The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Environmental Preservation and Conservation Committee

BILL:	CS/SB 2104
INTRODUCER:	Committee on Environmental Preservation and Conservation and Senator Constantine
SUBJECT:	Relating to Environmental Protection
DATE:	March 18, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Uchino	Kiger	EP	**Fav/CS**
2.			CA	
3.			GA	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The CS amends Florida statutes that impact the Department of Environmental Protection (department) by:

- Establishing a date by which land management plans for conservation lands must contain certain outcomes, goals, and elements;
- Deleting a conflicting and redundant 40-day timeframe for a board of county commissioners to decide whether to acquire county land being sold by the Board of Trustees of the Internal Improvement Trust Fund – counties have 45 days under another section of law;
- Setting the number of terms an Acquisition and Restoration Council member can sit on the Council to two four-year terms, clarifying how vacancies are filled, and requiring a majority vote for certain decisions;
- Establishing dates for certain information to be submitted to the Land Management Uniform Accounting Council;
- Providing how certain proceeds from the Florida Forever Trust Fund are to be expended for capital projects;
- Clarifying that title to certain sovereignty lands which were judicially adjudicated are excluded from automatically becoming private property;

- Increasing the time to petition for an administrative hearing on an application to use board of trustees-owned submerged lands;
- Expanding the existing provision to cover all federally delegated or approved air program pre-construction permitting requiring a public comment period of 30-days or more;
- Excluding certain air pollution violations from certain departmental actions;
- Revising and streamlining administrative penalties for violations involving drinking water contamination, wastewater, dredge, fill, or stormwater, mangrove trimming or alterations, solid waste, air emission, and waste cleanup;
- Providing exception from extinguishment by the Marketable Record Title Act (MARTA) for interests held by governmental entities and the water management districts; and
- Providing for technical changes.

The CS provides for an effective date of July 1, 2009.

The CS substantially amends sections 253.034, 253.111, 259.035, 259.037, 259.105, 253.12, 373.427, 403.0876, 403.121, 712.03, and 712.04 of the Florida Statutes

II. Present Situation:

Section 1: SB 542 (ch. 2008-229, Laws of Florida) made revisions to land management plan content and land management reporting requirements. The intent of the changes was that management planning, actual management and management reporting be detailed, effective and consistent across agencies. Multiple state agencies, local governments and other entities are responsible for preparing management plans for the state's 3.5 million acres of conservation lands. Pursuant to sections 253.034(5) and 259.032(10), F.S., these plans must be updated every 10 years. For management areas greater than 160 acres, the manager is required to form an advisory group composed of multiple entities and must conduct at least one public hearing. The statutory revisions require that all plans be revised to specifically identify long and short-term goals, quantitative data, and implementation schedules. The existing statute contains unclear language regarding goals, objectives and measures. There is confusion and disagreement among the state agencies on what standards to apply to adhere to these specific requirements, which must be uniform across all agencies so they can be compiled for legislative reporting purposes to show the overall land management needs and accomplishments. The July 1, 2008 effective date of the legislation immediately instituted the new requirements, which necessitates that over 330 management plans need to be amended and at least 268 advisory groups need to be formed to hold public hearings.

Section 2: SB 542 created inconsistencies between statutory sections 253.111(2), F.S., which requires a 40-day deadline for a county to determine by resolution whether it intends to purchase land titled in the Board of Trustees of the Internal Improvement Trust Fund that the Board intends to surplus, and sections 253.111 (3) and 253.034(6)(f)(1), F.S., which require that the property be offered to the county for 45 days.

Section 3: SB 542 increased the number of members sitting on the Acquisition and Restoration Council (ARC) from nine to eleven, but failed to adjust the number of votes required to add or subtract projects from the list. Currently only five of eleven members need to vote favorably to change a project boundary or add a project to the acquisition list. Additionally, the current

legislation continues a long-standing glitch in which ARC members are permitted to serve two terms (which are four years in length), but are limited to six years of total service. This inconsistency effectively limits any of the members from serving two full terms.

Section 4: The July 1, 2008 effective date of the legislation immediately instituted the new requirements for the Land Management Uniform Accounting Council, which necessitates that over 330 management plans need to be amended and at least 268 advisory groups need to be formed to hold public hearings. This is the same present situation as found in Section 1 above.

Section 5: The intent of revisions to s. 259.105, F.S., regarding the requirement that between three and ten percent of agency allocations be spent on capital expenditures for public access-related items. The intent is to allow public access to conservation lands as soon as possible after their purchase; however, all capital expenditures of the following programs' distributions must be identified during the time of acquisition:

- Thirty-five percent to the department for the acquisition of lands;
- One and five-tenths percent to the department to purchase inholdings and additions;
- One and five-tenths percent to the Division of Forestry of the Department of Agriculture and Consumer Services to purchase state forest inholdings and additions;
- One and five-tenths percent to the Fish and Wildlife Conservation Commission to purchase inholdings and additions; and
- One and five-tenths percent to the department for the Florida Greenway and Trails Program to purchase greenways and trails.

Section 6: Section 253.12 (9), F.S., does not currently exclude sovereignty lands that were filled by a governmental entity for a public purpose or pursuant to proprietary authorization from the Board of Trustees of the Internal Improvement Trust Fund. Such activities were not contemplated to fall under the legislation and the current language is unclear. This means that people may sue to claim title over sovereignty lands that were filled subject to the above purpose or authorization.

Section 7: Two different time clocks exist for someone to file a petition for an administrative hearing for an Environmental Resource Permit: 14 days to file if the project is linked to activities occurring on sovereignty submerged lands, and 21 days to file if the project is not linked to activities on sovereignty submerged lands. This different time clocks leads to confusion for both the public and the permitting agencies.

Section 8: Currently, Title V major source air operation permits issued by the department under federally delegated or approved programs are exempted from the 90-day default provision of s. 403.0876, F.S.

Federal programs have specific public involvement procedures, such as a 30 day public comment period and a requirement to hold a public meeting if requested. These procedural requirements can cause permit processing to exceed the existing 90-day requirements of s. 403.0876, F.S., and result in the department's technical default under the 90-day requirements of s. 403.0876, F.S. If default permits result, federal program approval can be lost, requiring applicants to obtain separate state and federal permits, and a duplication of effort.

Examples of permits that would be covered are the major air construction permits that involve analysis under the Prevention of Significant Deterioration, the Non-Attainment New Source Review, or the case-by-case Maximum Achievable Control Technology requirements. Before issuance, these permits must include a 30-day public comment period and an opportunity for a public meeting, if such meeting is requested during the comment period.

Section 9: Section 403.121, F.S., currently allows the department and parties alleged to be in violation of Florida's environmental laws to resolve less significant environmental violations in an administrative proceeding, instead of in state court. Except for violations involving hazardous wastes, asbestos, or underground injection, the department must proceed administratively in all cases in which the department seeks administrative penalties that do not exceed $10,000 per assessment, as calculated in accordance with sections 403.121(3), (4), (5), (6), (7), and (8),F.S. Through this administrative enforcement process, an administrative law judge may impose up to $10,000 in administrative penalties in addition to requiring actions to correct the violation and bring the regulated entity back into compliance. Section 403.121, F.S., establishes a specific penalty schedule for violations that may be pursued administratively and allows alleged violators a hearing before the Division of Administrative Hearings to dispute the department's allegations, to mediate the dispute, or to opt out of the administrative process entirely. If an alleged violator opts out, the department must file in state court to pursue enforcement. The department bears the burden of proving by a preponderance of the evidence that the alleged violator caused the violation. In any administrative proceeding brought by the department, the prevailing party recovers all costs. In cases that ultimately require a hearing by the Division of Administrative Hearing, the administrative law judge has final order authority. The alleged violator is entitled to an award of attorney's fees (up to $15,000) if the administrative law judge determines that the department's initiation of the enforcement action was not substantially justified.

Sections 10 and 11: Because of the vast holdings of each of the Water Management Districts (districts), as well as other state entities, it is a burden for the districts to expend significant resources in monitoring the status of title of all district land holdings, filing notices to protect district interests, and defending its interest in land holdings where they may be challenged based on the Marketable Record Title Act (MARTA). The MARTA provides that one who holds title to land based on a root of title at least 30 years old, takes free and clear ownership of title and extinguishes all matters arising prior to the root of the title that are not referenced in the root of title. It is possible that someone can file a wild deed on a piece of government or district owned property and if the government agency or district does not file a notice to protect the agency or district's interest, the entity filing the wild deed could take ownership.

Section 712.03, F.S., identifies those interests in property that are not extinguished by marketable record title. Currently only sovereignty submerged lands and covenants recorded under the provisions of chapter 376 or chapter 403 expressly exempt governmental interests from extinguishment. Another provision of s. 712.03 F.S., exempts easements from extinguishment, when any parts of the easement are in use. The easement exemption implicates governmental entities who acquire conservation easements and land protection agreements. The "easement in use" exemption was originally intended to apply to visible use on the ground, by which an owner would have notice that someone else might be using the land. Conservation easements and land protection agreements, however, are not necessarily visible on the ground, so uncertainty

surrounds whether the "easement in use" exception protects those interests from extinguishment by the MARTA.

III. Effect of Proposed Changes:

Section 1 amends paragraphs (a) and (c) of subsection (5) of s. 253.034, F.S. The beginning date of July 1, 2009, applies to all newly developed or updated management plans and reporting requirements in order to provide department staff more time to accomplish necessary interagency planning and rulemaking to implement both short-term and long-term management goals in an orderly and consistent way across the participating agencies. It also provides for technical changes.

Section 2 amends subsection (2) of s. 253.111, F.S., to remove the timing inconsistency between s. 253.111(2), F.S., and ss. 253.111 (3) and 253.034(6)(f)(1), F.S. The 40-day limitation for a board of county commissioners to pass a resolution determining whether it wants to buy surplus lands offered by the Board of Trustees of the Internal Improvement Trust Fund is removed. The new timeframe of 45 days for a board of county commissioners to respond to the Board of Trustees would be uniform across all three sections of the Florida Statutes. It also provides for technical changes.

Section 3 amends subsection (1), (2), and (5) of s. 259.035, F.S., to include language that would require a majority vote of the 11-member Acquisition and Restoration Council (ARC) to change a project boundary or add a project to the acquisition list; and to clarify that ARC members may serve two four-year terms, for a total of eight years, not six years. It also provides for technical and conforming changes.

Section 4 amends paragraph (b) of subsection (3) 259.037, F.S., to add a beginning date of July 1, 2009 for the management plan and reporting requirements. It amends subsection (6) of s. 259.037, F.S., to add a beginning date of July 1, 2010 for each agency to submit its 5-year operational report requirements for management areas to which a new or updated plan was approved by the Board of Trustees. Adding a beginning date allows department staff more time to accomplish necessary interagency planning and rulemaking to implement both short-term and long-term management goals in an orderly and consistent way across the participating agencies. It also provides for technical changes.

Section 5 amends paragraphs (b), (e), (f), (g), and (h) of subsection (3) of s. 259.105, F.S. to allow capital expenditures for rapid public access for projects which have been identified in the management prospectus, or during the development of the initial management plan, or update of the management plan. Such capital expenditures apply to:

- The department for the acquisition of lands;
- The department to purchase inholdings and additions;
- The Division of Forestry of the Department of Agriculture and Consumer Services to purchase state forest inholdings and additions;
- The Fish and Wildlife Conservation Commission to purchase inholdings and additions; and
- The department for the Florida Greenway and Trails Program to purchase greenways and trails.

It amends subsection (13) of s. 259.105, F.S., to clarify that a majority vote of the ARC members is needed to place a proposed project on the acquisition list. It also provides for technical changes.

Section 6 amends subsection (10) of s. 253.12, F.S., to clarify that sovereignty lands filled by a governmental entity prior to July 1, 1975, for a public purpose or pursuant to proprietary authorization from the Board of Trustees of the Internal Improvement Trust Fund does not operate to divest state ownership of those lands. It also provides for technical changes.

Section 7 amends paragraph (c) of subsection (2) of s. 373.427, F.S., to change the time clock for someone to file a petition for an administrative hearing for an Environmental Resource Permit for activities that occur on sovereignty submerged lands, i.e. linked projects to 21 days from 14 days. The proposed change means that a person has 21 days to file a petition for either linked or unlinked activities, which may address some confusion by both the public and agencies. It also provides for technical changes.

Section 8 amends paragraph (c) of subsection (2) of s. 403.0876, F.S., to allow the department to accommodate the public participation period of 30 days or longer required for federal air permits, while retaining the requirement for expeditious processing. The changes will require that the department issue its formal intent to issue or deny the permit within the 90-day period and that department act expeditiously to take final action following the public comment period, but prevent the possibility of default resulting solely from compliance with the federally-required public participation requirement. It also provides for technical changes.

Section 9 amends paragraph (b) and (f) of subsection (2) of s.403.121, F.S., to prohibit the department from seeking administrative remedies for violations involving major sources of air pollution; and to clarify that the alleged violator/respondent is the prevailing party when the administrative law judge enters a final order that does not require any corrective actions or award any damages or penalties to the department.

This section also amends subsections (3), (4), (5), and (9) of s. 403.121, F.S. The amendments do not change the administrative process established by s. 403.121, F.S., but modify the penalty schedule to clarify existing violations already operating within the Environmental Litigation Reform Act (ELRA) and expand the list to include new program areas that are not currently subject to the ELRA to resolve violations and penalties. The proposed changes will streamline the process to ensure that a more complete range of less significant environmental violations will be resolved administratively, without the need for costly and time-consuming state court litigation for both the public and the department. This section modifies the administrative penalty schedule applicable to specific program areas (e.g. drinking water, wastewater, solid waste, etc.) as follows:

- For drinking water facilities, expanded administrative violations provide for the following new penalty schedule:
  - $4,000 for failures to maintain required water pressure;
  - $1,500 for failures to obtain a clearance letter from the department before putting a drinking water system into operation;
  - $4,000 for failures to complete required public notification of violations, exceedances, or failures that may pose an acute risk to human health; and $2,000 for

all other failures to complete required public notification relating to maximum containment violations;
    - $1,000 for failures to submit a consumer confidence report to the department; and
    - $2,000 for failures to meet licensed operator and staffing requirements at a drinking water facility.
- For wastewater facilities, expanded administrative violations provide for the following new penalty schedule:
    - $5,000 for failures to obtain a required wastewater permit before construction or modification, other than a permit required for surface water discharge;
    - $4,000 for failures to obtain a permit to construct a domestic wastewater collection and transmission system;
    - $1,000 for failures to renew a required wastewater permit, other than a permit required for surface water discharge;
    - $2,000 for failures to properly notify the department of an unauthorized spill, discharge, or abnormal event that may impact public health or the environment; and
    - $2,000 for failures to provide or meet requirements for licensed operators or staffing at a wastewater facility.
- For dredging or filling violations, expanded administrative violations provide for the following new penalty schedule:
    - $3,000 for dredging or filling if the violator previously applied for or obtained authorization for the department to dredge or fill within wetlands or surface waters; and
    - $10,000 for dredge, fill or stormwater management system violations occurring in a conservation easement.
- For mangrove trimming and alteration violations, expanded administrative violations provide for the following new penalty schedule:
    - $5,000 against any person who violates ss. 403.9321-403.9333, F.S. Violations can now be assessed against anyone, not just the contractor or agent of the owner or tenant that conducts mangrove trimming or alteration;
    - An additional $100 penalty for each mangrove illegally trimmed and $250 penalty for each mangrove illegally altered for a second or subsequent violation, not to exceed $10,000; and
    - An addition $250 penalty for each mangrove illegally trimmed or altered for a second or subsequent violation when the violator is a professional mangrove trimmer, not to exceed $10,000.
- For solid waste violations, expanded administrative violations provide for the following new penalty schedule:
    - An additional $1,000 for unpermitted or unauthorized solid waste if the waste is Class I or Class III, which now includes yard waste;
    - $5,000 for failures to timely implement evaluation monitoring or corrective actions in response to adverse impacts to water quality at permitted facilities;
    - $3,000 for failures to have a trained spotter or trained operator on duty; failures to apply cover; failures to control or correct erosion resulting in exposed waste; failures to implement a gas management system; or failures to dispose of or process unauthorized waste;
    - $2,000 for failures to compact and slope waste, or failures to maintain a small working face; and

    - $1,000 for failures to timely submit annul updates required for financial assurance.
- For air emission violations, removed the additional $1,000 administrative penalty for an air emission if the emission results in an air quality violation.
- For storage tank system and petroleum contamination violations, expanded administrative violations provide for the following new penalty schedule:
    - $5,000 for failures to complete site assessment reports;
    - $3,000 for failures to timely assess or remediate petroleum contamination; and
    - $1,000 for failures to repair a storage tank system.
- For waste cleanup violations, new administrative violations provide for the following new penalty schedule:
    - $5,000 for failures to timely assess or remediate contamination; failures to provide notice of contamination beyond property boundaries, or failures to complete an offsite well survey; for the use or injection of substances or materials to surface water or groundwater for remediation purposes without prior department approval, or for operation of a remedial treatment system without prior department approval;
    - $3,000 for failures to timely submit a complete site assessment report; and
    - $500 for failures to timely submit any other plans, reports, or other information required by a department rule or order.

This section clarifies that the administrative penalties listed in s. 403.121(4), F.S., are in addition to the program specific penalties assessed according to s. 403.121(3), F.S., and that they may be assessed in cases involving violations that are not specified in s. 403.121(3), F.S.

This section also clarifies the meaning of "pollution control system or device," by elaborating that penalties will be assessed for failure to properly install, operate, maintain or use a required "pollution control, collection, treatment, or disposal system or device" and failure to use appropriate best management practices or erosion and sediment controls. These violations will be subject to a $4,000 administrative penalty.

For violations involving failure to obtain a permit, this section adds a distinction between cases in which an alleged violator failed to obtain a permit, but is complying with applicable requirements, who will be assessed a $3,000 penalty, and cases in which the applicant failed to obtain a permit and is not in compliance with applicable requirements, who will be assessed a $5,000 penalty.

This section increases the penalty for failure to prepare, submit, maintain, or use required reports or other required documentation from $500 to $1,000.

This section increases the penalty for failure to comply with any other regulatory statute or rule requirement not otherwise identified in s. 403.121, F.S., from $500 to $1,000.

This section clarifies that the department may seek more than $5,000 against any one violator if the violator received any economic benefit from the violation.

Lastly, this section provides for technical and conforming changes.

Sections 10 and 11 create subsection (9) of s. 712.03, F.S., and amend s. 712.04, F.S., respectively. The proposed amendments would create an exemption to the applicability of MARTA for any right, title, or interest held by the Board of Trustees of the Internal Improvement Trust Fund or by any local government, water management district, or other agency of the state. These amendments also resolve the confusion over whether conservation easements and land protection agreements were "easements in use" and prevent rights and interests acquired with public funds for public benefit from being extinguished. Section 11 provides for technical changes.

Section 12 provides for an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

It is indeterminate how much of an impact there will be to the private sector from this CS. There may be some additional costs from exercising a landowner's riparian rights given the exemption of sovereignty lands that were filled for a public purpose or proprietary authorization from the Board of Trustees of the Internal Improvement Trust Fund, but those costs, if any, are indeterminate. There may be slight cost savings to the private sector in synchronizing the linked and unlinked clocks to 21 days because of clarity and ease of filing a petition for an administrative hearing for an Environmental Resource Permit for activities that occur on sovereignty submerged lands; however, any costs savings is unknown.

Fines assessed against persons for some existing minor environmental violations subject to department administrative penalties have been increased. It is unknown how much the streamlining of the additional administrative penalties as provided in section 9 of this CS may save the private sector in both time and litigation expenses. It is possible the savings

will be significant as the ELRA process takes an average of four months, while processing through the state courts takes an average of two years. Violators also do not need to hire a lawyer to process their alleged violations through the ELRA, and, if unsatisfied with the administrative process, their right to go to court is automatically preserved. Further, if the alleged violator prevails in the ELRA hearing before an administrative law judge, he or she may be entitled to costs and up to $15,000 in attorney's fees.

C. Government Sector Impact:

There will likely be minor cost savings from clarification and synchronization of the time clocks, reporting deadlines and other technical changes, but it is indeterminate. State agencies, municipalities, water management districts and other governmental entities may see reduced litigation costs from the clarification to title to tidal lands vested in the state, exemptions to filled sovereignty lands and the exemption of their lands from the MARTA; however, these litigation savings, if any, are indeterminate. It is unknown how much the department will save by allowing it to submit operational reports for management areas every 5 years instead of every 2 years. Finally, it is unknown whether the department will see reduced litigation expenses from expanding the administrative penalties associated with the ELRA process for minor environmental violations.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Environmental Preservation and Conservation on March 17, 2009:
The CS changes "effective" dates to "beginning" dates in paragraphs (a) and (c) of subsection (5) of s. 253.034, F.S. The CS also clarifies that requirements of these paragraphs apply only to newly developed or updated management plans.

The CS amends subsection (6) of s. 259.037, F.S. to change the requirement that agencies submit operational reports once every 5 years for management plans that are new or updated, instead of biennially.

The CS amends paragraphs (b), (e), (f), (g), and (h) of subsection (3) of s. 259.105, F.S. to remove all time constraints for capital expenditures necessary to provide public access.

The CS amends subparagraph 1 of paragraph (d) of subsection (3) of s. 403.121, F.S. to clarify that the preparation or signing of a permit by a professional engineer does not constitute a violation of ss. 403.9321-403.9333, F.S.

The CS provides for technical and conforming changes.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.