

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1103 Ordinary High-Water Mark for Navigable, Nontidal Waterbodies

SPONSOR(S): Goodson

TIED BILLS: None **IDEN./SIM. BILLS:** SB 1362

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	9 Y, 4 N	Kaiser	Blalock
2) Civil Justice Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

In 1845, when Florida gained statehood, the federal government conveyed to Florida ownership of all lands lying beneath the navigable waters in the state, up to the ordinary high water line (OHWL).¹ The state Constitution provides that navigable waters in the state must be held in public trust for the people of Florida.² Florida statutes currently do not define the OHWL, nor do they provide any guidance for how the location of the OHWL should be determined.

However, the Florida Supreme Court established criteria for determining the location of the OHWL for navigable, nontidal lakes and rivers in two Florida Supreme Court cases: *Tilden v. Smith*³ and *Martin v. Busch*⁴.

In the *Tilden* case, the court recognized Florida's varying topography and differentiated between water bodies with steep banks versus those with flat banks. Flat banked rivers and lakes are common in Florida and these types of water bodies are where the difficulty arises in determining where the lakes or rivers end and private uplands begin. The court in *Tilden* stated that on low, flat-banked water bodies there is usually no clear mark on the ground, and the boundary is located where the presence of the water prevents the cultivation of ordinary agricultural crops. In the *Martin* case, the court explained that ordinary high water on flat banked water bodies with shallow, vegetated shorelines can also be determined by utilizing the best methods available, and that marks upon the ground or upon local objects that are more or less permanent can be considered in connection with competent testimony and other evidence in determining the line of ordinary high water mark. On steep banked water bodies, the court stated that the boundary is located by an observable physical mark on the ground where the presence and action of the water has wrested the bank of vegetation.

The bill codifies the Florida Supreme Court's decisions in *Tilden* and *Martin* by establishing criteria that must be applied when determining the location of the ordinary high water mark for navigable, nontidal water bodies, and defines the ordinary high water mark as the "highest reach of a navigable, nontidal water body as it usually exists when in its ordinary condition and is not the highest reach of such water body during the high water season or in times of freshets." The bill also provides definitions for "ordinary agricultural crop" and "freshet".

Lastly, the bill states that the criteria established for determining the ordinary high water mark for navigable, nontidal waterbodies do not alter the public's right to use navigable waters and sovereignty submerged lands for common law public trust purposes up to the ordinary high water mark, nor do they affect the ownership by the public of sovereignty submerged lands lying below that mark.

This bill does not appear to have a fiscal impact on state or local governments.

¹The terms "ordinary high water line" and "ordinary high water mark" are used interchangeably.

² Article X, Section 11. Sovereignty lands.

³ 94 Fla. 502.113 So. 708 (1927)

⁴ 93 Fla. 535, 112 So.274 (1927)

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

STORAGE NAME: h1103a.ANRS

DATE: 1/17/2012

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Dating back to the Roman times, navigable waters were public highways allowing goods and people to move freely throughout the land. Recognizing the intrinsic quality of these waterways, the navigable waterways were protected by public law.

Upon attaining statehood in 1845, “the state of Florida by virtue of its sovereignty assumed title to and sovereignty over the navigable waters in the state and lands thereunder.”⁵ The title to lands under navigable waters passed from the United States to the state through operation of the federal “equal footing” doctrine,⁶ and included the submerged bed up to the “ordinary high water mark” of navigable freshwater rivers and lakes.⁷ By adopting the “ordinary high water mark” as the boundary,⁸ Florida extended its sovereignty title to the limits of what federal law regarded as having passed to the state under the “equal footing” doctrine. Under the common law Public Trust Doctrine, navigable rivers, lakes, and tidelands are held in a public trust which imposes a legal duty upon the state to preserve and control them for public navigation, fishing, swimming, and other lawful uses.⁹ Because the essential feature of the doctrine is that lands beneath navigable water bodies are not held for the purpose of sale or conversion into private ownership, strict limitations are imposed on the state’s ability to transfer the water bodies into private hands.¹⁰ This common law Public Trust Doctrine has also been incorporated into the Florida Constitution,¹¹ and the Florida Supreme Court has stated that this constitutional provision represents a codification of prior case law.¹² Florida statutes currently do not define the OHWL, nor do they provide any guidance for how the location of the OHWL should be determined.

However, the Florida Supreme Court established criteria for determining the location of the OHWL for navigable, nontidal lakes and rivers in two Florida Supreme Court cases: *Tilden v. Smith*¹³ and *Martin v. Busch*¹⁴. In the *Tilden* case, the Supreme Court defined the boundary of freshwater lakes and rivers using a quote from a Minnesota Supreme Court opinion:¹⁵

In the case of fresh water rivers and lakes—in which there is no ebb and flow of the tide but which are subject to irregular and occasional changes of height without fixed quantity or time except that they are periodical, recurring with the wet or dry seasons of the year—high water mark as a line between a riparian owner and the public, is to be determined by examining the bed and the banks and ascertaining where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as to the nature of the soil itself. High water mark means what its language imports,—a water mark. It is co-ordinate with the limit of the bed of the water, and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation and to destroy its value for agricultural purposes. Ordinarily the slope of the bank and the character of its soil are such that the

⁵ Merrill-Stevens Co. v. Durkee, 62 Fla. 549, 57 So. 428,, 432 (1912)

⁶ Pollard v. Hagan, 44 U.S. 212 (1845)

⁷ Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 342 (Fla 1986)

⁸ State ex rel. Ellis v. Gerbing, 56 Fla 603 (1908)

⁹ Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 342 (Fla 1986); State ex rel. Ellis v. Gerbing, 56 Fla 603 (1908)

¹⁰ Broward v. Mabry, 58 Fla. 398 (1909)

¹¹ Article X, Section 11, Florida Constitution

¹² American Cyanamid, 492 So. 2d 339 (1986)

¹³ Tilden v. Smith, 94 Fla. 502 (1927)

¹⁴ Martin v. Busch, 93 Fla. 535 (1927)

¹⁵ “The Ordinary High Water Boundary on Freshwater Lakes and Streams: Origin, Theory, and Constitutional Restrictions”

water impresses a distinct character upon the soil as well as upon the vegetation. In some places, however, where the banks are low and flat, the water does not impress on the soil any well defined marks of demarcation between the bed and the banks. In such case the effect of the water upon vegetation must be the principal test of determining the location of high water mark as a line between the riparian owner and the public. It is the point at which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop.

In the *Martin v. Busch* case, the court discussed methods for locating the OHWL on low, flat-banked water bodies with swamped vegetated margins:

In flat territory or because of peculiar conditions, there may be little if any shore to navigable waters, or the elevation may be slight and the water at the outer edges may be shallow and affected by vegetable growth or other conditions, and the line of ordinary high water mark may be difficult of accurate ascertainment; but, when the duty of determining the high water mark is imposed or assumed, the best evidence attainable and the best methods available should be utilized in determining and establishing the line of true ordinary high water mark, whether it is done by general or special meandering or by particular surveys of adjacent land. Marks upon the ground or upon local objects that are more or less permanent may be considered in connection with competent testimony and other evidence in determining the true line of ordinary high water mark.

The court in *Tilden* recognized Florida's varying topography and differentiated between water bodies with steep banks versus those with flat banks. Flat banked rivers and lakes are common in Florida and these types of water bodies are where the difficulty arises in determining where the lakes or rivers end and private uplands begin. The court in *Tilden* stated that on law, flat-banked water bodies there is usually no clear mark on the ground, and the boundary is located where the presence of the water prevents the cultivation of ordinary agricultural crops. The court in *Martin* explained that ordinary high water on flat banked water bodies with shallow, vegetated shorelines can also be determined by utilizing the best methods available, and that marks upon the ground or upon local objects, such as trees and dock pilings, that are more or less permanent can be considered in connection with competent testimony and other evidence in determining the line of ordinary high water mark. On steep banked water bodies, the boundary is located by an observable physical mark on the ground where the presence and action of the water has wrested the bank of vegetation.

Effect of Proposed Changes

The bill creates s. 253.024, F.S., providing definitions for "ordinary high-water mark", "ordinary agricultural crop", and "freshet," as well as criteria for determining the location of the ordinary high-water mark for navigable, nontidal water bodies.

The bill defines the term "ordinary high-water mark" to mean "the highest reach of a navigable, nontidal water body as it usually exists when in its ordinary condition and is not the highest reach of such water body during the high water season or in times of freshets." The term ordinary high-water mark also includes the terms "ordinary high-water line" and "line of ordinary high water". "Ordinary agricultural crop" is defined as "any terrestrial plant or vegetation from a farm, nursery, grove, orchard, vineyard, or garden, but does not include cypress trees". "Freshet" is defined as "a flood or overflowing of a river by means of rain, melted snow, or an inundation of water".

The bill provides that, when determining the location of the ordinary high-water mark for navigable, nontidal water bodies, the following provisions apply and must be considered in their entirety:

- The ordinary high-water mark is an ambulatory boundary, shifting in response to long-term changes, and is to be determined by examining the bed and banks to ascertain where the presence and action of the water are so common and usual, and so long continued in all

ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation and the nature of the soil itself.

- The ordinary high-water mark is coordinate with the limit of the bed the water occupies sufficiently long and continuously to wrest it from vegetation and destroy its value for agricultural purposes. The bed does not take in swamp or overflowed lands, and the ordinary high-water mark is to be found between such lands and the area occupied by the water for the greater portion of each average year. At this level a definite escarpment in the soil is generally traceable, at the top of which is the position for the boundary. Escarpments resulting from the action of a storm, a flood, or rises in water levels of a water body during the annual high water season do not signify the ordinary high-water mark.
- In some places where the banks are low and flat and the water does not impress on the soil any well-defined line of demarcation between the bed and the banks, the effect of the water upon vegetation must be the principal test in determining the location of the ordinary high-water mark. In such an instance, the ordinary high-water mark is the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation constituting what may be termed an ordinary agricultural crop.
- Marks upon the ground or upon local objects that are more or less permanent may be considered, in connection with competent testimony and other evidence, in determining the ordinary high-water mark.

The bill provides that this section of law does not alter the public's right to use navigable waters and sovereignty submerged lands for common law public trust purposes up to the ordinary high-water mark nor does this section of law affect the ownership by the public of sovereignty submerged lands lying below that mark.

B. SECTION DIRECTORY:

Section 1: Creates s. 253.024, F.S.; providing definitions for "ordinary agricultural crop", "freshet" and, "ordinary high-water mark"; providing criteria for determining the location of the ordinary high-water mark; and, confirming public's ownership and right to use navigable waters and sovereignty submerged lands up to the ordinary high-water mark.

Section 2: Provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See fiscal comments.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See fiscal comments.

D. FISCAL COMMENTS:

It is unknown what effect this bill, if enacted into law, would have on established boundaries between sovereign submerged lands and uplands. To the extent existing boundaries are altered, the property rights associated with ownership would be affected.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.