

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.)

BILL: SB 668

SPONSOR: Senator Bronson

SUBJECT: Seawalls (RAB)

DATE: November 29, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gee	Voigt	NR	Favorable
2.	_____	_____	RC	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill contains amendments to clarify the types of activities and the location of activities that fall within permit exemptions relating to seawalls.

This bill amends s. 403.813 of the Florida Statutes.

II. Present Situation:

In enacting ch. 99-379, L.O.F., the Legislature amended ch. 120, F.S., (the Administrative Procedures Act) to clarify an agency's authority to adopt rules. Subsection (1) of s. 120.536, F.S., as amended, provides that a grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

To ensure compliance with s. 120.536(1), F.S., s. 120.536(2)(b), F.S., requires that each agency, by October 1, 1999 provide to the Administrative Procedures Committee a list of each rule or portion of a rule adopted by that agency prior to June 18, 1999 which exceeds the rulemaking authority permitted by s. 120.536, F.S. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency must also identify the language of the rule which exceeds this authority. The Administrative Procedures Committee will combine the lists and provide the cumulative listing to the President of the Senate and the Speaker of the House of Representatives. The Legislature shall, at the 2000 Regular Session, consider whether

specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 2001, each agency must initiate proceedings pursuant to s. 120.54, F.S., to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist. By February 1, 2001, the Administrative Procedures Committee must submit to the President of the Senate and the Speaker of the House of Representatives a report identifying those rules that an agency had previously identified as exceeding its rulemaking authority for which proceedings to repeal the rule have not been initiated. As of July 1, 2001, the Administrative Procedures Committee or any substantially affected person may petition an agency to repeal any rule, or portion thereof, because it exceeds the rulemaking authority permitted by this section. Not later than 30 days after the date of filing the petition if the agency is headed by an individual, or not later than 45 days if the agency is headed by a collegial body, the agency must initiate rulemaking proceedings to repeal the rule, or portion thereof, or deny the petition, giving a written statement of its reasons for the denial.

The Department of Environmental Protection (DEP) has reported that several provisions of its rules may exceed the statutory authority granted by the Legislature. These rules relate to permit exemptions under s. 403.813, F.S., and include exemptions for the construction and repair of seawalls in specified circumstances. The rules at issue and the DEP's analysis follow:

- *Rule 62-330, F.A.C., insofar as it adopts by reference rules 40B-400.051(2)(k), 40C-4.051(12)(k), 40D-4.051(12)(f); and 40E-4.051(4)(a), F.A.C.*

The text of Rule 40C-4.051, F.A.C., follows, with language in italics that the DEP reports exceeds statutory authority:

40C-4.051 Exemptions.

(12) No permit shall be required under chapters 40C-4, 40C-40, 40C-42, 40C-44, or 40C-400, F.A.C., for the following activities:

(k) Construction of seawalls or riprap, including only that backfilling needed to level the land behind seawalls or riprap, in artificially created waterways, where such construction will not violate existing water quality standards, impede navigation or adversely affect flood control. An artificially created waterway is defined as a body of water that has been totally degraded or excavated and which does not overlap natural wetlands or other surface waters. For the purpose of this exemption, artificially created waterways shall also include existing residential canal systems. *This exemption does not apply to the construction of vertical seawalls in estuaries or lagoons unless the proposed construction is within an existing man-made canal where the shoreline is currently occupied in whole or in part by vertical seawalls.*

The DEP reports that, although a rule can interpret a statutory exemption, a rule cannot limit, in whole or part, an exemption granted by statute. Therefore, the limiting provision exceeds the statutory authority. A rule authorization bill is requested because the proposed amendment is consistent with the intent of the Legislature to give special protection to estuaries and lagoons as evidenced by s. 373.414(5), F.S., which provides that:

- (5)(a) It is the intent of the Legislature to protect estuaries and lagoons from the damage created by construction of vertical seawalls and to encourage construction of environmentally desirable shore protection systems, such as riprap and gently sloping shorelines which are planted with suitable aquatic and wetland vegetation.
- (b) No permit under this part to create a vertical seawall may be issued by the governing board or the department unless one of the following conditions exists:
1. The proposed construction is located within a port as defined in s. 315.02, F.S., or s. 403.021, F.S.;
 2. The proposed construction is necessary for the creation of a marina, the vertical seawalls are necessary to provide access to watercraft, or the proposed construction is necessary for public facilities;
 3. The proposed construction is located within an existing manmade canal and the shoreline of such canal is currently occupied in whole or in part by vertical seawalls; or
 4. The proposed construction is to be conducted by a public utility when such utility is acting in the performance of its obligation to provide service to the public.
- (c) When considering an application for a permit to repair or replace an existing vertical seawall, the governing board or the department shall generally require such seawall to be faced with riprap material, or to be replaced entirely with riprap material unless a condition specified in paragraph (b) exists.
- (d) This subsection shall in no way hinder any activity previously exempt or permitted or those activities permitted pursuant to ch. 161, F.S.

Although s. 373.414(5), F.S., provides for extra protection for estuaries and lagoons, it only does so when a permit is required. A rule authorization bill would extend this extra protection to activities in estuaries and lagoons that would otherwise be exempt.

The DEP has proposed amending s. 403.813(2)(I), F.S., to authorize the limitation contained in the rule.

- *Rule 62-330 insofar as it incorporates by reference rules 40B-400.051(2)(I); 40C-4.051(12)(I); 40D-4.051(12)(I); and 40E-051(4)(b), F.A.C.*

The text of Rule 40C-4.051(12)(I), F.A.C., follows with language in italics that the DEP reports exceeds statutory authority:

40C-4.051 Exemptions.

(12)(I) No permit shall be required under chapters 40C-4, 40C-40, 40C-42, 40C-44, or 40C-400, F.A.C., for the following activities:

(1) The restoration of a seawall or riprap at its previous location or upland of or within one foot waterward of its previous location. No filling can be performed except in the actual restoration of the seawall or riprap. No construction shall be undertaken without necessary title or leasehold interest, especially where private and public ownership boundaries have changed as a result of natural occurrences such as accretion, reliction and natural erosion. *Restoration and repair shall be performed using the criteria set forth in subsection 373.414(5), F.S.* This exemption shall be limited to functioning seawalls or riprap. This exemption shall not affect the permitting requirements of ch. 161, F.S.

The DEP again reports that the language at issue limits the statutory exemption, therefore exceeding statutory authority. A rule authorization bill is requested because it is consistent with the intent of the Legislature to give special protection to estuaries and lagoons as evidenced by section 373.414(5), F.S., as noted above. Specifically, the Legislature intended to preclude vertical seawalls in estuaries and lagoons *except* in ports, and marinas, and except when necessary to provide access to watercraft or when needed for public facilities.

Although s. 373.414(5), F.S., provides this extra protection for estuaries and lagoons, it only does so when a permit is required. A rule authorization bill would extend this extra protection to estuaries and lagoons for activities that would otherwise be exempt.

The DEP has proposed to amend s. 403.813(2)(e), F.S., to authorize the limitation contained in the rule.

- *Rule 62-330 insofar as it adopts by reference rules 40B-400.051(2)(m); 40C-4.051(12)m); 40D-4.051(12)n); and 40E-4.051(4)(c).*

The text of Rule 40C-4.051(12)(m), F.A.C., follows with language in italics that the DEP reports exceeds statutory authority:

40C-4.051 Exemptions.

(12) No permit shall be required under chapters 40C-4, 40C-40, 40C-42, 40C-44, or 40C-400, F.A.C., for the following activities:

(m) The construction of private vertical seawalls in wetlands or other surface waters *other than in an estuary or lagoon*, and the construction of riprap revetments, where such construction is between and adjoins at both ends existing seawalls or riprap, follows a continuous and uniform construction line with the existing seawalls or riprap, is no more than 150 feet in length, does not violate state water quality standards, impede navigation, or adversely affect flood control. However, this exemption shall not affect the permitting requirements of ch. 161, F.S. *Construction shall be in accordance with s. 373.414(5), F.S.*

The DEP reports that these rules are exemptions for the construction of private vertical seawalls in wetlands and other surface waters, other than estuaries and lagoons. The rules also exempt the construction of certain riprap revetments within or without estuaries and lagoons. The rules implement the statutory exemption in s. 403.813(2)(o), F.S. However, the rules contain the following provision that is not included in the statutory exemption:

Construction shall be in accordance with s. 373.414(5), F.S.

This additional sentence is needed to meet the legislative intent of s. 373.414(5), F.S., to exempt private vertical seawalls in estuaries and lagoons in ports, and marinas, and when necessary to provide access to watercraft or when needed for public facilities.

The DEP has proposed amending s. 403.813(2)(o), F.S., to specifically require that such construction, in estuaries and lagoons, be consistent with s. 373.414(5)(b)1.-4., F.S.

III. Effect of Proposed Changes:

This bill amends s. 403.813(2), F.S., as follows:

- Paragraph (e) is amended to require that restoration and repair of seawalls at their previous locations or upland of, or within one foot waterward of their previous locations be performed using the criteria set forth in s. 373.414(5), F.S., in order to qualify for exemption from permitting pursuant to s. 403.813(2), F.S.
- Paragraph (i) is amended to provide that the permit exemption available for the construction of private docks and seawalls in artificially created waterways where such construction will not violate existing water quality standards, impede navigation, or affect flood control does not apply to the construction of vertical seawalls in estuaries or lagoons unless the proposed construction is within an existing man-made canal where the shoreline is currently occupied in whole or part by vertical seawalls.
- Paragraph (o) is amended to require that, in estuaries and lagoons, a permit exemption for the construction of a private seawall is only available if the construction is limited to the circumstances and purposes stated in s. 373.414(5)(b)1.-4., F.S.

This bill will take effect upon becoming law.

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 should be no direct impact, as the changes will only authorize rules that are currently in effect.

C. Government Sector Impact:

There should be no direct impact, as the changes will only authorize rules that are currently in effect.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.