

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 691 Beach Management
SPONSOR(S): Frishe
TIED BILLS: None **IDEN./SIM. BILLS:** SB 758

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee		Deslatte	Blalock
2) Rulemaking & Regulation Subcommittee			
3) Agriculture & Natural Resources Appropriations Subcommittee			
4) State Affairs Committee			

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 specifies 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 also specifies that the DEP and permit applicants must negotiate in good faith on DEP-proposed permit conditions, as well as specific provisions and requirements associated with requisite monitoring and mitigation plans, before the issuance of the notice of intent and transmittal of the permit. The time period between the applicant receiving a notice of intent and the final notice to proceed cannot be used to circumvent the time limits in the Administrative Procedures Act.

In addition, the bill authorizes the DEP to issue permits in advance of the issuance of 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.

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 excavation and placement of sediment in order to eliminate the need for variances, except within Outstanding Florida waters and aquatic preserves.

The bill provides 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 authorizes the DEP to issue a joint coastal construction permit/environmental resource permit, and specifies that the joint permits must allow for two maintenance or dredging disposal events or a permit life of 15 years, whichever is greater.

The bill requires the DEP to maintain active beach restoration and nourishment project listings on its website by fiscal year. The bill also requires the DEP to notify the Executive Office of the Governor and the Legislature regarding any significant changes in individual project funding levels and indicate where additional dollars are intended to be used. The bill requires the DEP to summarize project activities for the current fiscal year, funding status, and changes to annual project lists must be prepared by the DEP and included with the DEP's submission of its annual legislative budget request. The bill requires the DEP to notify the Executive Office of the Governor and the Legislature when a local project sponsor releases funding and indicate how project dollars will be used.

Lastly, the bill exempts certain de minimis exploratory activities associated with beach restoration and nourishment from the environmental resource permitting requirements adopted pursuant to Part IV of chapter 373, F.S.. A de minimis determination must be made by the DEP within 30 days after receipt of request.

The bill appears to have an insignificant negative fiscal impact on the DEP due to costs associated with rulemaking required under the bill, and from the loss of permit fees collected resulting from the provision in the bill exempting certain activities from permitting requirements. The bill appears to have a positive fiscal impact on local governments (See Fiscal Analysis Section below).

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0691.ANRS

DATE: 1/9/2012

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., provides 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., provides 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.

Current law also provides that the permit application is not considered “complete” until the agency determines that it has all of the information it needs to approve or deny the application. 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 on when the applicant must respond to the RAI, nor is there a limit to the number of times the agency 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:

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

- 3rd 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 3rd RAIs issued and an explanation of why the RAI was issued.
- 4th RAI or more- will require the DEP Secretary's approval prior to issuing the 4th 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., requiring the DEP and permit applicants to negotiate in good faith on DEP-proposed permit conditions, as well as specific provisions and requirements associated with requisite monitoring and mitigation plans, before the issuance of the notice of intent and transmittal of the permit. The time period between the applicant receiving a notice of intent and the final notice to proceed may not be used to circumvent the time limits in chapter 120, F.S., or the Legislature's expressed intent to simplify and expedite the regulatory process for beach nourishment and inlet management projects when they are declared to be in the public interest.

The bill also creates s. 161.041(6), 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.

In addition, the bill creates s. 161.041(7), F.S., directing 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 in order to eliminate the need for variances, except within Outstanding Florida Waters and aquatic preserves, and to reduce the need for other variances issued pursuant to ss. 373.414¹ or 403.201², F.S. The DEP must consider the legislative declaration that beach nourishment projects are in the public interest when processing variance requests.

The bill also creates s. 161.041(8), F.S., to provide 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(9), F.S., to provide that the Legislature intends to simplify 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 (F.A.C.) to streamline the permitting process for periodic beach maintenance projects and inlet sand bypassing activities.

¹ Section 373.414, F.S., provides additional criteria to permit applicants for activities in surface waters and wetlands such as providing reasonable assurance that a proposed activity will be clearly in the public interest for activities that are within an Outstanding Florida Water. The statute also provides for the applicability of variances to environmental resource permits for certain activities in surface waters and wetlands.

² Section 403.201, F.S., provides guidelines for granting variances.

Section 2. Creates s. 161.0413, F.S.

Current Situation

Under s. 161.055, F.S., the DEP can initiate the concurrent processing of applications for coastal construction permits, environmental resource permits, or dredge and fill permits, and sovereign submerged lands proprietary authorizations. These permits and authorizations, which were previously issued separately and by different state agencies, are now consolidated into a single permit from the DEP called a "joint coastal permit".

A joint coastal permit is required for activities that meet all of the following criteria:

- Located on Florida's natural sandy beaches facing the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida or associated inlets;
- Activities that extend seaward of the mean high water line;
- Activities that extend into sovereign submerged lands; and
- Activities that are likely to affect the distribution of sand along the beach³.

Activities that require a joint coastal permit include beach restoration or nourishment; construction of erosion control structures such as groins and breakwaters; public fishing piers; maintenance of inlets and inlet-related structures; and dredging of navigation channels that include disposal of dredged material onto the beach or in the near shore area.

Effect of Proposed Changes

The bill creates s. 161.0413, F.S., authorizing the DEP to issue a joint coastal permit for activities falling under s. 161.041, F.S. (permits for beach and shore preservation) and part IV of chapter 373 (permits for management and storage of surface waters). The bill specifies that joint coastal permits must allow for two maintenance or dredging disposal events or a permit life of 15 years, whichever is greater.

Section 3. Amends s. 161.101, F.S.

Current Situation

Section 161.101, F.S., provides that the DEP must determine beaches that 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 purpose of improving, furthering, and expediting the beach management program.

With regard to a project approved in accordance with s. 161.161, F.S.⁴, 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.

³ Department of Environmental Protection website, <http://www.dep.state.fl.us/beaches/programs/envpermt.htm>

⁴ Section 161.161, 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.

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

A project, in order to receive state funds, shall 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, F.S., also provides 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.
- 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., provides that the DEP must 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 in order to provide transparency regarding those projects receiving funding and the funding amounts, and to facilitate legislative reporting and oversight. The bill also provides 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" 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 4. Amends s. 373.406, F.S.

Current Situation

Section 373.406, F.S., specifically exempts certain activities from the environmental resource permitting requirements adopted pursuant to Part IV of Chapter 373, F.S.

Effect of Proposed Changes

The bill amends s. 373.406, F.S., to create an additional permit exemption for the following de minimis 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.

A determination of whether any other activity is de minimis and therefore exempt from the permitting process must be made by the DEP within 30 days after receipt of the request unless the applicant requests additional time.

Section 5. 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; requiring the permit applicant and the DEP to negotiate in good faith; 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. Creates s. 161.0413, F.S., providing for joint coastal permits for certain beach-related projects; providing for the permit life of joint permits.

Section 3. 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 4. Amends s. 373.406, F.S., providing a permit exemption for certain specified exploratory activities relating to beach restoration and nourishment projects and inlet management activities; requiring a DEP determination of a de minimis permit exemption to be provided within a certain time.

Section 5. Provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The DEP may see a decrease in permit fees collected due to the provision in the bill exempting certain activities from permitting requirements.

2. Expenditures:

The DEP could experience 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. 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 budget.

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:

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, except within Outstanding Florida Waters and aquatic preserves

C. DRAFTING ISSUES OR OTHER COMMENTS:

The DEP provided the following comments:

The bill would require rulemaking to address mixing zones and anti-degradation requirements for turbidity. As drafted, it does not limit the rulemaking to beach and inlet projects. The broad reference to "excavation and placement of sediment" on lines 133-134, would capture other types of dredge and fill projects. The general reference to reducing the need for "other variances" (line 136) issued under section 373.414, F.S., or section 403.201, F.S., would include subject matter unrelated to beach restoration.

The bill creates a new section 161.0413, F.S., authorizing the DEP to issue a joint coastal permit for activities falling under both s. 161.041, F.S., and part IV of Chapter 373, F.S. However, s. 161.055, F.S., appears to already grant the DEP with this authority. It is unclear why this new language is needed.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.