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.)

Prepared By: Environmental Preservation Committee

BILL: CS/SB 2510

SPONSOR: Environmental Preservation Committee and Senator Lawson

SUBJECT: Natural Resources

DATE: April 19, 2005 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Branning	Kiger	EP	**Fav/CS**
2.			CU	
3.				
4.				
5.				
6.				

I. Summary:

This committee substitute specifies that the state may review permits and licenses required for the siting and construction of any new electrical power plants as defined in s. 403.503(12), F.S., and the licensing and relicensing of hydroelectric power plants under the Federal Power Act, 16 U.S.C. ss. 791a et seq., as amended.

The committee substitute further allows the state to review permits and licenses required under the Mining Law of 1872, the Mineral Leasing Act for Acquired Lands, the Federal Land Policy and Management Act, or the OCS Land Act, for drilling, mining, pipelines, geological and geophysical activities, or rights-of-way on public lands. The state may also review permits and licenses required under the Indian Mineral Development Act.

When an environmental impact statement or environmental assessment that is required by the National Environmental Policy Act has been prepared for a specific activity, use, or project that is subject to federal consistency review, the environmental impact statement or environmental assessment shall be the data and information necessary for the state's review of the consistency of that activity, use, or project.

The committee substitutes also provides that an increase in the size of a heavy mineral mine as defined s. 378.403(7), F.S., will only constitute a substantial deviation subject to an additional development-of-regional-impact review if the average annual acreage mined is more than 500 acres and consumes more than 3 million gallons of water per day.

The committee substitute further authorizes the Department of Environmental Protection to use methods established pursuant to federal regulations implementing the Oil Pollution Act of 1990, as amended, to assess the damages to natural resources from pollution.

This bill substantially amends ss. 380.23, 380.06, and 376.121, F.S.

II. Present Situation:

Coastal Zone Management Act
In 1972, Congress enacted the Coastal Zone Management Act (CZMA), (PL92-583) in order to balance preservation and development in coastal areas. The Office of Coastal Zone Management was established within the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce to administer the program. Section 380.22, F.S., provides that the Department of Environmental Protection is the lead state agency pursuant to the CZMA

The CZMA provided for a program of grants to coastal states electing to participate in the program. The purpose of the grants is to assist those states in developing policies and methods for the coordinated management of coastal development. Under the CZMA the state is allowed to review federal activities, uses, and projects to ensure they comply with state laws. Federal CZMA regulations require states to list the federal activities that will be routinely reviewed. The federal regulations also authorize a state to review unlisted activities if it receives prior approval to do so from the Secretary of the U.S. Department of Commerce. Section 380.23, F.S., lists the federally licensed or permitted activities subject to state review for consistency. Those activities include:

- Permits and licenses required under the Rivers and Harbors Act of 1899, as amended;
- Permits and licenses required under the Marine Protection, Research and Sanctuaries Act of 1972, as amended;
- Permits and licenses required under the Federal Water Pollution Control Act of 1972, as amended, unless such activities have been delegated to the state;
- Permits and licenses relating to the transportation of hazardous substance materials or transportation and dumping which are issued pursuant to the Hazardous Materials Transportation Act, as amended;
- Permits and licenses for construction and operation of interstate gas pipelines and storage facilities;
- Permits and licenses required for the siting and construction of any new electrical power plants as defined in s. 403.503(12), F.S.;
- Permits and licenses for areas leased under the federal OCS Lands Act, as amended, including leases and approvals of exploration, development, and production plans;
- Permits for pipeline rights-of-way for oil and gas transmission;
- Permits and licenses required for deepwater ports; and
- Permits required for the taking of marine mammals under the Marine Mammal Protection Act of 1972, as amended.

Section 380.23, F.S., does not specifically provide that the state may review unlisted activities. Even if such authorization existed, the state would still have to comply with the federal regulations by obtaining prior approval from the Secretary of Commerce.

In a recent appeal of the state's objection to proposed oil and gas development in the Big Cypress National Preserve, the Secretary of Commerce determined that the list of activities in s. 380.23, F.S., did not provide an adequate basis for the state's review of the drilling proposal. The Secretary found that because the s. 380.23, F.S., references to applicable federal laws did not specifically list the permit needed for the drilling activity as one of the reviewable activities, the state could only review the drilling proposal under the unlisted activity procedure established by the CZMA regulations. Because s. 380.23, F.S., does not authorize the state to review unlisted activities and the state did not obtain approval from the Secretary of Commerce before reviewing the drilling proposal, the state's objection to drilling in the Big Cypress National Preserve was dismissed. The lack of U.S.C. citations in s. 380.23, F.S., and the statute's restriction on the use of the federal unlisted activity procedure limits the state's ability to review oil and gas development on federal public lands, as well as the construction and operation of pipelines and power plants regulated by the federal government.[1]

The National Environmental Policy Act (NEPA) requires federal agencies to prepare detailed environmental analysis to support the federal agency's review of large, complex activities. The NEPA documents also support the state's consistency review of the same activities under CZMA; however, the two review processes do not operate on the same schedule.[2]

Developments of Regional Impact Review

Section 380.06, F.S., provides for review of developments of regional impact. As provided in s. 380.06(1), F.S., a "development of regional impact" means any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county. Subsection (2) of s. 380.06, F.S., provides the guidelines and standards to be applied for determining when a development-of-regional-impact review is required. Subsection (19) of s. 380.06, F.S., provides for substantial deviations which would subject a previously approved development to further review. In the case of a mining operation, an increase in the average annual acreage mined by 5 percent or 10 acres, whichever is greater, or an increase in the average daily water consumption by a mining operation by 5 percent or 300,000 gallons, whichever is greater would trigger an additional review. Also, an increase in the size of the mine by 5 percent or 750 acres, whichever is less, would also trigger an additional review.

Natural Resources Damage Assessments

Sections 376.011-376.17, F.S., and 376.19-376.21, F.S., comprising the "Pollutant Spill Prevention and Control Act," establish the authority and procedures for recovering cleanup costs and compensation for damage to the state's natural resources resulting from an unauthorized discharge of pollutants in Florida waters. Although the costs of cleaning up a discharge are readily identifiable, determining the true extent of the harm caused to natural resources is less susceptible to calculation. Experience in Florida and other states (notably in Alaska) has shown that it is extremely difficult to accurately assess damage to fish, wildlife, and other biota. Difficulties arise in determining the number of organisms actually killed or damaged as well as the fiscal value of each destroyed or damaged natural resource. Because of such problems,

[1] Department of Environmental Protection Draft Bill Analysis on SB 2510 (2005).
[2] Id.

extensive litigation often had been necessary in order to arrive at a satisfactory value for compensation to a state for natural resource damage.

In 1992, the Florida Legislature amended s. 376.121, F.S., to create a compensation schedule to determine the amount of compensation due the state for damages to natural resources caused by the discharge of pollutants in state waters. The compensation schedule is based upon the cost of restoration and the loss of ecological, consumptive, intrinsic, recreational, scientific, economic, aesthetic, and educational values of such injured or destroyed resources. The schedule takes into account the volume of the discharge; the characteristics of the pollutant discharged, such as its toxicity, dispersibility, solubility, and persistence; and the type and sensitivity of the natural resources affected by the discharge, based on factors including whether the discharge is in inshore, nearshore, or offshore waters and whether special management areas are impacted, as well as the areal or linear extent of the natural resources impacted. Special compensation is exacted for the death of any endangered or threatened species.

For discharges of more than 30,000 gallons, s. 376.121(10), F.S., requires that the Department of Environmental Protection rules provide for assessing compensation for the damage to natural resources based upon the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources; the diminution in the value of those resources pending restoration; and the reasonable cost of assessing those damages. The person responsible for a discharge shall be given an opportunity to consult with the department on the assessment design and restoration program. Also, the person responsible for a discharge of more than 30,000 gallons may elect to have either the damage assessment determine compensation, or pay the amount calculated under the compensation schedule. However, the minimum compensation due the state is the amount due under the schedule, which must be paid within 90 days after receipt of a written request from the department.

While the provisions in s. 376.121, F.S., have generally worked well for Florida, these provisions sometimes conflict with the damage assessment procedures that have been codified in the Code of Federal Regulations[3] to implement the provisions of the Federal Oil Pollution Act of 1990, as amended, that are used by the Federal trustee agencies[4] who are interested in conducting a damage assessment.

III. Effect of Proposed Changes:

Section 1. Section 380.23, F.S., is amended to specify that the state may review permits and licenses required for the siting and construction of any new electrical power plants as defined in s. 403.503(12), F.S., and the licensing and relicensing of hydroelectric power plants under the Federal Power Act, 16 U.S.C. ss. 791a et seq., as amended.

Further, s. 380.12, F.S., is amended to allow the state to review permits and licenses required under the Mining Law of 1872, 30 U.S.C. ss. 21 et seq., as amended; the Mineral Leasing Act for Acquired Lands, 30 U.S.C. ss. 351 et seq., as amended; the Federal Land Policy and Management Act, 43 U.S.C. ss 1701 et seq., as amended; or the OCS Land Act 43 U.S.C. ss.

[3] 15 CFR 990

[4] As defined in 15 CFR 990.30, trustees are those officials of the federal and state governments, of Indian tribes, and of foreign governments, designated under 33 U.S.C. 2706(b) of the Oil Pollution Act of 1990, as amended.

1331 et seq., as amended, for drilling, mining, pipelines, geological and geophysical activities, or rights-of-way on public lands and permits and licenses required under the Indian Mineral Development Act, 25 U.S.C. ss. 2101 et. seq, as amended.

The provision allowing for broad review of permits for pipeline rights-of-way for oil and gas transmissions is deleted. The bill also clarifies the review provisions for activities permitted under the Deepwater Port Act of 1974.

When an environmental impact statement or environmental assessment that is required by the National Environmental Policy Act has been prepared for a specific activity, use, or project that is subject to federal consistency review, the environmental impact statement or environmental assessment shall be the data and information necessary for the state's review of the consistency of that activity, use, or project.

Section 2. Section 380.06, F.S., is amended to provide that an increase in the size of a heavy mineral mine as defined s. 378.403(7), F.S., will only constitute a substantial deviation subject to additional development-of-regional-impact review if the average annual acreage mined is more than 500 acres and consumes more than 3 million gallons of water per day.

Section 3. Section 376.121, F.S., is amended to provide that as an alternative to the compensation schedule specified in this section, the Department of Environmental Protection may, when no responsible party is identified, when a responsible party opts out of the formula under subsection 376.121(10)(a), F.S., or when the department conducts a cooperative damage assessment with federal agencies, use methods of calculating natural resources damages in accordance with federal rules implementing the Oil Pollution Act of 1990, as amended.

For cases in which the department may use a method of natural resource damage assessment other than the compensation schedules described in subsections (4), (5), (6), and (9) of s. 376.121, F.S, the department may use the methods described in federal rules implementing the Oil Pollution Act of 1990, as amended. When a responsible party is identified and the department is not conducting a cooperative damage assessment with federal agencies, the person responsible has the option to pay the amount of compensation calculated under the statutory compensation schedule or pay the amount determined by a damage assessment performed by the department. If the person responsible for the discharge elects to have a damage assessment performed, such person shall notify the department in writing of the decision within 30 days after identification of the discharge by the department.

In the event the person responsible for a discharge elects to have a damage assessment performed, said person shall pay to the department an amount equal to the statutory compensation for the discharge using the lesser of the volume of the discharge or a volume of 30,000 gallons.

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 DEP notes that synchronization of timeframes for state review of federal activities under the NEPA and the CZMA would reduce consultant and other costs associated with the compilation of data and information required for the federal and state reviews of proposed activities.

This bill will allow the state's single heavy mineral mine to expand and continue its mining operations without having to have an additional development-of-regional-impact review. The mine will still have to meet any local ordinances, and any permitting requirements of the applicable water management district or the Department of Environmental Protection.

Using the federal assessment model may have the effect of reducing the damage assessment costs for the parties responsible for a discharge, based on their ability to effectively remove as much oil as possible, as quickly as possible, thereby limiting the spread of such pollutants.[5]

C. Government Sector Impact:

The synchronization of timeframes for state review of federal activities would save agency staff time and eliminate the need for multiple state reviews.

According to information received from the Department of Environmental Protection, by allowing this alternative method of damage assessment that is used pursuant to the Federal Oil Pollution Act of 1990, as amended, the state would improve its access to federal funds available from the U.S. Coast Guard National Pollution Funds Center for compensation from the U.S. Oil Spill Liability Trust Fund. The statutory assessment formula would remain in use for most coastal oil spills. Since the smaller spills represent a majority of spill incidents in Florida, the assessment process would remain identical for most incidents.[6]

[5] Department of Environmental Protection Draft Bill Analysis, *SB 2772, 3/16/04*
[6] Id.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.