

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 137 CS

Florida Incentive-based Permitting Act

SPONSOR(S): Stansel

TIED BILLS:

IDEN./SIM. BILLS: SB 1182

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Environmental Regulation Committee	7 Y, 0 N	Perkins	Kliner
2) Agriculture & Environment Appropriations Committee	9 Y, 0 N	Dixon	Dixon
3) State Resources Council	8 Y, 0 N, w/CS	Perkins	Hamby
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The bill creates the Florida Incentive-based Permitting Act. The purpose of the act is to provide the Department of Environmental Protection (DEP) with clear and specific authority to consider the compliance history of a permit applicant who has applied for an incentive-based permit. Incentive-based permits are proposed to include Level 1 and Level 2 incentives which include longer duration permits, expedited permit reviews, short-form permit renewals, and other incentives to reward and encourage such applicants.

The bill instructs DEP to develop rules associated with Level 1 and Level 2 incentives and encourages DEP to provide notice to permit applicants on the incentive-based program components.

The bill provides that Level 1 and Level 2 incentives are also applicable to coastal construction permitting activities, consumptive use permitting, and to construction permitting activities associated with management and storage of surface waters.

The bill amends the authority of DEP to revoke permits pursuant to certain conditions.

The bill does not appear to have a significant fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill establishes incentives to permit applicants with a history of compliance with the permit conditions, requirements, and environmental laws of this state, therefore streamlining the permit and renewal process conducted by DEP.

Promote personal responsibility: The bill addresses personal responsibility by creating incentives for compliance with the permit conditions, requirements, and environmental laws of this state.

B. EFFECT OF PROPOSED CHANGES:

Issue – Incentive-based Permitting Program

Present Situation

The State of Florida regulates the impacts of certain activities on the environment primarily through three chapters of the Florida Statutes: Chapter 403, 161, and 373, F.S.

Chapter 403, F.S., is known and cited as the “Florida Air and Water Pollution Control Act.” It is a matter of public policy of the state to protect and conserve the waters of the state along with maintaining safe levels of air quality for the citizens, wildlife and fish, and other aquatic life.¹ DEP is responsible for issuing permits for stationary installations that are reasonably expected to be a source of air and water pollution.²

Parts I and II of Chapter 161, F.S., is known and cited as the “Beach and Shore Preservation Act.”³ The 825 miles of sandy coastline fronting the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida are part of Florida’s most valuable natural resources. In order to protect, preserve, and manage Florida’s valuable sandy beaches and adjacent coastal systems, the Legislature adopted the Beach and Shore Preservation Act, contained in Parts I and II of Chapter 161, F. S.⁴ Any coastal construction, reconstruction of existing structures, or physical activity undertaken specifically for shore protection purposes upon sovereignty lands of Florida requires a coastal construction permit issued by DEP.⁵

Chapter 373, F.S., is known and cited as the “Florida Water Resources Act of 1972.”⁶ It is a policy of the Legislature that the waters in the state be managed on a state and regional basis because water constitutes a public resource benefiting the entire state.⁷ Prior to construction or alteration of any stormwater management system, dam, impoundment, and reservoir appurtenant work, the DEP or governing board of a water management district may require a permit authorizing the construction or alteration activity.⁸

Currently there are limited incentives in the permitting program that allow DEP or the water management districts to consider an applicant’s or permitholder’s history of compliance with applicable permit conditions, requirements, and environmental laws of this state in reference to obtaining a permit

¹ s. 403.021, F.S.

² s. 403.087, F.S.

³ s. 161.011, F.S.

⁴ <http://www.dep.state.fl.us/beaches/programs/about.htm>

⁵ s. 161.041, F.S.

⁶ s. 373.013, F.S.

⁷ s. 373.016(4)(a), F.S.

⁸ s. 373.413, F.S.

or renewal of an existing permit.⁹ DEP may issue a permit to an applicant upon reasonable assurance that the activity will not violate DEP standards or pollution prevention rules. Specifically, Rule 62-4.070(5), F.A.C., authorizes DEP to take into consideration a permit applicant's violation of any DEP rules at any installation when determining whether the applicant has provided reasonable assurances that DEP standards will be met.

Effect of Proposed Change

The bill creates section 403.0874, F.S., as an act relating to the Florida Incentive-based Permitting Program. The purpose of the act is to provide DEP with clear and specific authority to consider compliance history of an applicant when DEP is considering whether to issue or reissue a permit to the applicant. It is incumbent on the applicant to request incentives as part of the permit application. Unless otherwise prohibited by state or federal law, agency rule, or federal regulation, and provided the applicant meets all other applicable criteria for the issuance of a permit, an applicant meeting the specified criteria qualifies for the following incentives:

Level 1 Requirements:

Applicant shall be entitled to incentives at a site based on the following:

- If the applicant conducted the regulated activity for at least 4 of the 5 years preceding submittal of the permit application or,
- If the activity is a new regulated activity, the applicant conducted a similar regulated activity under an agency permit for at least 4 of the 5 years at a different site in the state preceding submittal of the permit application.

An applicant shall not be entitled to incentives if the applicant has a relevant compliance history at the subject site that includes any violation that resulted in enforcement action and the violation resulted in significant harm to human health or the environment. Alleged violations shall not be considered unless a consent order or other settlement has been entered into or the violation has been adjudicated.

Level 1 Incentives:

- **Automatic Renewal of Permit:** A renewal of a permit shall be issued for a period of 5 years. In addition, after notice and opportunity for public comment, the permit may be automatically renewed for an additional 5 years without DEP action unless DEP determines, based on information submitted by the applicant or resulting from the public comments or its own records, that the applicant has committed violations during the review period that disqualify the applicant from receiving the automatic or expedited renewal.
- **Expedited Permit Review:** Processing time following receipt of a completed application shall be 45 days for the issuance of DEP action.
- **Short-form Renewals:** Renewals of permits not involving substantial construction or expansion may be made upon a shortened application form specifying only the changes in the regulated activity or a certification by the applicant that no changes in the regulated activity are proposed if that is the case.

Level 2 Requirements:

Applicant shall be entitled to incentives at a site based on the following:

- If the applicant meets the requirements for Level 1, and
- If the applicant takes any other actions not otherwise required by law that result in:
 - a. Reduction in actual or permitted discharges or emissions;
 - b. Reduction in the impacts of regulated activities on public lands or natural resources;
 - c. Waste reduction or reuse;
 - d. Implementation of a voluntary environmental management system; or
 - e. Other similar actions as determined by DEP rule.

⁹ s. 403.087(3), F.S.

Level 2 Incentives:

- May include all Level 1 incentives.
- Issuance of 10 year permits, provided the applicant has conducted a regulated activity at the site for at least 5 years.
- Fewer routine inspections than other regulated activities similarly situated.
- Expedited review of requests for permit modifications.
- DEP recognition, program-specific incentives, or certifications in lieu of renewal permits.
- No more than two requests for additional information.

The bill requires DEP to enter into rulemaking within six months after the effective date of this bill for Level 1 and Level 2 incentives. The rule is to specify incentives, qualifications, and the transfer of extended permits. Incentives will not be available to permit applicants until the implementing rules are adopted.

The bill encourages DEP to work with applicants and permittees to encourage compliance in order to avoid the costly consequences associated with noncompliance activities.

The bill expands current statutory language to provide for Level 1 and Level 2 incentives to be applicable to permitting of coastal construction activities identified in Chapter 161, F.S., consumptive use permits in section 373.219, F.S., and permitting construction activities associated with management and storage of surface waters in part IV of Chapter 373, F.S.

Issue – Revocation of Permits

Present Situation

Section 403.087, F. S., is the statutory authority which relates to the general issuance, denial, revocation, prohibition, and penalties associated with permits issued by DEP. Section 403.087(2), F.S., authorizes DEP to adopt, amend, or repeal rules for the issuance, denial, modification, and revocation of permits under this section. Chapter 62-4.100, F.A.C., states that DEP revocation shall not become effective except after written notice is served by personal service, certified mail, or newspaper notice and upon the person(s) named therein and a hearing held, if requested, within the time specified within the notice.

Effect of Proposed Change

The bill amends section 403.087(7), F.S., to provide that DEP may revoke a permit only if the permitholder commits one of the listed acts.

The table below illustrates a comparison of the current law and the proposed language in the bill:

Section 403.087(7) F.S.	
CURRENT LAW	PROPOSED LAW
A permit issued pursuant to this section shall not become a vested right in the permittee. The department may revoke any permit issued by it if it finds that the permitholder:	A permit issued pursuant to this section shall not become a vested right in the permittee. The department may revoke any permit issued by it if it finds that the permitholder:
(a) Has submitted false or inaccurate information in his or her application;	(a) Has submitted <u>material</u> false or inaccurate information in <u>the</u> application <u>for such permit when true or accurate information would have warranted denial of the permit in the first instance;</u>
(b) Has violated law, department orders, rules, or regulations, or permit conditions;	(b) Has violated law, department orders, rules, or regulations, or conditions <u>directly related to such permit;</u>
(c) Has failed to submit operational reports or other information required by department rule or regulation; or	(c) Has failed to submit operational reports or other information required by department rule or regulation <u>directly related to such permit;</u> or
(d) Has refused lawful inspection under s. 403.091.	(d) Has refused lawful inspection under s. 403.091 <u>at the facility authorized by such permit.</u>

Note: Bold underlined text is proposed statutory language.

C. SECTION DIRECTORY:

- Section 1. Creates s. 403.0874, F.S., to provide a section name, legislative findings and public purpose, definitions, and compliance incentives.
- Section 2. Amends s. 161.041, F.S., to provide that the Incentive-based Permitting Program provisions of s. 403.0874, F.S., are applicable to all permits issued under Chapter 161, F.S.
- Section 3. Creates section 373.219(3), F.S., to expand Incentive-based Permit provisions to consumptive use permits.
- Section 4. Amends s. 373.413, F.S., to provide that the Incentive-based Permitting Program provisions of s. 403.0874, F.S., are applicable to permits issued under part IV of Chapter 373, F.S.
- Section 5. Amends s. 403.087 (7), F.S., relating to revocation of permits.
- Section 6. Provides the bill takes effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.

2. Expenditures:

Non-recurring Effects: This bill includes rulemaking authority to implement the bill's provisions. Rulemaking costs will be insignificant and non-recurring. These costs include DEP's efforts to publicize a proposed rule through mail-outs and public workshops around the state, as well as costs associated with publication and process requirements pursuant to Chapter 120, F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

DEP states that the bill may encourage non-compliance with environmental regulations which could result in increased response costs and possibly increased costs for compliance/enforcement staff. In addition, DEP states that the time in which the permits must be reviewed will be greatly reduced, causing a need for additional permitting staff to do the reviews, or resulting in backlogs which will have substantive and fiscal consequences to the department and to permit applicants.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require cities or counties to spend funds or take actions requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other: None.

B. RULE-MAKING AUTHORITY:

DEP would be required to create additional rules for the implementation of this act.

C. DRAFTING ISSUES OR OTHER COMMENTS:

DEP Comments:

DEP reports that under current law, it is unusual in state licensing/certification/permitting procedures for an agency to provide incentives to applicants to comply with existing legal requirements. DEP indicates that after having discussions with the Department of Highway Safety and Motor Vehicles and the Department of Business and Professional Regulation concerning drivers and business licensing issuance and renewals, neither agency provides incentives to applicants merely because the applicants have obeyed relevant laws and regulations. DEP maintains this bill allows incentives too easily to be obtained, revocations more difficult, and restricts the scope of the agency review of permit applications.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 20, 2005, the State Resources Council adopted a "Strike-All" amendment and an amendment to the "Strike-All" amendment to HB 137:

Strike-All Amendment:

- Removes the language "**knowing** violation that resulted in **formal** enforcement action" and replaces with "violation that resulted in enforcement action" with regards to eligibility requirements for incentives.
- Removes "knowing" definition from the bill.
- Removes "notification requirements" related to enforcement actions associated with the noncompliance activity and the potential consequence of the continued violation in relation to Level 1 and 2 incentives.
- Revises permit revocation criteria.

Amendment to the 'Strike-All' Amendment: Section 373.219(3), F.S., (consumptive use permit) was added to the program area eligible for incentives.