

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

Public Marinas and Boat Ramps

IDEN./SIM. BILLS: SB 2288

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Environmental Regulation Committee	7 Y, 0 N	Kliner	Kliner
2) Local Government Council	6 Y, 0 N	Camechis	Hamby
3) Agriculture & Environment Appropriations Committee			
4) State Resources Council			
5)			

SUMMARY ANALYSIS

The bill directs the Department of Environmental Protection (DEP) to establish a general permit authorizing local governments to construct and maintain public marinas and boat ramps. The facilities may preempt no more than 50,000 square feet of sovereign submerged lands and are subject only to regulatory criteria applicable to activities in surface waters and wetlands. The bill also provides that:

- The state consents to the use of all state lands lying under water that are necessary for the accomplishment of the purposes of the bill;
- A "public facility" is one that is open to the public on a first-come, first-served basis with a rental term not to exceed 1 year;
- Public facilities are required to obtain "Clean Marina" status within a "reasonable time after completion" and maintain that status for the life of the facility;
- Public facilities are exempt from development of regional impact review;
- The sale of public facilities to a private entity is prohibited; and
- Fees charged to local governments for preemption of state lands are established in general law and must be used to promote boating access in the state.

This bill is not expected to have a significant fiscal impact on state or local governments expenditures or revenues.

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 public marina or boat ramp facilities.

B. EFFECT OF PROPOSED CHANGES:

EFFECT OF PROPOSED CHANGES

Currently, s. 403.814(1), F.S., provides that a “general permit” may only be issued for projects that have, either singly or cumulatively, “a minimal adverse environmental effect.” Therefore, a “general permit” is typically issued for the “best” of sites that have little or no impact on resources.¹ This bill creates subsection 403.814(12), F.S., which directs the Department of Environmental Protection (DEP) to adopt by rule a general permit to authorize local governments to construct and maintain public marinas and boat ramps. These facilities may preempt no more than 50,000 square feet of sovereign submerged lands² and are subject only to environmental permitting provisions applicable to activities in, on, or over surface waters or wetlands. The limitation on applicable permitting provisions may preclude the DEP from applying existing stormwater regulations or other currently applicable environmental regulations to the review for a public marina or boat ramp facility.

The bill provides that the state consents to the use of all state lands lying under water that are necessary for the accomplishment of the purposes of subsection (12). This provision appears to preclude individual review of permit applications by the Board of Trustees (BOT) of the Internal Improvement Trust Fund. Ordinarily, the BOT determines whether the intended use of the sovereignty lands is managed primarily for the preservation of natural conditions, propagation of fish and wildlife, and traditional recreational use.

The bill also defines a “public facility” as one that is open to the public on a first-come, first-served basis with a rental term not to exceed 1 year. “Public marina facilities” must obtain Clean Marina Program status “within a reasonable time” after completion and must maintain that status for the life of the facility.

If a public marina or boat ramp utilizes 50,000 or less square feet of sovereignty submerged lands, it is not subject to review as a development of regional impact (DRI) as long as the facility is consistent with the comprehensive plan of the applicable local government. A public marina of this size, on average, may provide for 50-60 wet slips for watercraft³. Section 380.0651(3)(e), F.S., currently provides an exemption from review as a DRI for small marinas. As such, current law may exempt some public marinas envisioned by this bill from review as a DRI.

A “public facility” constructed on sovereign submerged lands pursuant to this bill may not be sold to a private entity. Chapter 153, F.S., governs the amount of fees charged by the state to a local government for preemption of state sovereignty submerged lands. Fees collected by the state must be used to promote boating access in the state.

The bill does not appear to preempt any permitting requirements, or concerns created by, local comprehensive plans or federal regulations.

¹ Issuance of a general permit may exempt the local government from oversight by the water management district with jurisdiction over the proposed public facility.

² See, also, Part III.C., below for DEP comments.

³ John Sprague, Legislative Director, Florida Marine Industries Association.

PRESENT SITUATION

Pursuant to s. 403.813(2)(b) and (c), F.S., local governments are exempt from 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), Florida Administrative Code, such facilities, located on sovereignty submerged land, qualify for "consent by rule" or a Letter of Consent from the Board of Trustees of the Internal Improvement Trust Fund (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 authorizations would be processed by the appropriate DEP district office, subject to comments by the Florida Fish and Wildlife Conservation Commission, 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 Corps of Engineers, 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 is limited. 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.⁴ 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.⁵ 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 2008.⁶ The number of waterfront facilities has not increased while the number of 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 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.

⁴ Kate Brennan, Florida Today, January 31, 2005

⁵ Laurin Sellers and Jeff Libby | Sentinel Staff Writers, Posted November 30, 2004

⁶ Kate Brennan, Florida Today, March 18, 2005

BACKGROUND

Sovereignty Submerged Lands

Most lands owned by the State of Florida are titled in the name of the BOT, 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. Additionally, 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 project's 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), F.S., as examples.

Chapter 18-21, 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 Clean Marina Program is a voluntary, proactive partnership-driven approach designed to benefit marinas, boatyards and boaters to help keep Florida's coast and waterway resources clean. This program consists of Awards & Recognition, Education and Awareness, and Clean Marina/Boatyard Designation. The Program is administered by the Florida Department of Environmental Protection and funded through grants from the Environmental Protection Agency and the National Oceanographic and Atmospheric Association.

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."⁷ 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

⁷ s. 380.06(1), F.S.

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.

C. SECTION DIRECTORY:

- Section 1. Creates s. 403-814(12), F.S., to provide for a general permit for public marina and boat ramp facilities constructed by local governments and the use of state sovereignty submerged lands for such purposes.
- Section 2. Provides an effective date of July 1, 2005.

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: Local government revenues may increase due to collections of slip and launch fees but the amount is indeterminate at this time.
2. Expenditures: Local government expenditures may increase due to the construction and maintenance of marina or boat ramps but the actual cost is indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: Boaters in the area will have permanent access to submerged lands and businesses surrounding newly constructed marinas or boat ramps may realize a positive economic impact.

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: Section 11, Article X of the State Constitution addresses sovereignty submerged lands as follows:

The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

The title to all sovereignty tidal and submerged bottom lands, except submerged lands previously conveyed by deed or statute, is vested in the Board of Trustees of the Internal Improvement Trust Fund. The sovereignty tidal and submerged bottom lands which are presently vested in Board of Trustees include all islands, sandbars, shallow banks, and small islands made as a result of the dredging by the United States of any channel and similar or other islands, sandbars, and shallow banks located in the navigable waters of the state, including all coastal and intracoastal waters, and all submerged lands owned by the state by right of its sovereignty in navigable freshwater lakes, rivers, and streams.⁸

Although title to public bottoms is vested in state as public trust to be held for benefit of all the people, such trust does not go to the extent of requiring that every part of public bottoms be forever maintained in state of nature for use in that condition by any citizen who would prefer that no change be made. *Sarasota County Anglers Club, Inc. v. Burns*, App. 1 Dist., 193 So.2d 691 (1967), certiorari discharged 200 So.2d 178 (Fla. 1967). The state holds title to lands under navigable waters in trust for people of state to enjoy navigation, carry on commerce, and fish free from obstruction and interference of private parties. *Hicks v. State ex rel. Landis*, 116 Fla. 603, 156 So. 603 (1934).

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issue

The bill utilizes different terminology when referring to public marinas and boat ramps, which may lead to inconsistent interpretation and application of the bill. For example, the bill defines the term "public facility" as one that is open to the public on a first-come, first-served basis with a rental term not to exceed 1 year. However, the bill requires a general permit for "public marina facilities and public boat ramps", and provides that "such facilities" may not preempt more than 50,000 square feet of sovereign submerged lands and are subject to limited permit review. It is unclear as to whether the "public marina facilities and public boat ramps" must also be "public facilities" as that term is defined. The bill further provides that "all marina facilities" must obtain Clean Marina Program status, rather than requiring "public facilities" to obtain such status. Again, the bill provides that a "public marina facility or boat ramp" may not be sold to a private entity, rather than prohibiting the sale of a "public facility".

Florida Department of Environmental Protection Comments

The Florida Department of Environmental Protection provided the following 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

⁸ 42 Fla. Jur 2d Public Lands § 22

proposed General Permit an individual permit would be needed 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 on 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

None.