

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 791 Coastal Management

SPONSOR(S): Agriculture & Natural Resources Subcommittee and Renuart

TIED BILLS: None **IDEN./SIM. BILLS:** SB 956

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	12 Y, 0 N, As CS	Renner	Blalock
2) Agriculture & Natural Resources Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

A coastal construction control line (CCCL) is an upland jurisdictional line established on a county by county basis by the Department of Environmental Protection (DEP) to define the portion of the beach and dune system that is subject to severe fluctuations caused by a 100-year storm surge, storm waves, or other forces such as wind, wave, or water level changes. Unless exempted, applicants must receive a permit from DEP to construct a structure seaward of the CCCL. DEP is authorized to grant area-wide permits to local governments, other governmental agencies, and utility companies for special classes of activities in areas under their general jurisdiction if these activities, due to the type, size, or temporary nature of the activity, will not cause measurable interference with the natural functioning of the beach-dune system or with marine turtles or their nesting sites. DEP is also authorized to grant general permits for certain projects if the projects, due to type, size, or temporary nature, will not cause a measurable interference with the natural functioning of the beach-dune system or with marine turtles or their nesting sites.

The bill expands the activities that qualify for a DEP issued area-wide permit to include the construction of minor structures. The bill also adds dune restoration and on-grade walkovers for accessibility or use in compliance with the Americans with Disabilities Act to the list of specific activities or structures that are considered minor structures and special classes of activities. The bill requires DEP to adopt rules to establish criteria and guidelines for area-wide permit applicants. In addition, the bill authorizes DEP to grant a general permit for dune restoration, swimming pools associated with single-family habitable structures that do not advance the line of existing construction and satisfy all siting and design requirements, and for minor reconstruction for existing coastal armoring structures.

In 1975, Florida enacted the Aquatic Preserve Act with the intent that the state-owned submerged lands in areas that have exceptional biological, aesthetic, and scientific value be set aside forever as aquatic preserves or sanctuaries for the benefit of future generations. An aquatic preserve is defined as an exceptional area of submerged lands and its associated waters set aside for being maintained essentially in its natural or existing condition. The state restricts certain activities in aquatic preserves in order to conserve their unique biological, aesthetic and scientific value.

The bill requires DEP to promote the public use of aquatic preserves, and authorizes DEP to receive gifts and donations to carry out the purpose of the Florida Aquatic Preserves Act. DEP is authorized to grant a privilege or concession for the accommodation of visitors to aquatic preserves and their associated state-owned uplands if the privilege or concession does not deny or interfere with the public's access to the lands and is compatible with the aquatic preserve's management plan as approved by the Acquisition and Restoration Council. A privilege or concession can be granted without advertisement and without using a competitive bidding process and cannot be assigned or transferred without the consent of DEP.

The bill appears to have a potentially indeterminate positive fiscal impact on DEP if DEP receives fees for issuing a privilege or lease for the accommodation of visitors and use of aquatic preserves and their associated uplands. The bill appears to have a insignificant negative fiscal impact on DEP as a result of reduced permit fees due to some activities shifting to an area-wide or general permit. The bill also has a indeterminate positive fiscal impact on local governments seeking area-wide permits or general permits for minor structures which would have reduced permit fees. (See Fiscal Comments Section)

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Regulation of Coastal Construction

Present Situation

A coastal construction control line (CCCL) is an upland jurisdictional line established on a county-by-county basis by the Department of Environmental Protection (DEP) to define the portion of the beach and dune system that is subject to severe fluctuations caused by a 100-year storm surge, storm waves, or other forces such as wind, wave, or water level changes.¹

Section 161.053(1)(a), F.S., establishes the state CCCL permitting program. This is the principal program used by DEP to regulate construction activities on Florida's beach-dune system. The purpose of the CCCL permitting program is to preserve and protect beaches from imprudent construction that can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access.² Unless exempted,³ applicants must receive a permit from DEP to construct a structure seaward of the CCCL.

Local governments are authorized to adopt their own coastal construction zoning and building codes in lieu of the state permitting program. However, these codes must be approved by DEP as being adequate to preserve and protect the beaches and coastal barrier dunes adjacent to such beaches, which are under DEP's jurisdiction, from imprudent construction that will jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection to upland structures, endanger adjacent properties, or interfere with public beach access.⁴ Additionally, DEP can revoke the authority granted to the local government if DEP determines that the local administration of coastal zoning and building codes is inadequate.

DEP is authorized to grant the following CCCL permits:⁵

- **Administrative Permits** - These permits are required for any coastal construction or activity that is likely to have a material physical effect on the beach-dune system seaward of the CCCL line.⁶ Administrative permits are processed in Tallahassee, and once the CCCL application is deemed complete, final agency action (approval or denial) is issued within 90 days. Activities typically authorized by an administrative permit include:
 - Armoring (seawalls, revetments, geotextile tubs)
 - Large multi-family, commercial, and recreational projects (condominiums, beachfront resorts, shopping centers, restaurants, and park improvements)
 - Single-family projects (new homes, pools, additions, and remodeling)
 - Non-habitable major structures (construction of gazebos, large decks, spas, pools); and
 - Minor structures and activities (minor projects that cannot be approved via field permits and require permit manager review)
- **General Permits** - These permits offer a streamlined application and approval process for minor activities or structures that will not interfere with the natural functioning of the beach-dune

¹ Chapter 62B-33.005(1), F.A.C.

² Section 161.053(1)(a), F.S.

³ Generally, structures existing or under construction before the establishment of the CCCL are exempt from the provisions of s. 161.053, F.S. See also Chapter 62B-33.004, F.A.C. for other exemptions.

⁴ Section 161.053(3), F.S.

⁵ DEP's "Chapter 4-The CCCL Program and Covered Activities." This information is on file with Agriculture & Natural Resources Subcommittee staff.

⁶ Chapter 62B-33, F.A.C., outlines the specific permitting, application, and approval processes.

system or sea turtles or their nesting sites. Examples include dune walkovers, decks, fences, landscaping, sidewalks, driveways, pool resurfacing, minor pool repairs, and other non-habitable structures. A general permit may be issued for single-family homes that do not advance the “line of construction” or are located landward of an established General Permit Line (the line that defines the seaward limit where general permits can be issued). General permits cannot be used for home additions or multifamily habitable structures. A general permit requires the applicant to meet strict setbacks and dune protection rules and must be submitted as a complete application. Final agency action is issued within 30 days of the application submittal.⁷

- **Field Permits** - These permits are for certain minor structures and activities that have minor impacts and are typically issued by DEP field inspectors. However, permit managers in Tallahassee may also issue field permits.
- **After-the-Fact Permits** - These are administrative permits that authorize work that has already been completed. These are often subject to enforcement actions by DEP and are necessary to assure that the projects have been constructed in compliance with state law.
- **Emergency Permits** - As promulgated in Chapter 62B-33.014, F.A.C., emergency permit procedures are used to alleviate conditions resulting from a shoreline emergency.

In addition to these permits, DEP is authorized to grant area-wide permits to local governments, other governmental agencies, and utility companies for special classes of activities in areas under their general jurisdiction if these activities, due to the type, size, or temporary nature of the activity, will not cause measurable interference with the natural functioning of the beach-dune system or with marine turtles or their nesting sites.⁸ Current law specifies that such activities include, but are not limited to:

- Road repairs (not including new construction);
- Utility repairs and replacements;
- Beach cleaning; and
- Emergency response.

Effect of Proposed Changes

The bill expands the activities that qualify for a DEP issued area-wide permit to include the construction of minor structures. The term “minor structure” is not defined in the bill or the Florida Statutes for purposes of CCCLs. However, DEP’s rules define a “structure” as the composite result of putting together or building related components in an ordered scheme,⁹ and defines a “minor structure” as a structure designed to:

- Be expendable,
- Minimize resistance to forces associated with high frequency storms,
- Break away when subjected to such forces, and
- Have a minor impact on the beach and dune system.¹⁰

The bill also adds to the list of specific activities or structures that are considered minor structures and special classes of activities to include dune restoration and on-grade walkovers for accessibility or use in compliance with the Americans with Disabilities Act.

The bill requires DEP to adopt rules to establish criteria and guidelines for area-wide permit applicants.

In addition, the bill authorizes DEP to grant a general permit for dune restoration, swimming pools associated with single-family habitable structures that do not advance the line of existing construction and satisfy all siting and design requirements, and for minor reconstruction for existing coastal armoring structures.

⁷ Section 161.053(18), F.S., as promulgated in Chapter 62B-34, F.A.C.

⁸ Section 161.053(17), F.S.

⁹ Chapter 62B-33.002(60), F.A.C.

¹⁰ Chapters 62B-33.002(60)(b) and 62B-33.002(60), F.A.C.

Aquatic Preserves

Present Situation

The Florida Constitution provides that lands under navigable waters, including beaches below the mean high water line, are held by the state, by virtue of its sovereignty, in trust for all the people, and sale of these lands may be authorized by law, but only when in the public interest. Private use of portions of sovereign submerged lands can also be authorized by law, but only when not contrary to the public interest.

In 1975, Florida enacted the Aquatic Preserve Act¹¹ with the intent that the state-owned submerged lands in areas that have exceptional biological, aesthetic, and scientific value be set aside forever as aquatic preserves or sanctuaries for the benefit of future generations.¹² The Florida Statutes define an aquatic preserve as an exceptional area of submerged lands and its associated waters set aside for being maintained essentially in its natural or existing condition.¹³

DEP's Office of Coastal and Aquatic Managed Areas (CAMA) oversees the management of Florida's 41 aquatic preserves, three National Estuarine Research Reserves (NERR), National Marine Sanctuary and the Coral Reef Conservation Program. These protected areas encompass approximately 2.2 million acres.¹⁴

Section 258.41, F.S., authorizes the Board of Trustees of the Internal Improvement Trust Fund (BOT) to establish areas to be included in the aquatic preserve system, subject to confirmation by the Legislature, and provides that an aquatic preserve cannot be withdrawn from the state aquatic preserve system except by an act of the Legislature.

The Legislature has also designated by law certain areas to be included in the aquatic preserve system. These include the following:

- Cockroach Bay Aquatic Preserve.
- Gasparilla Sound-Charlotte Harbor Aquatic Preserve.
- Lemon Bay Aquatic Preserve.
- Terra Ceia Aquatic Preserve.
- Guana River Marsh Aquatic Preserve.
- Big Bend Seagrasses Aquatic Preserve.
- Boca Ciega Bay Aquatic Preserve.
- Biscayne Bay Aquatic Preserve.
- Oklawaha River Aquatic Preserve.

The state restricts certain activities such as the construction of utility cables and pipes and spoil disposal in aquatic preserves in order to conserve their unique biological, aesthetic and scientific value.¹⁵ Section 258.42, F.S., directs the BOT to maintain aquatic preserves subject to the following requirements:

- No further sale, lease, or transfer of sovereignty submerged lands shall be approved or consummated by the BOT except when such sale, lease, or transfer is in the public interest.¹⁶
- The BOT cannot approve the waterward relocation or setting of bulkhead lines waterward of the line of mean high water within the preserve except when public road and bridge construction

¹¹ Sections 258.35 through 258.46, F.S.

¹² Section 258.036, F.S.

¹³ Section 258.37(1), F.S.

¹⁴ DEP website on Aquatic Preserves, available at <http://www.dep.state.fl.us/coastal/programs/aquatic.htm>

¹⁵ Chapter 18-20.004, F.A.C.

¹⁶ Section 258.42(1)(a), F.S.

projects have no reasonable alternative and it is shown to be not contrary to the public interest.¹⁷

- No further dredging or filling of submerged lands may be approved by the BOT except for certain activities that must be authorized pursuant to a permit.¹⁸

Furthermore, structures may not be erected within the aquatic preserve, except:

- Private residential docks may be approved for reasonable ingress or egress of riparian owners. Slips at private residential single-family docks that contain boat lifts or davits that do not float in the water when loaded may not, in whole or in part, be enclosed by walls, but may be roofed if the roof does not overhang more than one foot beyond the footprint of the lift and the boat stored at the lift. These roofs are not included in the square-footage calculation of a terminal platform.¹⁹
- Private residential multislip docks may be approved if located within a reasonable distance of a publicly maintained navigation channel, or a natural channel of adequate depth and width to allow operation of the watercraft for which the docking facility is designed without the craft having an adverse impact on marine resources. The distance must be determined in accordance with criteria established by the trustees by rule, based on the depth of the water, nature and condition of bottom, and presence of manatees.²⁰
- Commercial docking facilities shown to be consistent with the use or management criteria of the preserve may be approved if the facilities are located within a reasonable distance of a publicly maintained navigation channel, or a natural channel of adequate depth and width to allow operation of the watercraft for which the docking facility is designed without the craft having an adverse impact on marine resources. The distance must be determined in accordance with criteria established by the trustees by rule, based on the depth of the water, nature and condition of bottom, and presence of manatees.²¹
- Structures for shore protection, including restoration of seawalls at their previous location or upland of, or within 18 inches waterward of their previous location, approved navigational aids, or public utility crossings may be approved.²²

Section 258.43, F.S., grants the BOT with rulemaking authority to implement the provisions of the Florida Aquatic Preserves Act. DEP rules²³ provide that only minimal or maintenance dredging is permitted in a preserve, and any alteration of the preserves' physical conditions is restricted unless the alteration enhances the quality or utility of the preserve or the public health generally. Minerals may not be mined (with the exception of oyster shells), and oil and gas well drilling is prohibited. However, the state is not prohibited from leasing the oil and gas rights and permitting drilling from outside the preserve to explore for oil and gas if approved by the BOT. Docking facilities and even structures for shore protection are restricted as to size and location.

¹⁷ Section 258.42(2), F.S.

¹⁸ Section 258.42(3)(a), F.S.

¹⁹ Section 258.42(3)(e), F.S.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Administrative rules applicable to aquatic preserves generally may be found in Chapters 18-20, F.A.C., Management Policies, Standards and Criteria. However, every aquatic preserve in the state has specific restrictions and policies that are set out in the Florida Administrative Code.

In determining whether to approve or deny any request for activities on sovereign submerged lands in aquatic preserves, BOT will evaluate each on a case-by-case basis and utilize a balancing test to determine whether the social, economic, and/or environmental benefits clearly exceed the costs.²⁴ BOT may authorize a lease, easement, or consent for the following activities:

- A public navigation project;
- Maintenance of an existing navigational channel;
- Installation or maintenance approved navigational aids;
- Creation or maintenance of a commercial/industrial dock, pier or a marina;
- Creation or maintenance of private docking facilities for reasonable ingress and egress of riparian owners;
- Minimum dredging for navigation channels attendant to docking facilities;
- Creation or maintenance of a shore protection structure, except that restoration of a seawall or riprap at its previous location, upland of its previous location, or within one foot waterward of its previous location is exempted from any requirement to make application for consent of use;
- Installation or maintenance of oil and gas transportation facilities;
- Creation, maintenance, replacement or expansion of facilities required for the provision of public utilities; and
- Other activities that are a public necessity or that are necessary to enhance the quality or utility of the aquatic preserve.²⁵

For the activities listed above, the activity must be designed so that the structure or structures to be built in, on, or over sovereign submerged lands are limited to structures necessary to conduct water dependent activities. Other uses of the aquatic preserve, or human activity within the aquatic preserve, although not originally contemplated, may be approved by BOT, but only subsequent to a formal finding of compatibility with the provisions of ch. 258, F.S. or ch. 18-20, F.A.C.²⁶ Furthermore, all proposed activities in aquatic preserves having management plans adopted by the BOT must demonstrate that such activities are consistent with the management plan.²⁷

Effect of Proposed Changes

The bill requires DEP to promote the public use of aquatic preserves, and authorizes DEP to receive gifts and donations to carry out the purpose of the Florida Aquatic Preserve Act.²⁸ Moneys received by DEP in trust, or by gift, devise, appropriation, or otherwise must be deposited into the Land Acquisition Trust Fund and appropriated to DEP for the administration, development, improvement, promotion, and maintenance of aquatic preserves and their associated uplands for any future acquisition or development of aquatic preserves and their associated uplands.

The bill authorizes DEP to grant a privilege²⁹ or concession for the accommodation of visitors to aquatic preserves and their associated state-owned uplands if the privilege or concession:

- Does not deny or interfere with the public's access to the lands; and
- Is compatible with the aquatic preserve's management plan as approved by the Acquisition and Restoration Council (ARC).

A privilege or concession can be granted without advertisement and without using a competitive bidding process and cannot be assigned or transferred without the consent of DEP.³⁰

²⁴ Chapter 18-20.004(1)(a) and (2), F.A.C.

²⁵ Chapter 18-20.004(1)(e), F.A.C.

²⁶ Chapter 18-20.004(1)(f) and (l), F.A.C.

²⁷ Chapter 18-20.004(3), F.A.C.

²⁸ Part II of Ch. 258, F.S.

²⁹ A privilege is not defined in statute or rule. According to DEP's definition, a privilege is not a regulatory function. It is granting a request for public use of the natural resource that is in concert with the Acquisition and Restoration Council-approved management plan, but is a use which occurs only with special permission.

According to DEP, a competitive bidding process is not currently needed due to the fact that this is a new program and it is necessary to encourage small businesses, research untested markets, and preserve the trade secrets or intellectual property of others. The opportunity to advertise for competitive bids will be available to DEP when the untested program matures and is proven.

B. SECTION DIRECTORY:

Section 1. Amends s. 161.053, F.S., relating to the regulation of coastal construction and excavation.

Section 2. Creates s. 258.435, F.S., requiring DEP to promote the public use of aquatic preserves.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments Section.

2. Expenditures:

The bill does not appear to have a fiscal impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill has a potentially positive fiscal impact on local governments seeking general permits for minor structures that would otherwise require an administrative permit. See Fiscal Comments for discussion of permit fees.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have a positive fiscal impact on private parties who wish to provide goods or services, such as providing food or boat rentals, to visitors in aquatic preserves.

D. FISCAL COMMENTS:

The bill appears to have a potentially indeterminate positive fiscal impact on DEP if DEP receives fees for issuing a privilege or concession for the accommodation of visitors and use of aquatic preserves and their associated uplands. The bill also authorizes DEP to receive certain gifts or donations.

The bill has a potentially negative fiscal impact on DEP as a result of the expansion of activities that qualify for a DEP-issued area-wide permit and the authorization to issue general permits for swimming pools associated with single-family habitable structures that do not advance the line of existing construction and satisfy all siting and design requirements, and for the maintenance of existing coastal armoring structures. DEP issues approximately 500 administrative permits per year. According to DEP, the fee for an administrative permit varies from \$300 for a dune walkover to \$1,000 for a swimming pool. The fee for a general permit varies from \$300 for a minor structure to \$500 for a major structure. A DEP-issued area-wide permit cost \$500. DEP anticipates a fee reduction of \$66,800 for permits that currently qualify for administrative permits or general permits and that will qualify for general permits or DEP-issued area-wide permits under the bill.³¹

³⁰ According to DEP, the percentage of income DEP would receive from concessionaires will be outlined in the contract with each concessionaire.

³¹ DEP 2014 analysis. On file with Agriculture & Natural Resources Subcommittee staff.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

This bill may implicate the single subject provision in Art. III, s. 6 of the Florida Constitution, which provides that “every law enacted by the Legislature shall embrace but one subject matter and properly connected therewith ...” The Florida Supreme Court has described the purpose of the single subject rule as twofold. First, it attempts to avoid surprise and fraud by ensuring that both the public and the legislators involved receive fair and reasonable notice of the contents of a proposed act. Secondly, the limitation prevents hodgepodge, logrolling legislation. With regard to the test to be applied by a court in determining whether a particular provision violates the single subject rule, the fact that the scope of a legislative enactment is broad and comprehensive is not fatal so long as the matters included in the enactment have a natural or logical connection.³² The bill contains one section that pertains to coastal construction permits and another section that pertains to the use of aquatic preserves, which are not necessarily in coastal areas.

B. RULE-MAKING AUTHORITY:

The bill requires DEP to adopt rules to establish criteria and guidelines for area-wide permit applicants.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 27 and 32 of the bill provide for the expansion of area-wide permits to include minor structures. Minor structures are defined in Rule 62B-33.002(60), F.A.C.; however, the bill does not provide a definition for a minor structure.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 11, 2013, the Agriculture & Natural Resources Subcommittee adopted one strike-all amendment and reported the bill favorably with a committee substitute. The amendment specifies that DEP issued area-wide permits are expanded to include the construction of minor structures. The amendment requires DEP to adopt rules to establish criteria and guidelines for area-wide permit applicants. In addition, the amendment authorizes DEP to grant a general permit for dune restoration, swimming pools associated with single-family habitable structures, and for minor reconstruction for existing coastal armoring structures.

Furthermore, the amendment specifies that DEP is authorized to grant a privilege or concession, for the accommodation of visitors to aquatic preserves and their associated state-owned uplands. The amendment removes the authority to grant a lease or permit for this purpose. The amendment specifies that the privilege or concession must be compatible with the aquatic preserve’s management plan as approved by the Acquisition and Restoration Council. Lastly, the amendment specifies that DEP is authorized to receive gifts and donations to carry out the purpose of the Florida Aquatic Preserves Act.

³² *Franklin v. State*, 887 So. 2d 1063 (Fla. 2004)