SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 270

SPONSOR: Senator King

SUBJECT: Environmental Protection

DATE: December 20, 2001 REVISED: 01/23/02

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Forgas	Johnson	JU	Fav/1 amendment
2.			NR	
3.			AGG	
4.			AP	
5.				
6.				

I. Summary:

Senate bill 270 amends s. 373.114, F.S., to remove authority from the Florida Land and Water Adjudicatory Commission to review certain orders and rules of water management districts that result from evidentiary hearings held under ss. 120.56, 120.569, and 120.57, F.S. The bill also amends s. 403.412, F.S., Florida's Environmental Protection Act, to prohibit citizens from instituting, initiating, petitioning for, or requesting an administrative proceeding under ss. 120.569 or 120.57, F.S. Section 403.412, F.S., is also amended to expand the award of costs and attorney's fees to prevailing parties to administrative proceedings instituted under the Environmental Protection Act.

This bill substantially amends the following sections of the Florida Statutes: 373.114 and 403.412.

II. Present Situation:

Florida Land and Water Adjudicatory Commission

The Florida Environmental Land and Water Management Act of 1972, consisting of ss. 380.012, 380.021, 380.031, 380.04, 380.05, 380.06, 380.07, and 380.08, F.S., created the Florida Land and Water Adjudicatory Commission. Section 380.07, F.S., specifies that the Florida Land and Water Adjudicatory Commission consists of the Administration Commission, which is comprised of the Governor and the Cabinet pursuant to s.. 380.031, F.S. When a local government issues a development order in any area of critical state concern, or in regard to any development of regional impact, copies of such orders as prescribed by rule by the state land planning agency are to be transmitted to the state land planning agency, the regional planning agency, and to the owner or developer of the affected property. Pursuant to s. 380.07(2), F.S.,

within 45 days after the order is entered, the owner, developer, or the state land planning agency may appeal the order to the Florida Land and Water Adjudicatory Commission.

Prior to issuing an order, the Florida Land and Water Adjudicatory Commission is required by s. 380.07(4), F.S., to hold a hearing pursuant to the provisions of the Administrative Procedures Act (APA), ch. 120, F.S. The commission must issue a decision granting or denying permission to develop pursuant to the standards of ch. 380, F.S. Pursuant to s. 380.07(5), F.S., the commission may attach conditions and restrictions to its decisions.

Pursuant to s. 380.07(6), F.S., if an appeal is filed with the commission with respect to any issues within the scope of a permitting program authorized by statutes pertaining to beach and shore preservation (ch. 161), water resources (ch. 373), or the Florida Air and Water Pollution Control Act (ch. 403), and for which a permit or conceptual review approval has been obtained prior to the issuance of a development order, any such issues shall be specifically identified in the notice of appeal. The appeal may proceed only after the commission determines by a majority vote that statewide or regional interests may be adversely affected by the development. In making this determination, s. 380.07(6), F.S., provides a rebuttable presumption that statewide and regional interests relating to issues within the scope of the permitting programs for which a permit or conceptual approval has been obtained are not adversely affected.

A party's standing to appeal an order to the Florida Land and Water Adjudicatory Commission is determined by s. 380.07(2), F.S., which authorizes the owner, developer, or the state land planning agency to appeal. Owners of land included for purposes other than development within a designated development of regional impact do not have standing to appeal a local government's development order. Likewise, conservation and environmental groups generally do not have standing to appeal a local government's development order regarding a development of regional impact. *See Friends of the Everglades, Inc. v. Zoning Board of Monroe County,* 478 So.2d 1126 (Fla. 1st DCA 1985).

Nevertheless, nothing in the Florida Land and Water Management Act of 1972 has abrogated the rights of citizens to challenge local zoning decisions in circuit court. Persons with a legally recognized interest which will be directly affected by a zoning decision have standing to seek declaratory and injunctive relief with respect to statutes governing developments of regional impact. *See White v. Metropolitan Dade County,* 563 So.2d 117 (Fla. 3rd DCA 1990).

<u>Commission Review of Water Management District Orders and Rules</u>

As far as water management district rules and orders are concerned, s. 373.114(1), F.S., currently grants the Florida Land and Water Adjudicatory Commission authority to review any order or rule of a water management district, other than a rule relating to an internal procedure of the district. The commission is granted this authority to ensure consistency with the provisions and purposes of the Florida Water Resources Act of 1972, which consists of ch. 373, F.S. The commission obtains jurisdiction to review an order or rule via the following routes:

- Pursuant to subsection (1) of s. 373.114, F.S., review may be initiated by: the Department of Environmental Protection; a person affected by the rule or order who submitted oral or written testimony of a substantive nature in support of, or in objection to, the rule or

order; or any person who participated as a party in a proceeding instituted pursuant to ch. 120, F.S.

- Pursuant to subsection (2) of s. 373.114, F.S., review may be initiated after the Department of Environmental Protection enters an order determining that a water management district rule is inconsistent with the water resource implementation rule of the Department and, therefore, requires the water management district to initiate rulemaking proceedings to amend or repeal the rule. Review may be sought by the water management district or any other party to the departmental proceeding.

Review by the Commission is appellate in nature. Unless waived by the parties, the matter must be heard by the Commission not more than 60 days after receipt of the request for review. Pursuant to paragraph (e) of s. 373.114(1), F.S., a request for review is not a precondition to the seeking of judicial review pursuant to s. 120.68, F.S., or the seeking of an administrative determination of the rule validity pursuant to s. 120.56, F.S.

If the Commission determines that a water management district rule is inconsistent with the provisions and purposes of ch. 373, F.S., the Commission may require the district to initiate rulemaking proceedings to amend or repeal the rule. If an order is deemed to be inconsistent with ch. 373, F.S., the Commission may rescind or modify the order, or remand the proceeding for further action if the Commission determines that the activity authorized by the order would substantially affect natural resources of statewide or regional significance. If the order does not substantially affect natural resources of statewide or regional significance, but does raise policy issues that have regional or statewide significance from the standpoint of agency precedent, the Commission may direct the district to initiate rulemaking to amend its rules to assure that future actions are consistent with ch. 373, F.S., without modifying the order.

Environmental Protection Act of 1971

The Environmental Protection Act of 1971 is found in s. 403.412, F.S. The act authorizes the Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state to maintain an action for injunctive relief to compel governmental entities to enforce laws, rules, and regulations that protect the air, water, and other natural resources of the state. The act also authorizes the Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state to seek injunctive relief against any person, corporation, or governmental entity to stop such entities from violating any laws, rules, or regulations that protect the environment.

As a condition precedent to the institution of an action under the act, s. 403.412(2)(c), F.S., requires the complaining party to first file a verified complaint with the governmental agencies or authorities responsible for regulating or prohibiting the complained of conduct. The complaint must set forth the facts upon which the complaint is based and the manner in which the complaining party is affected. Upon receipt of a complaint, the governmental entity must forthwith transmit a copy of the complaint to those parties accused of violating the laws, rules, and regulations in question. The governmental entity then has 30 days to take appropriate action and, if such action is not taken during that time, the complaining party may institute an action for an injunction.

The Florida Supreme Court has ruled that the act authorizes private citizens, both corporate and non-corporate, to institute a suit under the act without a showing of special injury (i.e. a violation that causes injury different both in kind and degree from that suffered by the public at large.) *See Florida Wildlife Federation v. Dept. of Environmental Regulation,* 390 So.2d 64 (Fla. 1980). However, to state a cause of action under the act, it must appear that the question raised is real and not merely theoretical, and that the plaintiff has a bona fide and direct interest in the result. *Id.* A mere allegation of an irreparable injury not sustained by any allegation of facts will not ordinarily warrant the granting of injunctive relief. *Id.*

Subsection (5) of s. 403.412, F.S., further provides that in any administrative, licensing, or other proceeding authorized for the protection of the environment, the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state shall have standing to intervene as a party. To do so, such person or entity must file a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state. It has been determined that subsection (5) of s. 403.412, F.S., grants authority to persons and entities to initiate evidentiary administrative proceedings pursuant to ss. 120.569 and 120.57, F.S. *See Manasota-88, Inc., v. Dept. of Environmental Regulation,* 441 So.2d 1109, 1111 (Fla. 1st DCA 1983).

The act, pursuant to paragraph (f) of s. 403.412(2), F.S., provides for a mandatory award of attorney's fees and costs to the prevailing party. However, if the action involves a state National Pollutant Discharge Elimination System (NPDES) program permit, the award of attorney's fees is not mandatory but lies within the discretion of the court. The court may require the plaintiff to post cash or a surety bond if the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment rendered against that party.

Chapter 120, F.S., The Administrative Procedure Act (APA)

The APA allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions.[1] Administrative hearings involving disputed issues of fact are generally referred to the Division of Administrative Hearings (DOAH), an independent group of administrative law judges (ALJs) who hear cases involving most state agencies. The DOAH's ALJs also determine whether proposed and existing agency rules are invalid exercises of delegated legislative authority based on certain statutory grounds, and based on constitutional grounds in the case of proposed rules. DOAH proceedings are conducted like nonjury trials and are governed by ch. 120, F.S., and the rules adopted to implement those statutory provisions.[2]

In adjudicatory cases, where a decision affects "substantial interests," the ALJ normally has the role of making findings of fact and drawing conclusions of law and providing a recommended order. The affected agency is responsible for entering a final order. Findings of fact by administrative law judges continue to be presumptively correct, and may not be lightly set aside by the agency. An agency may enter a final order rejecting or modifying findings of fact upon

[1] *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, by Judge Linda M. Rigot, The Florida Bar Journal, Jan. 2001, at 14.
[2] *Id.*

review of the entire record and after stating with particularity that the findings were not based upon competent substantial evidence or did not comply with essential requirements of law.[3] As a consequence of recent amendments, however, an ALJ's conclusions of law are even more insulated from change by the agency. "In view of these new responsibilities, it is plain that the division and ALJs continue to enjoy the confidence of the legislature."[4] An agency may enter a final order rejecting or modifying conclusions of law over which it has substantive jurisdiction. The agency must state its reasons with particularity, and must find that its substituted conclusion of law is at least as reasonable as the conclusion of law it rejected.[5] Appellate review of agency actions is authorized by s. 120.68, F.S.

III. Effect of Proposed Changes:

Section 1 of the bill amends subsection (1) of s. 373.114, F.S., pertaining to the Florida Land and Water Adjudicatory Commission's jurisdiction over water management district rules and orders. Specifically, the bill eliminates the Commission's authority to review an order resulting from an evidentiary hearing held under s. 120.569, F.S., or s. 120.57, F.S. These evidentiary hearings determine the validity of agency orders, permits, licenses, bid awards, and other actions not involving agency rules. The bill also eliminates the Commission's authority to review a rule that has been adopted after issuance of an order resulting from an evidentiary hearing held under s. 120.56, F.S.

The bill does not eliminate the Florida Land and Water Adjudicatory Commission's authority to review water management district rules and orders that have not been the subject of an evidentiary hearing held under ss. 120.56, 120.569, and 120.57, F.S. Likewise, the bill does not eliminate appellate review of water management rules and orders that are the subject of evidentiary hearings held under the aforementioned sections of ch. 120, F.S., as s 120.68, F.S., explicitly provides for judicial review of these rules and orders.

Section 2 of the bill amends subsection (5) of s. 403.412, F.S. (Environmental Protection Act of 1971), to specify that a citizen, the Department of Legal Affairs, or a political subdivision or municipality of the state can only intervene in administrative proceedings, licensing proceedings, or other environmental proceedings that are "ongoing proceedings." The bill does not define the term "ongoing proceedings." The bill further amends subsection (5) to state that "this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under s. 120.569 or s. 120.57" of the Florida Statutes. This change could be interpreted as a statutory reversal of the court's decision in *Manasota-88, Inc., v. Dept. of Environmental Regulation,* 441 So.2d 1109 (Fla. 1st DCA 1983).

The bill also creates a new subsection (7) that allows an administrative law judge to award the prevailing party costs and attorney's fees in administrative proceedings brought pursuant to this section. The award of costs and attorney's fees is not mandatory as it lies within the

[3] Section 120.57(1), F.S.
[4] *The Florida Division of Administrative Hearings*, by William E. Williams and S. Curtis Kiser, The Florida Bar Journal, Jan. 2001, at 24.
[5] Section 120.57(1), F.S.

administrative law judge's discretion. The current attorney's fees provision, found in subsection (2)(f), provides for a mandatory award of costs and attorney's fees in judicial actions.

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:

The bill expands the award of costs and attorney's fees to prevailing parties to include such awards in administrative proceedings instituted under s. 403.412, F.S.

C. Government Sector Impact:

The bill's provisions eliminating the Florida Land and Water Adjudicatory Commission's authority to review water management district rules and orders that result from evidentiary hearings under ss. 120.569 and 120.57, F.S., could streamline review of such rules and orders as the current law potentially allows for appellate review of such orders by the Commission and Florida courts. However, some sources contend that the bill could potentially eliminate the Commission's ability to ensure that water management decisions are consistent among districts as most water management district rules and orders are the subject of evidentiary hearings held under ch. 120, F.S.

According to the Florida Department of Environmental Protection (DEP), the bill's changes to s. 403.412(5), F.S., of the Environmental Protection Act of 1971, could limit to some degree citizen participation in DEP permitting cases. Currently, all a citizen needs to do to initiate an administrative action challenging a permitting decision is file a verified petition alleging citizenship, and state that the proposed action would impair, pollute, or otherwise injure air, water, or other natural resources of the state. The bill's proposed change, according to the DEP, would limit citizen involvement under this section to participation as intervenors in an already existing action. According to the

DEP, current case law indicates that intervenors may not have the same rights as other parties as they may be limited in terms of the issues they may raise and they may be bound by settlements reached among the parties already participating in the action. Nevertheless, the DEP indicates that most permitting cases involve allegations that the petitioner's substantial interests are being affected, thereby allowing the petitioner to seek review in an administrative proceeding under ss. 120.569 and 120.57, F.S.

The DEP also notes that it cites s. 403.412, F.S., as one of the bases for adequate citizen participation when applying for delegation or approval of several federal programs. Under agreements with the federal Environmental Protection Agency (EPA), the DEP must notify the EPA of changes in s. 403.412, F.S. According to the DEP, the bill's changes to s. 403.412, F.S., could trigger EPA review of the affected agreements and may result in changes in the status of these programs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Judiciary:
Reinstates the current law in paragraph (f) of subsection (2) of s. 403.412, F.S., regarding the award of attorney's fees to the prevailing party in any judicial action. The amendment also provides, in the creation of a new subsection (7), that the award of attorney's fees to the prevailing party in any administrative action instituted under s. 403.412, F.S., is not mandatory but lies within the administrative law judge's discretion.

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