

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 989  
**SPONSOR(S):** Mayfield  
**TIED BILLS:**

Public Marinas and Boat Ramps

**IDEN./SIM. BILLS:** SB 2288

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Environmental Regulation Committee	7 Y, 0 N	Kliner	Kliner
2) Local Government Council			
3) Agriculture & Environment Appropriations Committee			
4) State Resources Council			
5)			

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**SUMMARY ANALYSIS**

The bill directs the Department of Environmental Protection (DEP) to adopt a general permit authorizing local governments to construct and maintain public marinas and boat ramps up to 50,000 square feet in size and provides that the s. 373.414, F.S., regulatory criteria apply. Within a "reasonable time after completion" such facilities are required to obtain and maintain "Clean Marina" status. Such facilities shall be exempt from development of regional impact review. The bill further provides a definition of "public facility," prohibits the sale of such facilities to a private entity, provides for fees pursuant to ch. 253, F.S., and specifies the use of such fees.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Limited government. Requires the DEP to adopt by rule a general permit to authorize a local government to construct and maintain a public marina facility for the exclusive use of the public.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Sovereignty Submerged Lands, Generally:**

Most lands owned by the State of Florida are titled in the name of the Board of Trustees (BOT) of the Internal Improvement Fund, and are held in trust for the use and benefit of the people of the state. State owned uplands are used for purposes such as parks, schools and universities, prisons, and forestry management. Submerged lands can be leased to riparian landowners for docks, moorings, pilings, and marinas.

Generally, sovereignty submerged lands include tidal lands and all lands beneath navigable waters, the title to which has not been validly transferred. In 1845, the federal government conveyed ownership of all lands which lie beneath the navigable waters in this state, up to the ordinary high water mark, to Florida, upon its statehood. No surveys were required to delineate the boundaries of these sovereignty lands and the title vested in the Legislature to be held in a public trust for the people. Historically, this trust was to assure public access to navigable waters for navigation and commerce, and for fishing as a source of food. As society has evolved, however, the types of uses of public trust lands have changed. Recognized uses of public lands today include the preservation of scenic beauty, fishing, sunbathing, swimming, hunting, environmental protection, as well as recreational and commercial boating. Balancing these interests is a challenge as government considers the preservation of resources in a free market economy.

##### **Permitting Docks and Marinas:**

To protect the state's natural features for the enjoyment of future generations, the Florida Legislature has enacted laws to regulate activities which may potentially pollute or destroy environmentally sensitive lands and waters. Laws and regulations have also been enacted to protect wetlands, seagrasses, mangroves, and endangered species such as manatees and sea turtles.

Generally, any activity conducted in, on, or over the surface waters of the State of Florida will require a permit from the Florida Department of Environmental Protection and/or Water Management Districts. Such activities generally are also regulated by the counties and municipalities within the State. Concomitant with state requirements are federal regulations imposed by the federal permitting agencies.

Any activity which is not exempt from permitting activities will require an Environmental Resource Permit (ERP) from a Water Management District (WMD), or from the DEP in the case of activity within the jurisdiction of the Northwest Florida WMD. Depending upon the magnitude of the proposed activity, a Standard Permit, General Permit, or a Noticed General Permit may be required. In order to obtain an ERP, an applicant will be required to demonstrate that the proposed activity will (1) not adversely affect public health, safety and welfare of the property of others; (2) not adversely affect fish and wildlife; (3) not impair navigation or surface water flows; (4) not adversely affect nearby fishing or recreational uses; and (5) not increase the potential for flooding or discharge of pollutants.

If operating outside the Northwest Florida WMD, the evaluation will be done using chapters 62-330 and 62-343, F.A.C., and the rules of the water management districts (primarily 40B-4, 40C-4, 40D-4, or

40E-4, F.A.C., including the applicable water management district Applicant's Handbook or Basis of Review). There are criteria applicable for: (1) all projects; (2) for marinas located in, adjacent to or in close proximity to Class II waters or located in Class II waters or Class III waters classified as approved, restricted or conditionally restricted for shellfish harvesting; (3) for marinas that include vertical seawalls in estuaries or lagoons; (4) for marinas located in, on, or over wetlands or other surface waters; and (5) for marinas that include upland building and parking areas will need to provide appropriate stormwater quality and quantity treatment systems.

Marinas and other activities located on submerged lands owned by the state of Florida must be authorized by the BOT, and are subject to the requirements of chapters 18-14, 18-18, 18-20, and 18-21, F.A.C, as each may be applicable. General criteria apply to all marinas and all other activities on sovereignty submerged lands. Additional, different sets of rule criteria also apply depending on whether a marina is revenue-generating (either a commercial marina with restricted public availability, or a publicly-available marina) or is for a private residential multi-family upland.

After identifying the rules to apply, there are additional criteria used to determine the hydrographic information to assess the projects impact. Docking facilities are potential sources of pollutants to wetlands and other surface waters. To provide the required reasonable assurance that water quality standards will not be violated, various factors must be addressed by an applicant proposing the construction of a new docking facility, or the expansion of or other alteration of an existing docking facility that has the potential to adversely affect water quality.

In addition to these considerations are matters relating to any local government management plan, and federal issues relating to endangered or threatened species.

### **Local Governments and Sovereignty Submerged Lands/ Boat Ramps and Docks**

Local government docks and boat ramps are permitted pursuant to Part IV, Ch. 373, F.S. The general permit review criteria are limited to those contained in s. 373.414, F.S. For associated upland activities, such as construction of a parking lot, for instance, a local government will be required to obtain an individual Part IV, ch. 373, F.S., permit to address stormwater. In addition, the "in water" portion of the facility is still subject to other review criteria of Part IV, ch. 373, F.S., including federal consistency, consistency with local plans, necessary approvals and authorizations under Chapters 253 (State Lands) and 258 (State Parks and Preserves), Florida Statutes, as examples.

Chapter 18-21, Florida Administrative Code (FAC), addresses the trust and fiduciary responsibilities of the BOT for the administration, management and disposition of sovereignty lands, including the processes for the construction of docks, piers, boat ramps, board walks, mooring pilings, dredging of channels, filling, removal of logs, sand, silt, clay, gravel or shell, and the removal or planting of vegetation on sovereignty lands.

### **Clean Marina Program**

The aim of the Clean Marina Program is educating marina owner/operators and boaters of the environmental laws, rules and jurisdictions with which they must comply. A Clean Marina Designation lets boaters that use the marina know that these businesses adhere to - - or exceed program criteria, including Marina Environmental Measures (MEMs). MEMs are simple, innovative solutions to day-to-day marina operations that protect the environment, developed through examination of best management practices around the country and the partnership of Florida's marinas, boatyards, boaters and government.

### **Development of Regional Impact (DRI)**

Generally, a DRI 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."

Section 380.06(1), F.S. The Florida Department of Community Affairs (DCA) reviews DRIs for compliance with state law and to identify the regional and state impacts of large-scale developments. The DCA makes recommendations to local governments for approving, suggesting mitigation conditions, or not approving proposed developments.

Section 380.0651, F.S., provides statewide guidelines and standards for DRI review for various developments, including marinas. Under the statute, the proposed construction of a port or marina is required to undergo DRI review except one which is designed: (1) for wet storage of fewer than 150 watercraft used exclusively for sport, pleasure or commercial fishing; (2) for dry storage of fewer than 200 watercraft; (3) for the wet or dry storage of fewer than 150 watercraft on or adjacent to an inland freshwater lake (except lake Okeechobee); or (4) for the wet or dry storage of fewer than 50 watercraft of 40 feet or less in length.

Section 380.06(2)(d)1.a., F.S., provides that a development that is below 100 percent of all numerical thresholds in the guidelines and standards shall not be required to undergo development of regional impact review.

### **Present Situation**

Pursuant to s. 403.813(2)(b) and (c), F.S., local governments are exempt for the requirement to obtain a Part IV, ch. 373, F.S., permit for construction or operation of small docks and boat ramps. Pursuant to rule 18-21.005(1), F.A.C., such facilities, located on sovereignty submerged land, qualify for "consent by rule" or a Letter of Consent from the BOT unless fees are charged for the use of the facility. If fees are charged then the form of BOT authorization is a lease, although lease fees may be waived if the fees charged are used to maintain the facility.

Larger local government docks and boat ramps require an individually processed Part IV, ch. 373, F.S., permit and would need either a Letter of Consent or lease from the BOT as noted above. Applications for these authorization would be processed by the appropriate DEP district office, subject to comments by the FWCC, particularly with respect to manatee protection issues, including consistency with local government manatee protection plans where adopted. The state permit/ sovereignty submerged land review addresses such issues as manatees, seagrass beds, historic resources, navigation, protection of riparian rights, protection of water quality, and treatment of stormwater for associated upland facilities such as parking lots. Additional authorization is required from the U.S. Army COE, subject to comments from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service regarding manatee and other resource protection issues.

The recreational marine industry represents a total economic output of over \$14 billion annually and is responsible for over 180,000 jobs in the state. Recent economic and property trends in the state, however, indicate that marinas offering affordable rentals to the public are disappearing, and public access to Florida waterways are dwindling. In Brevard County, for instance, there are 90 marinas that operate over sovereignty submerged lands. Of those, 17 have a public access requirement of 90 percent, while 23 have a public-access requirement of less than 90 percent. The remaining 50 marinas are private, with no public-access requirement whatsoever.<sup>1</sup> Developers are purchasing marinas and boatyards across the state and transforming them into luxury waterfront condominiums where the slips alone have six-figure price tags, in an effort to by-pass by strict environmental regulations that make it difficult and expensive to build new marine facilities along Florida's waterways.<sup>2</sup> In a three month fight over a proposal to limit, or possibly eliminate, public access to the Whitley Bay Marina, the only public access marina in Cocoa City, Florida, the state Cabinet ruled March 17, 2005, that the developer should keep 90 percent of its slips available to the public until its current leases end, maintaining the status quo through 2008.<sup>3</sup> The number of waterfront facilities has not increased while the number of

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<sup>1</sup> Kate Brennan, Florida Today, January 31, 2005

<sup>2</sup> Laurin Sellers and Jeff Libby | Sentinel Staff Writers, Posted November 30, 2004

<sup>3</sup> Kate Brennan, Florida Today, March 18, 2005

water vessels registered in Florida has increased significantly. In 2003, the number of registered vessels in Florida number just under one million, which was a 30 percent increase from 1997, and a 50 percent increase from 1987.

In part to address this problem, the Florida Fish and Wildlife Conservation Commission (FWC) has commissioned a comprehensive state-wide recreational boating facility inventory for Florida. The inventory will include facilities (marinas, dry storage, mooring fields, boat ramps, and docks) in saltwater, freshwater, and brackish environments. It is projected the inventory may be completed in 2-3 years.

### **Effect of Proposed Changes**

The DEP is directed to adopt a general permit authorizing local governments to construct and maintain public marinas and boat ramps up to 50,000 square feet in size (a 50,000 square foot marina may have docking and slip facilities for approximately 50 vessels, depending on the size). See, also, Part III.C., below for DEP comments. A "general permit" is usually written for the "best" of sites that have little or no impact on resources. A general permit will alleviate the local government from WMD oversight.

The local government shall be given permission to use sovereignty submerged lands with no BOT review. Ordinarily, BOT review is necessary to determine that the intended use of the sovereignty lands shall be managed primarily for the preservation of natural conditions, propagation of fish and wildlife, and traditional recreational use. The bill, however, specifically states that the state "consents to the use of all state lands lying under water that are necessary for the accomplishment of the purpose of this subsection."

The general permit criteria are limited to that contained only in s. 373.414, F.S.

The permitted facilities are required to obtain, in a "reasonable" period of time, and maintain, Clean Marina status.

Such facilities are exempted from Development of Regional Impact review. The bill provides for a development that utilizes 50,000 or less square feet of sovereignty submerged lands. Such a facility, on average, may provide for 50 slips for watercraft. Current law provides a "fewer than 150 watercraft" threshold for a mooring facility for watercraft used exclusively for sport, pleasure or commercial fishing. As such, a facility envisioned by the bill will likely be well under the threshold for a DRI review anyway.

The bill provides a definition of "public facility," and the facilities may not be sold to a private entity.

Fees collected pursuant to ch. 253, F.S., may be collected by the DEP and such fees shall be used to promote boating access.

The bill will not alleviate any of the permitting requirements or concerns inherent in local plans or federal regulations.

### **C. SECTION DIRECTORY:**

Section 1. Directs that DEP adopt a general permit authorizing local governments to construct and maintain public marinas and boat ramps up to 50,000 square feet in size; provides for use of submerged lands; provides that the s. 373.414, F.S., regulatory criteria apply; requires such facilities to obtain and maintain Clean Marina status; exempts such facilities from DRI review; provides a definition of "public facility", prohibits the sale of such facilities to a private entity; provides for fees pursuant to ch. 253, F.S., and specifies the use of such fees.

Section 2. Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

According to DEP estimates, there will likely be a reduction in permit application fees depending on the number of facilities constructed under the proposed General Permit as the General Permit application fee is only \$100. There will likely be no change in sovereignty submerged lands fees although the use of those fees is redirected. Whether or not there would be any sovereignty submerged lands fees to redirect though is questionable. Only those facilities that charge "use" fees would be subject the sovereignty submerged lands lease fees and most local government facilities under lease qualify for a fee waived lease as they direct "use" fees to facility maintenance.

#### 2. Expenditures:

See Part II.A.1, above.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

Slip and launch fees – indeterminate at this time.

#### 2. Expenditures:

Maintenance on launch or slip structure – indeterminate.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Boaters in the area will have permanent access to submerged lands.

### D. FISCAL COMMENTS:

None.

## 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:

### B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

DEP Comments: As drafted this bill has a number of flaws including:

- Local government docks and boat ramps are permitted pursuant to Part IV, Ch. 373, F.S., not ch. 403, F.S. Direction to develop a general permit pursuant to s. 403.814(12), F.S., is inappropriate.
- The general permit review criteria are limited to those contained in s. 373.414, F.S., instead of all the applicable Part IV, ch. 373, F.S., criteria. Therefore, associated upland activities, such as construction of a parking lot, will be required to obtain an individual Part IV, ch. 373, F.S., permit to address stormwater. In addition, the "in water" portion of the facility is still subject to the other (e.g. non-s. 373.414, F.S.) review criteria of Part IV, ch. 373, F.S., To the extent that these criteria are prohibited from being addressed in the proposed General Permit an individual permit would be need to address those criteria for the "in-water" activities.
- By statute General Permits may only be issued for activities with minimal individual and cumulative impacts. Given the infinite number of site specific issues associated with construction of docks and boat ramps it is extremely unlikely that a General Permit could be developed for these facilities except for the "best" of sites (e.g. those with no resources; no or minimal dredging requirements; no manatee or other resource issues; excellent water circulation; etc.). Such sites are very uncommon and in most cases already have facilities constructed on them. In any case, construction of facilities at such sites is already relatively easy to permit.
- Analysis of DEP and Water Management District data for the last 5 years indicates no significant issues, including time to process, with obtaining state permits. However, anecdotal and numeric data indicates that Federal permits are much more difficult and time consuming to obtain, largely as a result of legal issues associated with threatened and endangered species. Thus the adoption of a state General Permit even for the "best" of sites is unlikely to have much, if any, impact of the overall time needed to permit construction of any new facilities.
- The bill language speaks to obtaining Clean Marina status in a "reasonable" period of time, without defining that term. In addition, the bill is silent on what, if any, action is to be taken if a facility fails to maintain Clean Marina status.
- As noted above, it is very unlikely that these facilities will generate any funds pursuant to ch. 253, F.S. However, the bill's attempt to specify the use of those funds appears to conflict with the appropriations process and attempt to limit the authority of future Legislatures.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**