

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: February 26, 1998 Revised: 03/13/98 \_\_\_\_\_

Subject: Rulemaking Authority With Respect to Aquatic Preserves

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Green</u>	<u>Voigt</u>	<u>NR</u>	<u>Fav/1 amendment</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

The bill provides statutory authority for existing rules of the Board of Trustees of the Internal Improvement Trust Fund to consider cumulative impacts when approving or denying requests for private activities in aquatic preserves.

The bill adds subsection (5) to s. 258.42, F.S., and adds subsection (2) to s. 258.43, F.S. This bill redesignates present subsections (2) and (3) of s. 258.43, F.S., to (3) and (4) respectively.

**II. Present Situation:**

The 1996 amendments to the Administrative Procedure Act (“APA”) were designed to require executive branch agencies to more closely adhere to statutory authority when agencies adopt rules. The 1996 amendments contained a new section, 120.536(1), F.S., requiring existing and proposed rules to implement, interpret or make specific the particular powers and duties granted by the enabling statute. This “map-tack” provision ensures that agency rules closely relate to the enabling statute and, thus, imposes a more stringent standard.

The Legislature recognized that imposing a new statutory standard to determine the validity of rules might suddenly invalidate many rules which had previously been adopted by the agency in good faith under the older, more lenient standard. Rather than immediately invalidate existing rules, the 1996 reform legislation required each agency to examine all of its rules that had been adopted prior to the effective date of the 1996 amendments in light of the new “map-tack” provision. Agencies were required to report to the Joint Administrative Procedures Committee the list of rules which exceeded the new “map-tack” standard.

Rules placed on the list are temporarily “shielded” from legal challenges that they are invalid under the new “map-tack” provision. This “shield” leaves the rules in place during the 1998 legislative session, allowing the Legislature to examine the policy established by rule to determine if it is good public policy. If legislation providing statutory support for the rule is enacted during the 1998 session, the rule will remain in effect. On the other hand, the statute directs the agency to initiate repeal of any rule for which there is no authorizing legislation by January 1, 1999. Notably, an existing agency rule successfully challenged under the new APA for lack of statutory authority requires that the agency discontinue its reliance on the rule and the agency may have to pay attorney’s fees and costs.

The Department of Environmental Protection identified a number of program areas that have inadequate rulemaking authority and the department is proposing several bills to provide adequate rulemaking authority.

One of these program areas involves rules relating to aquatic preserves. While s. 258.43, F.S., provides general rulemaking authority for the Board of Trustees of the Internal Improvement Trust Fund (“the Board”) to regulate human activity within aquatic preserves, it does not provide specific authority to consider the cumulative impacts of proposed activities when issuing permits. However, the Board has rule 18-20.006, F.A.C., which allows it to consider the cumulative impacts from activities within aquatic preserves when determining whether to approve or deny requests for authorization for private activities. The Board also has rules which require it to impose the stricter standards of local governments on docking facilities within the preserve, rule 18-20.004(5)(a)4, F.A.C., and allow it to consider applications in light of local ordinances and comprehensive plans, rules 18-20.004(5)(d)7 and 18-20.006(5), F.A.C. Under the more stringent standards of the new APA, the above-referenced rules lack sufficient statutory authority. It should be noted that these have been long-standing rules of the Board, consistently implemented.

### **III. Effect of Proposed Changes:**

The bill provides statutory authority for the following existing rules of the Board: rules 18-20.004(5)(a)4, 18-20.004(5)(d)7, 18-20.006, and 18-20.006(5), F.A.C.

Section 1. Amends s. 258.42, F.S., to provide that the Board may consider the cumulative impacts of activities on aquatic preserves. Allows the Board to adopt and enforce stricter rules, regulations, and orders of a local government in the jurisdiction where they apply when such standards are consistent with chapter 258, F.S., and any approved management plan for the preserve, and if the Board approves them by rule.

Section 2. Provides authority for the Board to adopt and enforce rules addressing the cumulative effect of activities on aquatic preserves.

Section 3. Provides an effective date.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There is no fiscal impact because these are existing rules of the department.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

Because the bill title refers to “impact of activities on manatees and other listed species” and the bill contains no such language, the title is defective.

**VII. Related Issues:**

None.

**VIII. Amendments:**

#1 by Natural Resources:

Title amendment removing reference to “impact of activities on manatees and other listed species.”

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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