

STORAGE NAME: h1635a.fpr.doc

DATE: April 19, 2001

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
FISCAL POLICY & RESOURCES
ANALYSIS**

BILL #: HB 1635

RELATING TO: Environmental control

SPONSOR(S): Representative(s) Goodlette

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION YEAS 11 NAYS 0
 - (2) FISCAL POLICY & RESOURCES YEAS 13 NAYS 0
 - (3) COUNCIL FOR READY INFRASTRUCTURE
 - (4)
 - (5)
-

I. SUMMARY:

HB 1635's primary goal is to simplify and pull-together the Department of Environmental Protection's various administrative fine authority provisions. Specific aspects of the bill will:

- Clarify enforcement powers with respect to aquatic plant control.
- Authorize the water management districts to assess penalties related to management and storage of surface waters.
- Permit the department to assess penalties related to energy resource violations and phosphate land reclamation.
- Create a process for use of administrative law provisions for certain penalties.
- Provide an administrative penalty schedule for violations of the following: drinking water contamination; dredge and fill stormwater; first-time mangrove trimming or altering; solid waste; air emissions; and storage tank systems.
- Allow the department to consider a violator's history with respect to violations.
- Establish penalty limits and reductions.
- Make numerous conforming changes.
- Require a report describing the number of notices and the results, including fines collected.

The bill provides that the act shall take effect July 1, 2001.

On April 5, 2001, the Committee on Natural Resources and Environmental Protection adopted a "strike-everything" amendment that is traveling with the bill. On April 19, 2001, the Committee on Fiscal Policy & Resources adopted a substitute strike-everything amendment, and reported the bill favorably. Please see "Amendments or Committee Substitute Changes" Section.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Under current law, when the Department of Environmental Protection (DEP) enforces violations of environmental laws and rules, the department must resort to prosecute such violations in the circuit court. Although the DEP tries to settle enforcement actions with violators out of court, when this fails, an action in circuit court must be filed to impose fines or seek other relief. Although a few specific statutes authorize the DEP to impose administrative fines, i.e., Beaches and Coastal Systems regarding coastal protection, and the Board of Trustees of the Internal Improvement Trust Fund regarding harm to state lands, for most of its regulatory programs there is no such option.

Although the DEP generally cannot impose administrative penalties, the authority to do so has been made readily available by the Legislature to other agencies. A few examples of this delegated authority include:

- Pursuant to s. 370.13(2)(b), F.S., the Fish and Wildlife Conservation Commission may impose an administrative penalty of up to \$5,000 for offenses relating to stone crab traps.
- Pursuant to s. 597.0041, F.S., the Department of Agriculture and Consumer Services may impose an administrative penalty not to exceed \$1,000 per violation per day for aquaculture violations.
- Pursuant to s. 381.0061, F.S., the Department of Health may impose administrative penalties not exceeding \$500 per violation for violations of its environmental health programs.
- Pursuant to s. 492.113(3)(c), F.S., the Department of Business and Professional Regulation may impose an administrative penalty not to exceed \$1,000 per offense for violation of professional practices relating to geology.

Because it cannot rely on administrative penalties for enforcement, the DEP spends significant time and expense litigating smaller cases that otherwise could be disposed of through administrative practice. The DEP reports that its lawsuits in circuit court could be reduced by more than 70 percent if it had the ability to seek administrative penalties for small-to-moderate offenses. The DEP claims that authority to impose administrative fines would allow the DEP to prosecute major offenses more effectively. Because the administrative hearing process generally resolves disputes faster than the

state court system, the DEP claims that allowing an administrative fine procedure would resolve cases quicker.

C. EFFECT OF PROPOSED CHANGES:

Please see "Section-By-Section Analysis"

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Section 369.25(3), F.S., is amended to authorize the DEP to enforce ch. 369, F.S., in the same manner and to the same extent as provided in ss. 403.121, 403.131, 403.141, and 403.161, F.S.

Section 2. Section 373.129, F.S., is technically amended.

Section 3. Section 373.437, F.S., is created to authorize WAD governing boards to assess administrative penalties as provided in s. 403.121, F.S.

Section 4. Section 377.37, F.S., is amended to require the DEP to assess administrative penalties for violations of ch. 377, F.S., in accordance with s. 403.121, F.S. Such penalties collected must be deposited in the Minerals Trust Fund. The DEP may use a portion of the fund to contract for services to help in the collection of the administrative penalties assessed.

Section 5. Section 378.211, F.S., is amended to authorize the DEP to institute an administrative action under s. 403.121, F.S., to recover a civil penalty for violations involving phosphate land reclamation. Existing penalties to be imposed by a court are repealed.

Section 6. Section 403.121, F.S., is amended to provide the authority and procedures for the DEP to assess administrative penalties. Except for violations involving hazardous wastes, asbestos, or underground injection, the DEP must proceed administratively in all cases in which the DEP seeks administrative penalties that do not exceed \$10,000 per assessment, as calculated in accordance with ss. 403.121(3), (4), (5), (6), and (7), F.S. The DEP may not impose administrative penalties in excess of \$10,000 in a notice of violation. The DEP may not have more than one notice of violation seeking administrative penalties pending against the same party at the same time unless the violations occurred at different sites or later violations were discovered by the DEP after the filing of the previous notice of violation.

This section provides procedures for written notices to alleged violators, for filing petitions challenging the notice, and entering and enforcing final orders.

The DEP bears the burden of proving by a preponderance of evidence that the petitioner caused the violation. The bill specifies that the penalties should not be imposed absent satisfaction of that burden.

The bill provides procedures for a petitioner challenging an administrative penalty to request the appointment of a private mediator to mediate the dispute. The Florida Conflict Resolution Consortium will pay up to \$1,200 per case and provide administrative support.

In any administrative proceeding brought by the DEP, the prevailing party will recover all costs. The costs must be included in the final order. The petitioner is the prevailing party when an order is entered awarding no penalties to the DEP and either the order has not been reversed on appeal or the order has not been appealed and the time for seeking judicial review has expired. The petitioner is entitled to an award of attorney's fees if the administrative law judge determines that the DEP initiated the notice of violation seeking the imposition of administrative penalties for an improper purpose. An award of attorney's fees may not exceed \$15,000.

The Deep's authority to judicially pursue injunctive relief or damages or to enter into a settlement, either before or after initiating a notice of violation, is not limited by the bill. A settlement may include a penalty amount that departs from the administrative penalty schedule. The DEP also retains the authority to judicially pursue penalties in excess of \$10,000 for violations not specifically identified in the administrative penalty schedule, or for multiple or multi-day violations alleged to exceed a total of \$10,000. Any case filed in state court because the penalties are alleged to exceed a total of \$10,000 may be settled in the court action for less than \$10,000.

Except for violations involving hazardous wastes, asbestos, or underground injection, administrative penalties must be calculated according to the following schedule:

- For a drinking water contamination violation, the DEP will assess a penalty of \$2,000 for a Maximum Containment Level violation, plus \$1,000 if the violation is for a primary inorganic, organic, or radiological Maximum Contaminant Level or if it is a fecal coliform bacteria violation; plus \$1,000 if the violation occurs at a community water system; and plus \$1,000 if any Maximum Contaminant Level is exceeded by more than 100 percent.
- For a domestic or industrial wastewater violation not involving a violation of surfacewater or groundwater quality, the DEP will assess a penalty of \$2,000 for an unpermitted or unauthorized discharge or effluent-limitation exceedance, plus \$1,000 if the discharge was from a Type I facility. For an unpermitted or unauthorized discharge or effluent-limitation exceedance that resulted in a violation of surfacewater or groundwater quality, the DEP will assess a penalty of \$4,000, plus \$1,000 if the discharge was from a Type I facility.
- For a dredge and fill or stormwater violation, the DEP will assess a penalty of \$1,000 for unpermitted or unauthorized dredging or filling against the persons responsible for the illegal dredging or filling, plus \$2,000 if the dredging or filling occurs in or contiguous to an Aquatic Preserve, Outstanding Florida Water, or Class I or Class II surfacewater, plus \$1,000 if the area dredged or filled is between one-quarter acre and one-half acre, and plus \$1,000 if the area dredged or filled is between one-half acre and one acre. The administrative penalty schedule does not apply to a dredge and fill violation if the area dredged or filled exceeds one acre; the DEP retains the authority to seek judicial imposition of civil penalties for all dredge and fill violations involving more than one acre. A penalty of \$3,000 will be assessed for the failure to complete required mitigation or failure to record a required conservation easement or for a turbidity violation. The penalty is \$2,000 for the failure to properly construct a stormwater management system within the designated time and \$1,500 for violations of surfacewater quality which are caused by stormwater construction activities or failure of a stormwater treatment facility. In addition to the other penalties authorized in this paragraph, the DEP will assess a penalty of \$5,000 per day per violation against the contractor or agent of the owner or tenant that conducts unpermitted or unauthorized dredging or filling.
- For a first-time mangrove trimming or altering violation, the DEP will assess a penalty of \$1,000 for the alteration of less than 100 square feet of mangroves, or the trimming of less than 500 square feet of mangroves; \$2,000 for the alteration of 100 to 500 square feet of mangroves, or trimming of 500 to 1,000 square feet of mangroves; \$3,500 for the alteration of 500 to 1,000 square feet of mangroves, or the trimming of 1,000 to 5,000 square feet of mangroves; or \$5,000 for the alteration of over 1,000 square feet of mangroves, or the trimming of over 5,000 square feet of mangroves. In addition to the above penalties, a penalty of \$5,000 per day per violation will be assessed against the contractor or agent of the owner or tenant that conducts unpermitted or unauthorized mangrove trimming or alteration. For a second or subsequent

mangrove trimming or alteration violation, in addition to this schedule of penalties, additional penalties must be imposed as provided in s. 403.9332(3), F.S.

- For solid waste violations, the DEP will assess a penalty of \$2,000 for the unpermitted or unauthorized disposal or storage of solid waste; plus \$1,000 if the solid waste is Class I or Class III (excluding yard trash) or if the solid waste is construction and demolition debris in excess of 20 cubic yards, plus \$1,000 if the waste is disposed of or stored in any natural or artificial body of water or within 500 feet of a potable water well, plus \$1,000 if the waste contains PCBs at a concentration of 50 parts per million or greater; untreated biomedical waste; friable asbestos greater than 1 cubic meter which is not wetted, bagged, and covered; used oil greater than 25 gallons; or 10 or more lead acid batteries. For failure to properly maintain leachate control; unauthorized burning, failure to have a trained spotter on duty during operation; failure to provide access control for three consecutive inspections; or failure to construct or maintain a required stormwater management system, the penalty is \$3,000.
- For an air emission violation, the DEP will assess a penalty of \$1,000 for an unpermitted or unauthorized air emission or an air-emission-permit exceedance, plus \$1,000 if the emission results in an air quality violation, plus \$3,000 if the emission was from a major source, plus \$1,000 if the emission was more than 150 percent of the allowable level.
- For storage tank system and petroleum discharge or release violations, the DEP will assess a penalty of \$5,000 for failure to take a storage tank system out of service until repairs are completed when a release has occurred from that storage tank system; for failure to timely recover free product; or for failure to conduct remediation or monitoring activities until a no-further-action or site-rehabilitation completion order has been issued. The penalty is \$3,000 for failure to timely upgrade a storage tank system. The DEP will also assess a penalty of \$2,000 for failure to conduct or maintain required release detection; for failure to timely investigate a suspected release from a storage tank system; for depositing motor fuel into an unregistered storage tank; or for failure to properly install a storage tank system. Finally, a penalty of \$1,000 will be assessed for failure to properly operate, maintain, or close a storage tank system.

The bill also provides an additional schedule for administrative penalties, as follows:

- For failure to satisfy financial responsibility requirements or for violations of s. 377.371(1), F.S., \$5,000.
- For failure to install, maintain, or use a required pollution control system or device, \$4,000.
- For failure to obtain a required permit not otherwise addressed in s. 403.121(3), F.S., \$3,000.
- For failure to conduct required monitoring or testing; failure to conduct required release detection; failure to construct in compliance with a permit; violation of a specific permit condition not otherwise identified in s. 403.121, F.S.; or failure to plug oil, gas, injection, or disposal wells, \$2,000.
- For failure to maintain required staff to respond to emergencies; failure to conduct required training; failure to prepare, maintain, or update required contingency plans; failure to adequately respond to emergencies to bring an emergency situation under control; failure to comply with geophysical seismic-line-safety onsite reclamation requirements; or failure to submit required notification to the DEP, \$1,000.

- For failure to prepare, submit, maintain, or use required reports or other required documentation, \$500.
- For failure to comply with any other departmental regulatory statute or rule requirement not otherwise identified in s. 403.121, F.S., the DEP may assess a penalty of \$500.

For each additional day during which a violation occurs, the administrative penalties in ss. 403.121(3),(4), or (5), F.S., may be assessed per day per violation.

The bill also provides increased penalties for repeat violators who have a previous violation identified in ss. 403.121(3) or (4), F.S., in the \$2,000 and other categories resulting in an executed consent order, final order or judgment as follows:

- One previous violation within 5 years before the filing of the notice of violation will result in a 25 percent per day increase in the scheduled administrative penalty.
- Two previous violations within 5 years before the filing of the notice of violation will result in a 50 percent per day increase in the scheduled administrative penalty.
- Three or more previous violations within 5 years before the filing of the notice of violation will result in a 100 percent per day increase in the scheduled administrative penalty.

The bill limits the penalty for any particular violation to \$5,000 against any one violator, unless the violator has a history of noncompliance, the economic benefit of the violation to the violator exceeds \$5,000, or there are multi-day violations. The total administrative penalties may not exceed \$10,000 per assessment for all violations attributable to a specific person in the notice of violation.

The bill authorizes the administrative law judge to consider evidence in mitigation, and reduce penalties identified in ss. 403.121(3), (4), and (5), F.S., up to 50 percent.

All penalties collected will be deposited into the Ecosystem Management and Restoration Trust Fund or other designated trust fund. A portion of the fund may be used to fund conflict resolution.

The bill clarifies that ss. 403.121(3), (4), (5), (6), or (7), F.S., do not limit a state court in its assessment of civil penalties or damage assessment. Finally, the bill repeals existing law found in s. 403.(3)(a)-(e), F.S., authorizing the DEP to assess noncompliance fees.

Section 7. Section 403.131, F.S., is amended to provide that the judicial and administrative remedies to recover damages and penalties under ss. 403.121 and 403.131, F.S., are alternative and mutually exclusive.

Section 8. Section 403.727, F.S., is amended to remove penalty provisions that have now been incorporated in Section 6 of the bill.

Section 9. Section 403.860, F.S., is amended to require approved county health departments to assess administrative penalties for violations of s. 403.860, F.S.

Provisions authorizing the assessment of noncompliance fees for failure to comply with DEP requirements for water suppliers are repealed.

Section 10. The DEP must report to the Legislature two years after the effective date of the bill. The report must describe the number of notices of violations issued seeking imposition of administrative penalties, the amount of penalties recovered, and any efficiencies gained by the program.

Sections 11, 12, and 13. Reenacts various sections of Florida statutes to conform them to the proposed changes contained in the bill.

Section 14. Provides that the act shall take effect July 1, 2001.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

The primary benefit to the state lies in the anticipated reduction in state court litigation. The DEP has estimated that the bill would result in a 70 percent reduction in the number of suits filed in state court. Even if the penalty schedule resulted in diminished receipts from enforcement action, as has been suggested, the slight loss of revenue would be more than offset by the increased legal resources made available for more major enforcement actions.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Although its impact on the private sector depends on the number and type of environmental offenses resolved through administrative practice, the bill creates a system of administrative penalties. A number of individual penalties are created, together with increased penalties for a variety of aggravating actions. Penalties range from \$500 to \$5,000 per violation. Depending on circumstances, the schedules of penalties could be beneficial to violators who do not want the expense of prolonged litigation.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require municipalities or counties to spend money or to take action that requires a significant expenditure of money.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that municipalities or counties have to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of state tax revenues shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

There were two major changes to underlying bill:

Sections 3 and 4 were removed. These sections gave additional authority for the water management districts and the DEP to assess administrative fines in areas where other entities currently have that authority.

A provision was added to the changes in s. 403.121, F.S., which would permit the respondent to opt out of the administrative process and use the traditional courts.

Finally, minor technical and clarifying issues were addressed.

On April 19, 2001, the Committee on Fiscal Policy & Resources adopted a substitute strike-everything amendment, which made several technical changes to the traveling amendment and clarified language regarding the addition of the economic benefit to the imposition of an administrative penalty.

STORAGE NAME: h1635a.fpr.doc

DATE: April 19, 2001

PAGE: 9

VII. SIGNATURES:

COMMITTEE ON NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION:

Prepared by:

Staff Director:

Wayne Kiger

Wayne Kiger

AS REVISED BY THE COMMITTEE ON FISCAL POLICY & RESOURCES:

Prepared by:

Staff Director:

Douglas Pile

Greg Turbeville