well as to implement an annual audit and inspection program to ensure compliance.

HB 761 affirms that a tomato farmer, packer, repacker or handler implementing T-GAPs and BMPs is considered to be in compliance with state food safety standards unless a violation or noncompliance can be shown through inspections. The bill also gives the department rule-making authority to implement the BMP program.

Section 6:
The Florida License and Bond Law (law) [11] was enacted in 1941 to give market protection to producers of perishable agricultural commodities. The law is intended to facilitate the marketing of Florida agricultural products by encouraging a better understanding between buyers and sellers and by providing a marketplace that is relatively free of unfair trading practices and defaults.

In 2004, the Committee on Agriculture in the Florida House of Representatives reviewed the law as part of an interim project and recommended changes to the then-current statutes. During the 2005 legislative session, HB 1231 implemented the recommendations suggested by the interim project. Based on one of the recommendations, the bill amended the definition of the term "agricultural products" to include tropical foliage as a non-exempt agricultural product produced in the state. Until that point, tropical foliage had been exempt from the provisions of the law. For the most part,

[8] http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2340&Session=2008&DocumentType=Reports&FileName=State%20Lands%20Acquisition%20and%20Management.pdf
[9] Section 373.1395, F.S.
[10] The private land providing the easement must be classified as agricultural land pursuant to s. 193.461, F.S.
[11] Sections 604.15-604.34, F.S.

agricultural products considered exempt from the law are generally those offered by growers or groups of growers selling their own product(s); all persons who buy for cash and pay at the time of purchase with U.S. currency; dealers operating as bonded licensees under the Federal Packers and Stockyards Act; or retail operations purchasing less than $1,000 in product per month from Florida producers.

Due to the manner by which the foliage business is conducted, the change implemented by HB 1231 has not proven beneficial to the foliage industry and they have requested a reenactment of the exemption. This bill reverses the legislation enacted in 2005 to return tropical foliage to exempted status from the provisions of the law.

Section 7:
Nonresidential farm buildings have always maintained exempt status from building codes except for a brief period in 1998 when the statewide building code was amended and the exemption was inadvertently left out. In the recent past, some counties and municipalities have started assessing impact fees and/or requiring permits for nonresidential farm buildings even though the buildings are never inspected and are exempt from building codes.

In October 2001, then-Attorney General Bob Butterworth wrote in an opinion to Nicolas Camuccio, Gilchrist Assistant County Attorney, "*…The plain language of sections 553.73(7)(c)[12] and 604.50, Florida Statutes, exempts all nonresidential buildings located on a farm from state and local building codes. Thus, to the extent that the State Minimum Building Codes require an individual to obtain a permit for the construction, alteration, repair, or demolition of a building or structure, no such permits are required for nonresidential buildings located on a farm…*"

The bill exempts nonresidential farm buildings from county or municipal permits or impact fees.

Section 8:
There are currently two sections in statute[13] that address open burning of materials used in agricultural production. They differ only in the products listed as approved for open burning. The bill amends the language in Chapter 823, F.S., to mirror the language in Chapter 403, F.S., which is the most recent expression of the Legislature.

C. SECTION DIRECTORY:

Section 1: Amends s. 163.3162, F.S.; prohibits a county from enforcing certain ordinances, resolutions, regulations, rules, or policies relating to land classified as agricultural under certain circumstances; and, prohibits the county from imposing a tax, assessment or fee for stormwater management in certain circumstances.

Section 2: Amends s. 205.064, F.S.; revises exemption eligibility for a local business tax receipt.

Section 3: Amends s. 373.1395, F.S.; provides indemnity for agricultural landowner on property provided as an easement to a water management district being used for public access; exempts the water management district from maintenance of the easement; and, makes agricultural landowners as liable in situations of gross negligence.

Section 4: Amends s. 500.70, F.S.; proscribes measures to be implemented for tomatoes to be considered in compliance with state food safety standards.

Section 5: Amends s. 570.07, F.S.; authorizes the Department of Agriculture and Consumer Services (department) to adopt rules relating to agricultural production and food safety.

Section 6: Amends s. 604.15, F.S.; revises the definition of "agricultural products."

[12] This cite has changed to s. 553.73(8)(c), F.S., since the opinion was written.
[13] ss. 403.707(2)(e) and 823.145, F.S.

Section 7: Amends s. 604.50, F.S.; revises the exemption for non-residential farm buildings to include permits or impact fees.

Section 8: Amends s. 823.145, F.S.; revises the agricultural materials allowed to be openly burned.

Section 9: Provides an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

	FY 08-09	FY 09-10	FY 10-11
1. Revenues:			
Agricultural Product Dealers License	$ -	$ (147,500)	$(237,300)

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See "Fiscal Comment" section below.

2. Expenditures:

See "Fiscal Comment" section below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill provides relief to agricultural producers who are being assessed with taxes, assessments, fees or impact fees by counties or municipalities.

D. FISCAL COMMENTS:

The Division of Marketing (division) within the department reports that there are approximately 491 tropical foliage dealers who are currently licensed by the division and a possible 350 dealers who are prospective licensees. By exempting tropical foliage dealers from the definition of agricultural products, the division will experience a loss of revenue in the General Inspection Trust Fund of $147,500 for FY 2009-10 and a loss of $237,300 for FY 2010-11.

The department reports that returning tropical foliage to exempted status from the provisions of the License and Bond law will result in a decrease in the revenue generated to support the License and Bond program and will have an adverse effect on the program's ability to achieve self-sufficiency.

According to the department, the fiscal impact of sections 1, 2 and 7 of this legislation on counties and municipalities is indeterminate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandate provision appears to apply because the bill prohibits counties from imposing certain taxes, assessments, or fees relating to stormwater management on land classified as agricultural if the agricultural operation has an agricultural discharge permit or implements BMPs. The bill also exempts non-residential farm buildings from impact fees. The Revenue Estimating Conference has not yet determined if the fiscal impact is significant or if an exemption to the mandate provision applies.

2. Other:

Access to Courts
The bill provides immunity for persons and entities from civil liability in lawsuits for certain actions involving public access to the land owned by water management districts by way of easements owned by a private landowner. This provision may implicate the "access to court" protections of the Florida Constitution.[14] The Florida Supreme Court, in *Kluger v. White*, 281 So. 2d 1(Fla. 1973), held that where a right to access the courts for redress for a particular injury predates the adoption of the access to courts provision in the 1968 state constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show: (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.[15]

B. RULE-MAKING AUTHORITY:

In section 570.07, F.S., the department is given rule-making authority in regards to best management practices for agricultural production and food safety.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The department states that, in July 2007, a firm dealing in tropical foliage was ordered to pay over $97,000 to a South Florida nursery for tropical foliage it purchased but failed to pay for. The program is currently processing claims totaling $149,409 filed by Florida producers against agricultural dealers listing tropical foliage among the commodities handled.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On Wednesday, March 19, 2008, the Committee on Agribusiness adopted five amendments that are traveling with HB 761.

- **Amendment 1** removes the word "tax" from Section 1 of the bill as it relates to "…counties having the authority to impose a tax, assessment or fee for stormwater management…" This was amendment was recommended by the Revenue Estimating Conference.

[14] Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." *See generally* 10A FLA. JR. 2D CONSTITUTIONAL LAW §§ 360-69.
[15] *See Kluger v. White*, 281 So. 2d 1(Fla. 1973).

- **Amendment 2** requires all electronic sweepstakes games to be directly tied to the sale of a consumer product and be regulated by the department. Additionally, electronic sweepstakes operators must post a $1 million trust account or surety bond, unless exempted by the department, as well as obtain independent lab confirmation from a department-approved testing facility that the game is a finite sweepstakes game, unless exempt from current statute.

- **Amendment 1 to Amendment 2** clarifies is a technical amendment. In s. 849.094(11)(c), F.S., the language is amended to read "…exempt pursuant to…." Amendment 2 had previously stated, "…exempt from…" This amendment was recommended by the department.

- **Amendment 3** removes obsolete language from s. 583.13, F.S., regarding the grading of dressed poultry. This amendment was recommended by the United States Department of Agriculture.

- **Amendment 4** establishes a permitted 5-year pilot program within the department to allow the planting of *Casuarina cunninghamiana* (trees) as a windbreak for commercial citrus groves. The trees must come from an authorized registered nursery and be certified by the department as being from certified male plants. Each commercial citrus grove is required to have a permit, to be renewed every 5 years. If ownership of the property is transferred, the seller must notify the department and provide the buyer with a copy of the permit and copies of all invoices and certification documentation prior to the closing of the sale. Nurseries authorized to produce the trees must obtain a special permit from the department, which must be renewed annually, certifying that the trees are from sexually mature male source trees. Each male source tree must be registered by the department and labeled with a source tree registration number. Nurseries may only sell the trees to persons with a special permit issued by the department. At the end of the 5-year pilot program, if it is determined that the potential is low for adverse environmental impacts from planting the trees as windbreaks, the department may, by rule, allow the use of the tree windbreaks for commercial citrus groves in other areas of the state.

  The amendment requires that all trees be destroyed by the property owner within six months after:
  - the property owner takes permanent action to no longer use the site for commercial citrus production;
  - the site has not been used for commercial citrus production for a period of five years; or
  - the department determines that the trees on the site have become invasive. The determination of invasiveness shall be based on, but not limited to, the recommendation of the Noxious Weed and Invasive Plant Review Committee (committee), created by the department, DEP, and in consultation with a representative of the citrus industry who has a *Casuarina cunninghamiana* windbreak.

  If the owner or person in charge refuses or neglects to comply with the destruction of the trees, the director of the Division of Plant Industry may, by authority of the department, destroy the trees. The department is authorized to assess the owner for expenses incurred in the destruction of the trees. If the owner fails to pay the assessed cost, the department is authorized to record a lien against the property.

  The amendment provides that the use of trees for windbreaks will not restrict or interfere with any other agency or local government efforts to manage or control noxious weeds or invasive plants. Other agencies or local governments are not allowed to remove any *Casuarina cunninghamiana* planted as a windbreak under special permit issued by the department.

  The department is authorized to develop and implement a monitoring protocol to determine invasiveness of the trees. At a minimum, the protocol shall require:
  - Inspection of the planting site by department inspectors within 30 days following initial planting or any subsequent planting of trees to ensure the criteria of the special permit have been met.
  - Annual site inspections of planting sites and all lands within 500 feet of the planted windbreak by trained department inspectors.

- Any new seedlings found within 500 feet of the planted windbreak shall be removed, identified to the species level and evaluated to determine if hybridization has occurred.
- The department shall submit an annual report and a final five year evaluation identifying any adverse effects resulting from the planting of the trees for windbreaks and documenting all inspections and the results of those inspections to the committee, DEP, and a designated representative of the citrus industry, who has a tree windbreak.

If the department determines that female flowers or cones have been produced on any trees that have been planted under a special permit issued by the department, the property owner shall be responsible for destroying the trees. The department shall notify the property owner of the timeframe and method of destruction.

If, at any time, the department determines that hybridization has occurred during the pilot program between trees planted as a windbreak and other *Casuarina sp*., the department will expeditiously initiate research to determine the invasiveness of the hybrid. The information obtained from this research shall be evaluated by the committee, DEP, and a designated representative of the citrus industry, who has a tree windbreak. If the department determines that the hybrids have a high potential to become invasive, based on, but not limited to, the recommendation of the committee, DEP, and a designated representative of the citrus industry, who has a tree windbreak, the pilot program shall be permanently suspended.

Each application for a special permit must be accompanied by a fee and an agreement that the property owner will abide by all permit conditions. The bill provides for information that must be included on the application. The applicant must notify the department within 30 business days of any change of address or change in the principal place of business.

If the department determines that the property owner is no longer maintaining the trees according to the criteria of the special permit or determines that the continued use of the trees presents an imminent danger to public health, safety or welfare, the department may issue an immediate final order (IFO), appealable or enjoinable as provided by Chapter 120, F.S., directing the permitholder to immediately remove and destroy the trees authorized to be planted under the special permit. If the permitholder fails to remove and destroy the trees in a timely manner after receipt of the IFO, the department may remove and destroy the trees that are subject to the special permit. The permitholder may request an extension of time from the department for removing and destroying the trees, which may be granted depending on the circumstances for the request.

The reasonable costs and expenses incurred by the department for removing and destroying the trees subject to a special permit shall be paid to the Citrus Inspection Trust Fund (CITF) and shall be reimbursed by the party to which the IFO was issued. If the party to which the IFO has been issued fails to reimburse the state within 60 days, the department may record a lien on the property.

The department may require any permitholder to provide verified statements of planted acreage subject to the special permit and may review the permitholder's business or planting records at her/his place of business during normal business hours in order to determine the acreage planted. The failure of the permitholder to furnish such statement or to make such records available is cause for suspension of the special permit. The department may revoke the special permit if such failure is found to be willful.