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:	SB 1404
INTRODUCER:	Senator Evers
SUBJECT:	Environmental Permitting
DATE:	March 27, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Uchino	Yeatman	EP	**Pre-meeting**
2.			CA	
3.			AG	
4.			BC	
5.				
6.				

I. Summary:

The bill creates, amends and redefines provisions relating to environmental permitting. It addresses development, construction, operating and building permits; permit application requirements and procedures, including waivers, variances, revocation and challenges; local government comprehensive plans and plan amendments; state programmatic general permits and regional general permits; permits for projects relating to coastal construction, surface water management systems, dredge and fill activities, inland multimodal facilities, commercial and industrial development, biofuel and renewable energy facilities and phosphate mining activities. The bill revises requirements for demonstrating injury in order to seek relief under the Environmental Protection Act and shifts the burden of persuasion and evidence to third parties in certain instances. Specifically the bill:

- Authorizes notice of the procedure to obtain an administrative hearing or judicial review to be available online;
- Shifts the burden of persuasion and evidence to third parties who wish to challenge an agency's decision for those challenges arising under chs. 373, 378 or 403, F.S;
- Shortens the time frame an agency has to approve or deny a completed application for a license from 90 to 60 days; allows an applicant to request his or her application be processed if he or she believes all legally required information has been provided;
- Directs local governments to include the construction and operation of bio-fuel processing and renewable energy facilities as a valid industrial, agricultural and silviculture use permitted within those land use categories of their local comprehensive plans; directs local governments to establish an expedited review process of comprehensive plan amendments if these types of facilities are not in their original comprehensive plans;

- Prohibits a local government or a municipality from conditioning the approval for a development permit on an applicant obtaining a permit or approval from any other state or federal agency;
- Allows applicants 90 days to respond to requests for additional information (RAI);
- Redefines the term "affected person" to require persons affected by local government comprehensive plans to demonstrate that their substantial interests will be affected in order to challenge comprehensive plan changes;
- Redefines the term "aggrieved or adversely affected party" to require that any local government or person must demonstrate that their substantial interest will be affected in order to be granted standing to challenge the development order;
- Prohibits a county from requiring an applicant to obtain state and federal permits as a condition of approval for development permits;
- Expands the use of Internet-based self-certification services for exemptions and general permits;
- Expands the process for submitting RAIs;
- Provides for an expanded state programmatic general permit;
- Provides for incentive-based environmental permitting;
- Requires certain counties/municipalities with certain populations to apply for delegation of authority by June 1, 2012, for environmental resource permitting;
- Provides a general permit for a surface water management system under 10 acres may be authorized without agency action;
- Provides expedited permitting for inland multimodal facilities; clarifies creation of regional action teams for expedited permitting for certain businesses; establishes a limited exemption from the strategic intermodal system adopted level-of-service standards for certain projects; and
- Clarifies mitigation requirements for impacts related to transportation projects.

This bill substantially amends ss. 120.569, 120.60, 125.022, 161.041, 163.3180, 163.3184, 163.3215, 166.033, 373.026, 373.413, 373.4137, 373.4141, 373.4144, 373.441, 380.06, 380.0657, 403.061, 403.087, 403.412, 403.814, 403.973, Florida Statutes.

This bill creates ss. 125.0112, 161.032, 166.0447, 403.0874, Florida Statutes.

II. Present Situation:

There is no aspect of our daily lives that is not affected by environmental permitting, from the air we breathe and the water we drink to the roads we drive on and the homes we live in. Some activities require permits from the federal government on down to the local level and can be incredibly complex, such as airports. Others have such little cumulative impacts that they qualify for online self-certification, such as small single family docks.

The affected permitting and other areas proposed to be amended by this bill are diverse. They include administrative hearing challenge requirements and burdens, shortened timelines to review applications, biofuels manufacturing, limiting redundant federal, state and local permitting authority, agency requests for additional information (RAIs), burdens and requirements on challenging parties, Internet-based self-certification, state programmatic general

permitting, delegation of permitting authority, incentive-based permitting, general permits for surface water management systems, solid mineral mining, expedited permitting for economic development projects and mitigation. Each programmatic area will be addressed in the "effect of proposed changes" of the bill to allow for greater clarity of how it is affected by the particular proposed change.

III. Effect of Proposed Changes:

Section 1 amends s. 120.569, F.S., relating to challenges under the Administrative Procedures Act.[1]

Chapter 120, F.S., is called the Administrative Procedures Act (APA). It regulates how executive branch agencies adopt rules used to implement and administer their powers and duties. Section 120.569, F.S., provides an avenue for administrative review of proceedings in which the substantial interests of a party are determined by an agency. Pursuant to this section, a party is entitled to notification of any order, including a final order, arising from an administrative hearing. Notice must be mailed to each party or his or her attorney to the address on record. Additionally, under current law, when a party challenges an agency action, the applicant has the ultimate burden of persuasion and evidence in a de novo administrative proceeding.[2]

The bill provides that the notice described above, including any items required by the uniform rules adopted pursuant to s. 120,54(5), F.S.,[3] may be provided via a link to a publicly available Internet website. The bill also provides that for any proceeding arising under Chapters 373,[4] 378,[5] or 403,[6] F.S., if a third party nonapplicant challenges an agency's issuance of a license or conceptual approval, the petitioner initiating the action has the burden of ultimate persuasion and, in the first instance, has the burden of going forward with the evidence. This shifts the burden from the applicant to the third party nonapplicant who challenges the agency's action.

Section 2 amends s. 120.60, F.S., relating to reviews of license applications.

Pursuant to s. 120.60(1), F.S., upon receipt of an application for a license, an agency is required to examine the application and, within 30 days, notify the applicant of any apparent errors or omissions and RAI. The application is not deemed "complete" until the agency determines that it has all of the information it needs to approve or deny the application. An agency is required to approve or deny every application within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. There is no time limit on when the applicant must respond to the RAI, nor is there a limit to the number of times the agency may

[1] Section 120.51, F.S.
[2] See *Fla. Dep't of Transportation v. J.W.C.*, 396 So. 2d 778 (Fla. 1st DCA 1981).
[3] Section 120.54(5), F.S., provides that the Administration Commission shall adopt one or more sets of uniform rules of procedure for agencies to comply with. These rules shall establish procedures that comply with the requirements of Chapter 120. The uniform rules shall be the rules of procedure for each agency subject to Chapter 120 unless the Administration Commission grants an exception to the agency.
[4] Chapter 373, F.S., directs the DEP or WMDs to issue environmental resource permits for activities involving the alteration of surface water flows.
[5] Chapter 378, F.S., directs the DEP to authorize permits for phosphate land reclamation and resource extraction reclamation.
[6] Chapter 403, F.S., establishes that the state's public policy includes protecting water and air quality and supply for public health and safety and the environment.

request additional information. Under s. 373.4141, F.S., if a permit applicant believes an agency's RAI is not permitted by law or rule, he or she may request that the agency process the permit application. Such language is not included for licensing purposes.

The bill requires agencies to approve or deny licenses within 60 days instead of 90 days. It also allows a license applicant to request that a license application be processed if he or she believes the agency's RAI is not permitted by law or rule.

Section 3 creates s. 125.0112, F.S., relating to biofuels and renewable energy in counties.

Section 125.01, F.S., establishes the powers and duties of county governments. These powers and duties include the power to prepare and enforce comprehensive plans for development of the county and to establish, coordinate, and enforce zoning and business regulations as necessary to protect the public.[7] Section 166.021, F.S., establishes the powers of municipalities. Municipalities may exercise any power for municipal purposes, except when expressly prohibited by law. Municipal purpose is defined as any activity or power which may be exercised by the state or its political subdivisions. Accordingly, municipalities may adopt and enforce land use regulations as well.

To make biofuel processing and biomass generating facilities[8] economically feasible, the facilities must often be sited on or near the land from which the feedstock for the facility is produced. Transporting the feedstock can reduce the cost-effectiveness of these facilities. Currently, local land use plans may require a property owner to obtain an amendment to the local comprehensive plan, a special exemption, or some similar relief to allow the combination of industrial, agricultural, and/or silvicultural land uses on a site that the owner intends to use for purposes of biofuel processing or biomass generation.

The alternative state review process contained in s. 163.32465, F.S., is an expedited review process for local comprehensive plan amendments for urbanized areas. The Legislature's intent was to provide for less state oversight of comprehensive plan amendments from local governments in urban areas because of their planning capabilities and resources.

This statute states that "The Legislature finds and declares that this state's urban areas require a reduced level of state oversight because of their high degree of urbanization and the planning capabilities and resources of many of their local governments. An alternative state review process that is adequate to protect issues of regional or statewide importance should be created for appropriate local governments in these areas. Further, the Legislature finds that development, including urban infill and redevelopment, should be encouraged in these urban areas. The

[7] *See* s. 125.01(g) and (h), F.S.

[8] Section 366.91(2)(d), F.S., defines renewable energy as, "electrical energy produced from a method that uses one or more of the following fuels or energy sources: hydrogen produced from sources other than fossil fuels, biomass, solar energy, geothermal energy, wind energy, ocean energy, and hydroelectric power. The term includes the alternative energy resource, waste heat, from sulfuric acid manufacturing operations." Section 366.91(2)(a), F.S., defines "biomass" as "a power source that is comprised of, but not limited to, combustible residues or gases from forest products manufacturing waste, byproducts, or products from agricultural and orchard crops, waste or coproducts from livestock and poultry operations, waste or byproducts from food process, urban wood waste, municipal solid waste, municipal liquid waste treatment operations, and landfill gas."

Legislature finds that an alternative process for amending local comprehensive plans in these areas should be established with an objective of streamlining the process and recognizing local responsibility and accountability."

The bill directs counties to define the construction and operation of a biofuels processing facility or renewable energy generating facility as a valid industrial, agricultural and silvicultural use in their comprehensive plans. If no such definition exists in counties' comprehensive plans, the bill directs counties to establish a review process to determine the necessary changes to allow for construction of these types of facilities. The bill does not require counties to adopt the changes to allow these types of facilities. If, however, a county wishes to amend its comprehensive plan, the amendment is eligible for the alternative state review process pursuant to s. 163.32465, F.S. It also clarifies that construction and operation of one of these types of facilities does not affect the remainder property's classification as agricultural.

Section 4 amends s. 125.022, F.S., relating to county development permit requirements.

Stakeholders in the business and regulated communities have expressed some frustration at the local permitting process. There is anecdotal evidence that local governments may condition approval of development permits on the applicant's first securing state and federal permits. For complicated permits requiring local, state and federal permits, this process can cause delays and drive up costs.

The bill prohibits a county from making approval of its permit conditional on the applicant securing permits from any other state or federal agency. It specifies that issuance of a county development permit does not create any rights for the applicant to obtain permits from other agencies. It also clarifies that a county is not liable for the applicant's failure to fulfill its legal obligations. The bill allows a county to require that an applicant obtain all state and federal permits before commencing development.

Section 5 creates s. 161.032, F.S., relating to application review and RAIs.

Under current law, upon receipt of an application for a license or permit, an agency is required to examine the application and, within 30 days, notify the applicant of any apparent errors or omissions and request additional information. The application is not considered "complete" until the agency determines that it has all of the information it needs to approve or deny the application. An agency is required to approve or deny every application within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. There is no time limit for applicants to respond to RAIs. There is also no limit to the number of RAIs an agency may request from an applicant.

The bill specifies how the Department of Environmental Protection (DEP) processes applications and issues RAIs. The bill requires the DEP to issue any RAIs within 30 days of receiving an application. It limits the types of information that can be included in a RAI. Once the RAI is received, the DEP may only require additional information needed to clarify or directly related to the responses to the first RAI. If the applicant believes the RAI is not authorized by law or rule, he or she may request the DEP to process the application. Additionally, the bill allows the

applicant 90 days to respond to a RAI and for one 90-day extension for applicants who notify the DEP. Further extensions may be granted for good cause.

Section 6 amends s. 163.3184, F.S., relating to challenges to comprehensive plan amendments.

The Local Government Comprehensive Planning and Land Development Regulation Act, also known as Florida's Growth Management Act (GMA),[9] was adopted by the 1985 Legislature. Significant changes have been made to the Act since 1985 including major growth management bills in 2005 and 2009. The Act requires all of Florida's 67 counties and 413 municipalities to adopt local government comprehensive plans that guide future growth and development. Pursuant to s. 163.3184, F.S., an "affected person" has the right to petition for an administrative hearing to challenge a Department of Community Affair's (DCA) decision on a comprehensive plan or plan amendment.[10] "Affected person" is defined as:

- The local government that adopted the plan or plan amendment,
- Persons who own property, reside, or own or operate a business within the boundaries of the local government that adopted the plan or plan amendment,
- Owners of real property abutting real property that is the subject of a future land use map, and
- An adjoining local government that can demonstrate substantial impacts to areas within its jurisdiction.

The bill adds an additional requirement to the "affected person" definition before persons who own property, reside, or own or operate a business within the boundaries of the local government that adopted the plan or plan amendment would receive this status. Under the bill, parties have to demonstrate that their "substantial interests" are being affected by the comprehensive plan or plan amendment before they can challenge a plan or plan amendment. This change will reduce the number of people determined to be "affected persons."

Section 7 amends s. 163.3215, F.S., relating to standing to enforce local comprehensive plans through development orders.

The GMA gives no regulatory authority to the DCA to enforce local government development order consistency with the provisions of its adopted comprehensive plans. However, s. 163.3215, F.S., provides that any "aggrieved or adversely affected party" can challenge a development order issued by a local government that is believed to be inconsistent with the adopted comprehensive plan. An "aggrieved or adversely affected party" must show he or she has an interest protected by a local government's comprehensive plan, and this interest will be adversely affected in some degree greater than the general public's interest. The term includes the owner, developer, or applicant for a development order.

The bill changes the definition of "aggrieved or adversely affected party" by requiring persons or local governments to demonstrate that their substantial interests will be affected by the development order before being granted this status. It also deletes language that allows for parties with lesser impacts to qualify for this status. This change will make it harder to attain

[9] *See* chapter 163, Part II, F.S.
[10] See s. 163.3184, F.S.

legal standing in challenges involving enforcement of local comprehensive plans through development orders.

Section 8 amends s. 166.033, F.S., relating to municipal development permits.

This section of the bill is substantially similar to section four of the bill, except it addresses municipalities instead of counties. The bill prohibits a municipality from making approval of its permit conditional on the applicant securing permits from any other state or federal agency. It specifies that issuance of a municipal development permit does not create any rights for the applicant to obtain permits from other agencies. It also clarifies that a municipality is not liable for the applicant's failure to fulfill its legal obligations. The bill allows a municipality to require that an applicant obtain all state and federal permits before commencing development.

Section 9 creates s. 166.0447, F.S., relating to biofuels and renewable energy in municipalities.

This section of the bill is substantially similar to section 3 of this bill, except it addresses municipalities instead of counties. The bill directs municipalities to define the construction and operation of a biofuels processing facility or renewable energy generating facility as a valid industrial, agricultural and silvicultural use in their comprehensive plans and for zoning purposes in their unincorporated areas. The bill prohibits municipalities from requiring operators of such facilities to obtain comprehensive plan amendments, rezoning, special exemptions, use permits, waivers, or variances. It prohibits municipalities from assessing any special fees in excess of $1000.00 for operation of a facility in a area zoned industrial, agricultural or silvicultural. The bill requires facilities to meet applicable building codes. It also clarifies that construction and operation of one of these types of facilities does not affect the remainder property's classification as agricultural.

Section 10 amends s. 373.026, F.S., relating to DEP powers and duties.

Self-certification of permit requirements is the process of the permitting agency allowing "applicants" to manage their own compliance for a given regulated activity. The regulating agency sets up the specific requirements of the permit, and if followed, "applicants" do not apply for permits in the traditional sense. They simply undertake the regulated activity and "self-certify" that they have complied with all conditions of the permit. The DEP currently accepts certain types of permit applications online and provides an online self-certification process for private docks associated with detached individual single-family homes on the adjacent uplands. Through this electronic process, one may immediately determine whether a dock can be constructed without further notice or review by the DEP. The DEP is working on expanding its online self-certification into other permitting areas, but it is currently limited to constructing, repairing, and adding boatlifts to private docks and adding rip rap to the toe of existing seawalls.[11]

[11] Florida Dep't of Environmental Protection, *FDEP's Self-Certification Process for Single-Family Docks*, http://appprod.dep.state.fl.us/erppa/ (last visited Mar. 26, 2011).

In addition, the water management districts (WMDs) allow users to access nearly all permitting documents and forms online. Their websites also allow interested third parties access to permitting applications and supplementary materials. According to the Legislative Committee on Intergovernmental Relations report,[12] interviews with stakeholder groups indicated some local governments often do not accept self-certification for permit-exempt projects identified in statute, rule, or listed in the DEP's website. Some local governments require a "signature" from DEP permit review staff to verify the exempt status of a project submitted under self-certification, notwithstanding the fact that current law neither requires nor provides for a "signature" from the DEP as an alternative or as supplemental to self-certification.

The bill requires the DEP to expand the use of Internet-based self-certification services for appropriate exemptions and general permits, if economically feasible. In addition to expanding the use of such online services, the DEP and WMDs must identify and develop general permits for activities currently requiring individual review that could be expedited through the use of professional certifications.

Section 11 amends s. 373.4141, F.S., relating to the DEP's permit processing procedures.

Upon receipt of an application for a license or permit, an agency is required to examine the application and, within 30 days, notify the applicant of any apparent errors or omissions and RAIs. The application is not deemed complete until the agency determines that it has all of the information it needs to approve or deny the application. An applicant may request that the agency process the application if he or she believes that an RAI is not authorized by law or rule. An agency is required to approve or deny every application within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. There is no time limit on when the applicant must respond to the RAI, or limitation to the number of times the agency may request additional information.

The bill requires a second RAI by the DEP or a WMD be signed by the supervisor of the project manager; a third by the division director who oversees the program area; a fourth by the assistant secretary of the DEP or the assistant executive director of the WMD; and beyond that, by the secretary of the DEP or the executive director of the WMD. The bill also shortens the time frame that permits must be approved or denied from 90 days to 60. Additionally, the bill requires local governments to approve or deny any permits that also need a state permit within 60 days of receiving the original application. Any application which is not approved or denied within 60 days is approved by default.

Section 12 amends s. 373.4144, F.S., relating to federal environmental permitting.

One of Florida's key characteristics is its vast wetlands, including the Everglades. Wetlands are defined as being neither dry nor covered by open water but continually influenced by water. At

[12] Florida Legislative Committee on Intergovernmental Relations, *Improving Consistency and Predictability in Dock and Marina Permitting* (Mar. 2007), available at http://www.floridalcir.gov/UserContent/docs/File/reports/marina07.pdf (last visited Mar. 26, 2011).

times, wetlands may be dry for months or even years, or they may be covered with water the majority of the time only drying out for short periods.[13]

For activities occurring in "waters of the United States" in Florida, including wetlands, the Federal Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) require compliance with and regulate activities under the authority of Section 404 of the federal Clean Water Act (CWA).[14] Wetlands are also regulated under Section 10 of the federal Rivers and Harbors Act of 1899,[15] although the focus of that legislation is primarily maintaining navigable waters.[16] When a dredge and fill permit is required in addition to permits required by the state, it is issued independently from the DEP or the WMD permits and is reviewed by the Corps. However, the Corps' issuance of the permit is dependent on the applicant first receiving state water quality certification or waiver through the state Environmental Resource Permit (ERP)[17] program. If the permitted activity is in a coastal county, the application must also have received a finding of consistency with the Florida Coastal Zone Management Program.[18]

In addition to permits issued under the CWA and the federal Rivers and Harbors Act, the Corps also administers the National Pollution Discharge Elimination System (NPDES) permit program. The Corps has delegated the authority to Florida to implement this program for stormwater systems, including municipal systems, certain industrial activities and construction activities. The WMDs do not have delegated authorization from the EPA to implement this program. The EPA has determined that the separate WMDs do not constitute a central state authority, and therefore, they do not have the state-wide consistency required for federal delegation of the NPDES permit program.

The Corps has also delegated to Florida the authority to issue federal dredge and fill permits under Section 404 of the CWA for certain activities. These are known as State Programmatic General Permits (SPGP). Under this delegated authority, the department may issue state authorization for limited state exemptions and noticed general permits for shoreline stabilization, docks, boat ramps, and maintenance dredging that constitute federal authorization. Such authorization may be subject to additional specific federal conditions, however.[19] The DEP has expressed interest in expanding the SPGP program for activity-specific categories, subject to acreage limitations. In addition to a closer alignment of state and federal wetland delineation methods, changes to statutes or rules must be made to address federal coordination and consultation requirements for threatened and endangered species.

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[13] Florida Dep't of Environmental Protection, *Florida State of the Environment – Wetlands: A Guide to Living with Florida's Wetlands*, available at http://www.dep.state.fl.us/water/wetlands/docs/erp/fsewet.pdf (last visited Mar. 28, 2011).
[14] 33 U.S.C. §§ 1251-1387.
[15] 33 U.S.C. § 403.
[16] Florida Dep't of Environmental Protection, *Consolidation of State and Federal Wetland Permitting Programs, Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)* (Sep. 2005), available at http://www.dep.state.fl.us/ig/reports/files/final_report016.pdf (last visited Mar. 28, 2011).
[17] *See generally* ch. 373, Part IV, F.S.
[18] Florida Dep't of Environmental Protection, *Summary of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida* (2007), available at http://www.dep.state.fl.us/water/wetlands/docs/erp/overview.pdf (last visited Mar. 28, 2011).
[19] *Id. at* 20.

The bill requires the DEP to obtain an expanded SPGP or a series of regional general permits from the Corps for activities in waters similar in nature that will only cause minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. Where appropriate, the SPGP program should be used to eliminate the need for a separate individual approval from the Corps.

The bill directs the DEP to not seek such permits unless the conditions are at least as protective of the environment and natural resources as existing state law under this section and federal law under the Clean Water and the Rivers and Harbors Act of 1899.

The bill authorizes the DEP and the WMDs to implement a voluntary SPGP for all dredge and fill activities impacting 3 acres or less of wetlands or other surface waters, including navigable waters, subject to agreement with the Corps, if the SPGP is at least as protective as existing state and federal laws. The bill would not preclude the DEP from pursuing a series of regional general permits for construction activities in wetlands or surface waters.

The bill also removes obsolete language requiring the DEP to report to the Legislature on how to consolidate federal and state wetland permitting functions.

Section 13 amends s. 373.441, F.S., relating to delegation of ERPs to local governments.

Florida Statutes and Florida Administrative Code (F.A.C.) sections authorize and provide procedures and considerations for the DEP to delegate the Environmental Resource Permit (ERP) program to local governments.[20] Local governments are entitled to request delegation authority from the DEP for a variety of programs. The DEP has authority to approve those delegations based on Florida law. With respect to programs related to section 404 of the CWA, both wastewater and ERP programs may be delegated to local governments, but delegation is permissive, not mandated. The various delegations are periodically updated in rule 62-113, F.A.C.[21] Currently, only Broward County has a received an ERP program delegation, but the DEP is processing requests by Miami-Dade and Hillsborough Counties. In general, delegations are requested by larger local governments that have the resources to implement and oversee these complex permitting programs.

Delegation allows the local government to review and approve or deny the state permits at the same time the local authorizations are approved or denied. The goals are to "seek to increase governmental efficiency" and "maintain environmental standards." Delegations can be granted only where:

- The local government can demonstrate that delegation would further the goal of providing an efficient, effective and streamlined permitting program; and

[20] In an effort to place the planning and regulatory program into the hands of the local governments, s. 373.441, F.S., and its implementing rule, chapter 62-344, F.A.C., provide delegation authority.
[21] Florida Dep't of Environmental Protection, *Delegations*, available at http://www.dep.state.fl.us/legal/Rules/shared/62-113/62-113.pdf (last visited Mar. 26, 2011).

- The local government can demonstrate that it has the financial, technical and administrative capabilities and desire to effectively and efficiently implement and enforce the program, and protection of environmental resources will be maintained.[22]

According to the statute, delegation includes the applicability of chapter 120, F. S., (the APA), to local government programs when the ERP program is delegated to counties, municipalities, or local pollution control programs. Responsibilities of the state agency and the local government are outlined in a "delegation agreement" executed between the two parties.

The bill requires any county having a population of 75,000 or more, or a municipality that has local pollution control programs serving populations of more than 50,000, to apply for delegation of authority on or before Jun 1, 2012. Local governments that fail to apply for delegation of authority may not require permits that are similar, in part or in full, to the requirements needed to obtain an ERP from the DEP or the WMDs. The bill also prohibits the DEP and the WMDs from regulating the activities subject to the delegation within a jurisdiction unless regulation is required pursuant to the terms of the delegation agreement. This change will force local governments that meet the criteria to apply for ERP delegation or stop local permitting programs that are similar to the state ERP program.

Section 14 amends s. 403.061, F.S., to prohibit local governments from requiring a signature or other proof from DEP permit review staff that a project qualifies for a permit exemption or meets the permitting requirements of chs. 161, 253, 373 or 403, and self-certification permits. For more information about the present situation of this issue, see "Section 10" above.

Sections 15 creates s. 403.0874, F.S., relating to the "Florida Incentive Based Permitting Act."

There were several bills introduced during the 2007 Regular Session that addressed incentive-based permitting.[23] Ultimately, none passed. Currently, the DEP has no comprehensive program to reward those in the regulated community who consistently meet or exceed their permit requirements, although having a record of compliance may lead to increased permit durations in some instances.[24] However, the DEP does not consistently consider applicants' past violations or compliance when reviewing requests for new permits.

Pursuant to s. 403.087(2), F.S., the DEP has adopted rules describing the various requirements that must be met by permit applicants. These may include provisions such as equipment requirements, operating and maintenance requirements, and limitations on emissions or discharges from the permitted facility. In addition to listed permit requirements, pursuant to Rule 62-4.070(5), F.A.C., the DEP must consider environmental violations of the applicant, at any location in the state, when determining whether the applicant has provided the necessary "reasonable assurance" that it will be able to meet the permit requirements. However, the rule does not specify exactly which violations may be considered, leading to inconsistent application throughout the DEP's permitting programs.

[22] Chapter 62-344, F.A.C., provides a guide to local governments in the application process, as well as the criteria that will be used to approve or deny a delegation request.
[23] See SB 738, HB 297 and HB 7171 (2007 Reg. Session).
[24] See s. 403.087(3), F.S.

Within certain individual program areas of the DEP, additional rules or statutes narrow the scope of Rule 62-620.320, F.A.C. For example, s. 403.707(8), F.S., authorizes the DEP to deny a permit application for a solid waste management facility if an applicant has repeatedly violated statutes, rules, orders, or permit terms or conditions relating to any solid waste management facility and is deemed to be irresponsible, as defined by Rule 62-701.320(3)(b), F.A.C. For wastewater facilities, the DEP considers violations of rules related to wastewater facilities or activities when it makes the "reasonable assurance" determination.[25] For ERPs, the DEP considers specific ERP rule and permit violations.[26] Similar to Rule 62-620.320, F.A.C., none of these programmatic rules or statutes provide guidance as to what type of violations should be considered or how far back into an applicant's history the DEP should review.

Additionally, under s. 403.0611, F.S., the DEP has statutory authority to adopt alternative permitting programs on a pilot project basis. The Legislature directed the DEP to explore alternative methods of regulatory permitting aimed at reducing transaction costs and providing economic incentives for reducing pollution. To date the DEP has not implemented a pilot program under this section.

In June of 2000, the EPA established the National Environmental Performance Track program. The EPA discontinued the program in March 2009.[27] The last year data are available for the program is 2007. The goal of the program was for government to complement existing programs with tools and strategies that protected people and the environment, reduced cost and spurred technological innovation.[28] Benefits of membership included exclusive regulatory and administrative benefits, reduced routine inspections, and public recognition.[29]

The bill creates s. 403.0874, F.S., the "Florida Incentive-based Permitting Act." It establishes the Legislature's finding that the DEP should consider a permit applicant's site-specific and program-specific history of compliance when considering whether to issue, renew, amend, or modify a permit. Compliance with applicable permits and state environmental laws makes a person eligible for permitting benefits, including, but not limited to, expedited permit application reviews, extended permit terms, decreased announced compliance inspections, and other similar regulatory and compliance incentives. These benefits are intended as incentives to encourage and reward environmental performance.

This bill applies to all persons and regulated activities subject to permitting requirements of chs. 161, 373, and 403, F.S., as well as all other applicable state or federal laws governing activities for the purpose of protecting the environment or public health from pollution or contamination. However, it does not apply to environmental permitting or authorization laws that regulate zoning, growth management or land use. Additionally, it does not apply where its implementation would jeopardize the state's delegation or assumption of federal law or permit

[25] See Rule 62-620.320, F.A.C.
[26] See Rule 40B-400.104(2), F.A.C.
[27] U.S. Environmental Protection Agency, Letter to Performance Track Partners, available at http://www.epa.gov/performancetrack/downloads/PTClosure_MEMO_CKent.pdf (last visited Mar. 26, 2011).
[28] U.S. Environmental Protection Agency, *National Environmental Performance Track*, available at http://www.epa.gov/performancetrack/ (last visited Mar. 26, 2011).
[29] *Id.*

programs. "Regulated activities" within this section refers to any activity including, but not limited to, construction or operation of a facility, installation, system, or project, for which a permit, certification, or authorization is required under chs. 161, 373 and 403, F.S.

The DEP is directed to consider permit applicants' compliance history for five years before the date any permit or renewal application is received. To qualify for compliance incentives, an applicant must:

- Have conducted the regulated activity at the same site for which the permit or renewal is sought for at least four of the five years prior; or
- Have conducted the same regulated activity at a different site within the state for at least four of the last five years prior; and
- Have not been subject to a formal administrative or civil judgment or criminal conviction in the last five years where the applicant was found to have knowingly violated the applicable law or rule and the violation was the proximate cause that resulted in significant harm to human health or the environment. This excludes administrative settlement or consent orders, unless entered into as a result of significant harm to human health or the environment.

The bill requires that an applicant must request applicable compliance incentives at the time of submitting a permit application or renewal. If an applicant meets all other criteria for the permit or authorization, unless otherwise prohibited by state or federal law, rule, or regulation, an applicant is entitled to the following incentives:

- Expedited reviews on certain permit actions including, but not limited to, initial permit issuance, renewal, modification, and transfer, if applicable. Expedited review means, at a minimum, that any requests for additional information regarding a permit application shall be issued no later than 15 days after the application is filed and final agency action shall be taken no later than 45 days after the application is deemed complete;
- Priority review of permit applications;
- Reduced number of routine compliance inspections;
- No more than two requests for additional information under s. 120.60, F.S.; and
- Longer permit durations.

Furthermore, the DEP is directed to identify and provide additional incentives to applicants who have 10-year compliance histories that resulted in:

- Reductions in actual or permitted discharges or emissions; or
- Reductions in the impacts of regulated activities on public lands or natural resources; or
- Implementation of voluntary environmental performance programs, such as environmental management systems; and
- The applicant having not been subject in the 10 years before the renewal application to a formal administrative or civil judgment or criminal conviction where the applicant was found to have knowingly violated the applicable law or rule and the violation was the proximate cause that resulted in significant harm to human health or the environment. This excludes administrative settlement or consent orders, unless entered into as a result of significant harm to human health or the environment.

An applicant meeting any of the first three criteria and the fourth criterion during the 10-year compliance history is entitled to automatic renewals, if there are no substantial changes in permitted activities or circumstances, and reduced or waived application fees.

The DEP must implement rulemaking within six months after the act becomes law. The DEP may identify additional incentives and programs consistent with this section's purpose. All rules must produce certain compliance incentives established in this bill. Rules adopted pursuant to this section are binding on the WMDs and any local government, which has delegated authority or assumed a regulatory program covered under this section.

Sections 16 and 17 amend ss. 161.041 and 373.413, F.S., respectively. They are conforming sections for the "Florida Incentive-based Permitting Act" and apply to beach and shore preservation and construction or alteration of affecting surface waters.

Section 18 amends 403.087, F.S., relating to permit revocation.

Currently, the DEP may revoke permits for the following reasons:
- The permit holder has submitted false or inaccurate information on the application;
- The permit holder has violated law, DEP orders, rules, or regulations, or permit conditions;
- The permit holder has failed to submit operational reports or other information required by DEP rule or regulation; or
- The permit holder has refused lawful inspection under s. 403.091, F.S.[30]

There is no requirement that the permit holder knowingly engaged in any of the four activities listed above. There is also no requirement that the violation directly relates to the permit at issue or that the DEP give the permit holder an opportunity to cure the cause of the violations.

The bill requires the DEP to prove that a permit holder knowingly violated any of the four conditions of the permit that may lead to revocation. It also requires the DEP to only look at the violations for the specific permit, or permitted facility, at issue. The bill allows the permit holder to correct the violation before the DEP revokes the permit.

Section 19 amends 403.412, F.S., relating to third party intervention in administrative proceedings.

Section 403.412, F.S., created the Environmental Protection Act of 1971 (Act). The Act permits the Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state to maintain an action for injunctive relief against:
- Any agency with the duty of enforcing laws, rules, and regulation for the protection of the environment of the state to compel enforcement; or
- Any person, including corporations, or governmental agencies to stop them from violating laws intended to protect the environment.

[30] Section 403.091(c), F.S., states that no person shall refuse reasonable entry or access to any authorized representative of the DEP who requests entry for purposes of inspection and who presents appropriate credentials; nor shall any person obstruct, hamper, or interfere with any such inspection. The owner or operator of the premises shall receive a report, if requested, setting forth all facts found which relate to compliance status.

The statute explicitly states no demonstration of special injury different in kind from the general public at large is required. The Florida Supreme Court has ruled that the act authorizes private citizens, both corporate and non-corporate, to institute a suit under the act without a showing of special injury (i.e. a violation that causes injury different both in kind and degree from that suffered by the public at large).[31] However, to state a cause of action under the act, it must appear that the question raised is real and not merely theoretical, and that the plaintiff has a bona fide and direct interest in the result. A mere allegation of an irreparable injury not sustained by any allegation of facts will not ordinarily warrant the granting of injunctive relief.

Before filing such a suit, the party must file with the appropriate agency a verified complaint describing the facts and explaining how the party is affected. This verified complaint is then forwarded by the agency to the parties charged with the violation. The agency has 30 days to take appropriate action before the complaining party can start court proceedings. If appropriate action is not taken within that 30 days the complaining party may institute suit.

In that suit, the court may add as a defendant, any agency who is responsible for enforcing the applicable environmental laws, rules, and regulations. However, a person cannot sue if the party charged with the violation is acting pursuant to a valid permit issued by the proper agency and is complying with that permit. The court may grant injunctive relief to stop the complained of activity and may also impose conditions on the defendant consistent with law and any rules or regulations adopted by any state or local environmental agency.

The prevailing party is entitled to costs and attorneys' fees. However, in an action involving a state NPDES permit, the court has discretions on whether to award attorneys' fees. If the court is doubtful about the plaintiff's ability to pay such costs and fees, the court may order the plaintiff to post a good and sufficient surety bond or cash.

In administrative, licensing, or other environmental proceedings, s. 403.12(5), F.S., grants the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state standing to intervene as a party. In order to intervene, a verified pleading must be filed asserting that the activity, conduct, or product to be licensed or permitted has or will have a negative effect on the environment of the state. The term "intervene," under s. 403.12, F.S., has been interpreted to mean that a party can initiate ss. 120.57 or s. 120.569, F.S., hearings in an administrative, licensing, or other environmental proceeding after notice of proposed agency action.

The APA allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions. Under s. 120.52(1)(b)(8), F.S., "agency" is defined to include each entity described in chapter 380, F.S., which would include WMD governing boards. Administrative hearings involving disputed issues of fact are generally referred to the Division of Administrative Hearings (DOAH), comprised of an independent group of administrative law judges (ALJ), that hears cases involving most state agencies.

[31] *See Florida Wildlife Federation v. Dep't. of Environmental Regulation*, 390 So.2d 64 (Fla. 1980).

In a challenge to a rule under s. 120.56, F.S., any person substantially affected by a rule or proposed rule may seek a determination as to whether the proposed or existing agency rule is an invalid exercise of delegated legislative authority. In the case of proposed rules, an invalid determination may be based on constitutional grounds. The hearings are conducted by an ALJ in the same way as provided in ss. 120.569 and 120.57, F.S., discussed below.

Under s. 120.569, F.S., in adjudicatory cases, where a decision affects "substantial interests," the ALJ has the role of making findings of fact and drawing conclusions of law and providing a recommended order. The affected agency is responsible for entering a final order. Findings of fact by ALJs continue to be presumptively correct, and may not be lightly set aside by the agency. The ALJ conducts an evidentiary hearing and makes a determination as to the facts in question. These proceedings are less formal than court proceedings and function in most respects like a non-jury trial with an ALJ presiding. Section 120.57, F.S., sets out the procedures used. In a hearing involving disputed issues of material fact, an agency may enter a final order rejecting or modifying findings of fact upon review of the entire record and after stating with particularity that the findings were not based upon competent substantial evidence or did not comply with essential requirements of law. An agency may enter a final order rejecting or modifying conclusions of law over which it has substantive jurisdiction. The agency must state its reasons with particularity and must find that its substituted conclusion of law is at least as reasonable as the conclusion of law it rejected. Procedures applicable to cases not involving disputed issues of material fact are described in s. 120.57(2), F.S. Appellate review of agency actions is authorized by s. 120.68, F.S.

The bill removes language that specifically allows third parties to intervene without having to demonstrate a special injury different in kind than the general public. The change will make it more difficult for third parties to intervene in administrative proceedings to challenge an agency's actions in that they will have to prove a "special injury."

Section 20 amends s. 403.814, F.S., relating to general permits.

Currently, the DEP is authorized to adopt rules establishing and providing for a program of general permits for projects, which have, either singularly or cumulatively, a minimal adverse environmental effect. Such rules must specify design or performance criteria which, if applied, would result in compliance with appropriate standards. Any person complying with the requirements of a general permit may use the permit 30 days after giving notice to the DEP without any agency action by the DEP.[32] Projects include, but are not limited to:

- Construction and modification of boat ramps of certain sizes,
- Installation and repair of riprap at the base of existing seawalls,
- Installation of culverts associated with stormwater discharge facilities, and
- Construction and modification of certain utility and public roadway construction activities.

The bill allows the DEP to create a general permit for construction, alteration and maintenance of a surface water management system for up to 40 acres. If the DEP chooses to create a general permit for these types of systems, the system may be constructed without action by the DEP or a WMD if:

[32] Section 403.814(1), F.S.

- Design and calculations are certified by a professional engineer licensed under chapter 471, F.S.;
- It will not be located in surface waters or wetlands, as delineated in s. 373.421(1), F.S.;
- It will not cause water quantity impacts to receiving water and adjacent lands;
- It will not flood onsite or off-site property;
- It will not cause adverse impacts to surface water storage or conveyance;
- It will not cause water quality in receiving waters to violate applicable water quality standards or rules;
- It will not adversely impact groundwater levels or surface water flows;
- It will not adversely impact WMD works;
- It is not part of a larger plan of development or sale;
- It will comply with all NPDES requirements; and
- The professional engineer who is responsible for the design provides written notice to the DEP within 10 days of commencement of construction.

Additionally, the bill directs the DEP to create a general permit for construction, alteration, and maintenance of surface water management systems for up to 10 acres. The system may be constructed without action by the DEP or a WMD if:

- The total project area is less than 10 acres;
- The total project area involves less than two acres of impervious surface;
- No activities will impact wetlands or other surface waters;
- No activities are conducted in, on or over wetlands or other surface waters;
- Drainage facilities will not include pipes having diameters greater than 24 inches, or the hydraulic equivalent, and will not use pumps in any manner; and
- The project is not part of a larger common plan of development or sale.

Section 21 amends s. 380.06, F.S., relating to mining activities.

Section 380.06, F.S., provides for state and regional review of local land use decisions regarding large developments that, because of their character, magnitude, or location, would have a substantial effect on the health, safety, or welfare of the citizens of more than one local government.[33] Regional planning councils assist the developer by coordinating multi-agency developments of regional impact (DRI) review. The council's job is to assess the DRI project, incorporate input from various agencies, gather additional information and make recommendations on how the project should proceed. The DCA reviews DRIs for compliance with state law and to identify th regional and state impacts of large-scale developments. The DCA makes recommendations to local governments for approving mitigating conditions, or not approving proposed developments. There are numerous exemptions from the DRI process specified in statute.[34]

The bill exempts any proposed phosphate mine and any proposed addition to, expansion of, or change to an existing phosphate mine from DRI review. Any proposed changes to any previously approved solid mineral mine DRI's development orders having vested rights will not be subject to further review or approval as a DRI, nor will any notices of proposed change review or

[33] Section 380.06(1), F.S.
[34] Section 380.06(24), F.S.

approvals pursuant to s. 380.06(19), F.S., except for those applications pending as of July 1, 2011, which will be governed by s. 380.115(2), F.S.[35] Finally, any previously approved solid mineral mine DRI orders will continue to be effective unless rescinded by the developer.

Section 22 amends s. 380.0657, F.S., relating to expedited permitting for economic development projects.
The DEP and the WMDs are required to adopt programs to expedite the processing of wetland resource permits and ERPs when such permits are for the purpose of economic development projects that have been identified by a municipality or county as meeting the definition of target industry businesses under s. 288.106, F.S.

Pursuant to s. 288.106(2)(t), F.S., a "target industry business" is defined as a corporate headquarters business or any business that is engaged in one of the target industries identified pursuant to the following criteria developed by the Office of Tourism, Trade and Economic Development (OTTED) in consultation with Enterprise Florida, Inc.:

- Future growth in both employment and output;
- Workforce is not subject to periodic layoffs;
- High wages compared to the surrounding area;
- Market and resource independence from Florida markets;
- Expansion or diversification of the state's or the area's economic base; and
- Strong economic benefits to the state or regional economies.

An inland multimodal cargo facility, also called an inland port, is typically a distribution complex designed to provide intermodal transfers between ship, rail and truck operations. The Port of Palm Beach has limited expansion options. Its terminal size is also limiting its growth potential. To address its limitations, Port staff developed the inland port idea to be located in western Palm Beach County.[36] The project has not gotten out of the planning stage and has hit a number of delays. The most recent came when the Port St. Lucie Planning & Zoning Board rejected plans to annex 7,139 acres for development and to amend the comprehensive plan to change the land use from agricultural to heavy industrial.[37]

The bill allows for expedited permitting for any inland multimodal facility that receives and sends cargo to and from Florida's ports.

Section 23 amends 403.973, F.S., relating to expedited permitting and comprehensive plan amendments.

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[35] Section 380.115(2), F.S., states that a development with an application for development approval pending, pursuant to s. 380.06, F.S., on the effective date of a change to the guidelines and standards, or a notification of proposed change pending on the effective date of a change to the guidelines and standards, may elect to continue such review pursuant to s. 380.06, F.S.
[36] Florida Dep't of Transportation, *South Florida Inland Port Feasibility Study – final report* (June 2007), available at http://www.dot.state.fl.us/seaport/pdfs/SFL_Inland_Port_Final_Report_11_07.pdf (last visited Mar. 26, 2011).
[37] Alex Howk, *Planning board rejection signals dwindling support for Port St. Lucie inland port project*, TCPalm, Mar. 3, 2011, available at http://www.tcpalm.com/news/2011/mar/03/planning-board-rejection-signals-dwindling-for/ (last visited Mar. 26, 2011).

Section 403.973, F.S., provides for an expedited permitting and comprehensive plan amendment process for certain projects that are identified to encourage and facilitate the location and expansion of economic development, offer job creation and high wages, strengthen and diversify the state's economy, and which have been thoughtfully planned to take into consideration the protection of the state's environment.

Under s. 403.973, F.S., OTTED or a Quick Business County (QBC) may certify a business as eligible to use the process. Recommendations on which projects should use the process may come from Enterprise Florida, any county or municipality, or the Rural Economic Development Initiative (REDI). Eligibility criteria stipulate that a business must:

- Create at least 50 jobs; or
- Create 25 jobs if the project is located in an enterprise zone, in a county with a population of fewer than 75,000, or in a county with a population of fewer than 100,000 that is contiguous to a county having a population of 75,000 residing in incorporated and unincorporated areas of the county.

Regional Permit Action Teams are established by a Memorandum of Agreement (MOA) with the secretary of the DEP directing the creation of these teams. The MOA is between the secretary and the applicant with input solicited from the DCA, DOT, Florida Department of Agriculture and Consumer Services; the Florida Fish and Wildlife Conservation Commission; the Regional Planning Councils; and the WMDs. The MOA accommodates participation by federal agencies, as necessary. At a local government's option, a special MOA may be developed on a case-by-case basis to allow some or all local development permits or orders to be covered under the expedited review. Implementation of the local government MOA requires a noticed public workshop and hearing.

Certified projects receive the following benefits:

- Pre-application meeting of regulatory agencies and business representatives held within 14 days after eligibility determination;
- Identification of all necessary permits and approvals needed for the project;
- Designation of a project coordinator and regional permit action team contacts;
- Identification of the need for any special studies or reviews that may affect the time schedule;
- Identification of any areas of significant concern that may affect the outcome of the project review;
- Development of a consolidated time schedule that incorporates all required deadlines, including public meetings and notices;
- Final agency action on permit applications within 90 days from the receipt of complete application(s);
- Waiver of twice-a-year limitation on local comprehensive plan amendments; and
- Waiver of interstate highway concurrency with approved mitigation.

Appeals of expedited permitting projects are subject to the summary hearing provisions of s. 120.574, F.S. The ALJ's recommended order is not the final state agency action unless the participating agencies of the state opt at the preliminary hearing conference to allow the ALJ's decision to constitute the final agency action. Where only one state agency action is challenged, the agency of the state shall issue the final order within 10 working days of receipt of the ALJ's

recommended order. In those proceedings where the more than one state agency action is challenged, the Governor shall issue the final order within 10 working days of receipt of the ALJ's recommended order.

Expedited permitting provides a special assistance process for REDI counties. OTTED, working with REDI and the regional permitting teams, is to provide technical assistance in preparing permit applications for rural counties. This additional assistance may include providing guidance in land development regulations and permitting processes, and working cooperatively with state, regional and local entities to identify areas within these counties that may be suitable or adaptable for preclearance review of specified types of land uses and other activities requiring permits.

Section 403.973(19), F.S., prohibits the following projects from using the expedited process:

- A project funded and operated by a local government and located within that government's jurisdiction; or
- A project, the primary purpose of which is to:
  - Affect the final disposal of solid waste, biomedical waste, or hazardous waste in the state,
  - Produce electrical power (unless the production of electricity is incidental and not the project's primary function);
  - Extract natural resources;
  - Produce oil; or
  - Construct, maintain or operate an oil, petroleum, natural gas or sewage pipeline.

The bill revises the structure and process for expedited permitting of targeted industries. It substitutes the Secretary of DEP, or his or her designee, for OTTED. It clarifies that commercial or industrial development projects that will be occupied by businesses that would individually or collectively create at least 50 jobs qualify for expedited review. The bill requires regional teams to be established through the execution of a project-specific MOA. Finally, the bill provides that the standard form of the MOA will be used only if the local government participates in the expedited review process.

Section 24 amends 163.3180, F.S., relating to concurrency.

Transportation concurrency is a growth management strategy intended to ensure that transportation facilities and services are available "concurrent" with (at the same time as) the impacts of development. To carry out concurrency, local governments must define what constitutes an adequate level of service for the transportation system and measure whether a proposed new development will create more demand than the existing transportation system can handle. If the development will create excess demand, the local government must schedule transportation improvements to be made as the development is built. If the roads or other portions of the transportation system are inadequate, then the developer must either provide the necessary improvements, contribute money to pay for the improvements, or wait until government provides the necessary improvements. These general concepts are further defined through Florida's growth management statutes and administrative rules.[38]

[38] Florida Dep't of Community Affairs, *Division of Community Planning*, http://www.dca.state.fl.us/fdcp/dcp/transportation/CurrentTopics.cfm (last visited Mar. 27, 2011).

In addition to considering capacity that is available or will be provided through development agreements, Rule 9J-5.0055(3), F.A.C., allows local governments to evaluate transportation concurrency against planned capacity in its Five-Year Schedule of Capital improvements. That schedule must reflect the Metropolitan Planning Organization's transportation improvement program in urbanized areas, under s. 163.3177(3)(a)(6), F.S. A community must demonstrate that the necessary facilities will be available and adequate to address the impacts of a development within three years of issuing the building permit or its functional equivalent. The schedule must include the estimated date of commencement and completion of the project, and this timeline may not be eliminated or delayed without a plan amendment approved by the DCA. Changes to the schedule may be made outside of the regular comprehensive plan amendment cycle.[39]

The Florida Department of Transportation (DOT) is responsible for establishing level-of-service standards on the highway component of the strategic intermodal system (SIS) and for developing guidelines to be used by local governments on other roads. The SIS consists of statewide and interregionally significant transportation facilities and services and plays a critical role in moving people and goods to and from other states and nations, as well as between major economic regions in Florida.

Alternatives to the general concurrency requirements are available under certain circumstances. Public transportation facilities, certain infill or redevelopment projects, and projects whose impacts may be considered insignificant or "*de minimis*" are exempted from concurrency, where certain criteria are met. There are two alternatives:

- Transportation Concurrency Exception Areas - The Transportation Concurrency Exception Area is the most widely used alternative to concurrency. Provided for in s. 163.3180(5), F.S., these areas allow local governments to reduce obstacles that may limit urban infill and redevelopment, thereby lessening urban sprawl, by allowing development to proceed within a designated area despite a deteriorating level of service on roadways. To use this option, a community must demonstrate a commitment to increased mobility within the area by fostering alternative transportation modes and urban development patterns that will reduce single-occupant vehicle trips.
- Multimodal Transportation Districts - The Multimodal Transportation District is an area in which primary priority is placed on "assuring a safe, comfortable, and attractive pedestrian environment, with convenient interconnection to transit."[40] To use this alternative, a local government must incorporate community design features that reduce the use of vehicles while supporting an integrated multimodal transportation system. Common characteristics of a Multimodal Transportation District include the presence of mixed-use activity centers, connections between the streets and land uses, transit-friendly design features, and accessibility to alternative modes of transportation. Multimodal Transportation Districts must include level of service standards for bicycles, pedestrians, and transit as well as roads.

The bill provides for a limited exemption from Strategic Intermodal System adopted level-of-service standards for new or redevelopment projects consistent with local comprehensive plans as inland multimodal facilities receiving or sending cargo for distribution and providing cargo

[39] *Id.*
[40] Section 163.31801(15)(a), F.S.

storage, consolidation, repackaging, and transfer of goods, and which may include other intermodal terminals, related transportation facilities, warehousing and distribution facilities, and associated office space, light industrial, manufacturing, and assembly uses. The exemption applies only if the project meets all of the following criteria:

- The project will not cause the adopted level-of-service standards for the Strategic Intermodal System facilities to be exceeded by more than 150% within the first five years of the project's development;
- The project, upon completion, would result in the creation of at least 50 full-time jobs;
- The project is compatible with existing and planned adjacent land uses;
- The project is consistent with local and regional economic development goals or plans;
- The project is proximate to regionally significant road and rail transportation facilities; and
- The project is proximate to a community having an unemployment rate, as of the date of the development order application, which is 10% or more above the statewide reported average.

Section 25 amends s. 373.4137, F.S., relating to mitigation requirement for specified transportation projects.

Enacted in 1996, s. 373.4137, F.S., directs the Florida Department of Transportation (DOT) to annually submit for approval to the DEP and the WMDs a plan to mitigate the adverse environmental impacts of transportation projects to wetlands, wildlife and other aspects of the natural environment. The ecosystem-based mitigation plan was to be based on an environmental impact inventory reflecting habitats that would be adversely impacted by projects listed in the next three years of the tentative work programs. The DOT creates escrow accounts with the DEP or a WMD for its mitigation requirements.

Expressway authorities created pursuant to chapters 348 and 349, F.S., are also able to create escrow accounts with the WMDs and the DEP for their mitigation requirements.

On a annual basis, the DOT and the participating expressway authorities are required to transfer to their escrow accounts sufficient funds for the current fiscal year to pay for mitigation of projected acreage impacts resulting from projects identified in the inventory. At the end of each year, the projected acreage impacts are compared to the actual acreage of impact of projects as permitted, including permit modifications. The escrow balances are then adjusted accordingly to reflect any over or under transfer of funds.

In addition to using mitigation banks to offset the adverse effects of transportation projects on wetlands, the bill provides for the use of any other mitigation options that satisfy state and federal requirements, including, but not limited to U.S. general compensatory mitigation requirements.[41] The bill makes it optional for transportation authorities to participate in the program. It provides that environmental mitigation funds that are identified or maintained in an escrow account for the benefit of a WMD may be released if the associated transportation project is excluded in whole or in part from the mitigation plan. Once the final payment has been made, the DOT or the participating transportation authorities' obligation will be satisfied and the WMD

[41] 33 U.F.R. s. 332.3(b), available at http://edocket.access.gpo.gov/cfr_2009/julqtr/pdf/33cfr332.3.pdf (last visited Mar. 27, 2011).

will have continuing responsibility for the mitigation project. Lastly, it allows the DOT, a transportation authority or a WMD to elect to exclude specific projects from the mitigation plan.

Section 26 provides that the act shall take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, Section 18(a) of the Florida Constitution states that no county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and it meets one of these exceptions:

- The Legislature appropriates funds or provides a funding source not available for such county or municipality on February 1, 1989;
- The expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or
- The law is required to comply with a federal requirement.

Subsection (d) provides an additional applicable exemption. Laws determined to have an "insignificant fiscal impact," which means an amount not greater than the average statewide population for the applicable fiscal year times $0.10 ($1.88 million for FY 2010-2011), are exempt.

If a local government's comprehensive plan does not allow for construction of a biofuels processing facility, this bill requires the local government to establish a review process for that purpose. It is not known how many local governments allow for the construction of biofuels processing facilities in their comprehensive plans. Further examination is necessary to determine the number of impacted local governments and the costs associated with establishing a review process. However, given the relative complexity of these facilities, this requirement is likely a mandate and will require a two-thirds vote and a finding of important state interest.

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:

Reducing environmental permitting requirements, time, necessity and compliance costs for those who qualify for incentive-based rewards will collectively save business and individuals significant amounts of money; however, the savings cannot be calculated at this point.

Defendant parties to administrative hearings may also save on litigation costs as their burdens will be reduced. Alternatively, the costs for interested third parties in administrative hearings will likely increase as their burdens for persuasion, evidence and simply proving their substantial interests will be increased or shifted to them.

The DEP's reduced permit revocation ability may result in the loss of federal delegation of some programs. Such a loss would increase permit application costs for private parties because both federal and state permits would subsequently be required. The DEP has indicated that permit costs may actually increase due to time limitations on both permit application reviews and RAIs. However, the impact of this cannot be determined to be either positive or negative as there are too many variables.

Biofuel and renewable energy facilities should have an easier path get permitted at the local government level. This impact cannot be determined but may be significant in both savings and economic development.

C. Government Sector Impact:

According to the DEP, local governments that have their environmental regulatory programs preempted could see a cost savings from program elimination. When a local government is a permit applicant, increased availability of web-based authorizations should reduce permitting costs, as well as reduced permit approval times, will save them money, but only if overall permit times are actually reduced. Additionally, local governments that lose currently active permitting programs to state preemption will lose revenues associated with those programs. It is not known whether the cost savings will be greater than the lost revenues.

According to the DEP's analysis, reducing the time frame for permit application reviews, RAIs, and ultimately approval or denial will require the addition of 100 full-time equivalents (FTE). The DEP has calculated that each FTE's entire compensation package is between $50,000 to $75,000. The total impact to the DEP to implement all requirements of this bill in FTEs alone will be between $5 million to $7.5 million annually. If the DEP's assessment is accurate, similar costs could also affect the WMDs permitting costs. Lastly, the WMDs have expressed concerns that the changes to the DOT mitigation funding scheme may leave them with insufficient funds to provide mitigation for DOT projects.

VI. Technical Deficiencies:

In section 21, the bill applies the DRI review exemption inconsistently to both "phosphate" and "solid mineral" mines. While all phosphate mines are solid mineral mines, not all solid mineral

mines are phosphate mines. This may cause confusion as to how the bill is applied to mining activities.

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.)

None.

B. Amendments:

None.