



The bill substantially amends sections 253.04, 327.73, and 372.73, Florida Statutes

The bill creates section 372.731, Florida Statutes.

## II. Present Situation:

### Seagrasses

Seagrass systems are highly productive communities that provide base resources for important fisheries, marine wildlife, and ecological processes. Seagrasses provide submerged habitat that supports many economically important saltwater fish, shellfish, and wildlife species. Seagrass meadows are responsible for generating up to approximately \$20,000 in fishery-related economic benefits per acre each year. Seagrass is an important food source for manatees and sea turtles. Seagrass protection is essential for the maintenance of saltwater fisheries, wildlife, high-quality marine environments, and recreational opportunities in the State of Florida.

Florida currently has over 1 million registered boats.<sup>1</sup> Propeller scarring in seagrass is a recognized problem in areas of high boating use around the state. A 1995 report generated by the Fish and Wildlife Research Institute (formerly Florida Marine Research Institute) determined that more than 173,000 acres of seagrass in shallow near-shore waters were scarred by watercraft.<sup>2</sup> Subsequent analysis of seagrass systems has shown increases in both the number of propeller scars and the severity of scarring. A Charlotte Harbor assessment found a 71-percent increase in severely scarred seagrass habitat when aerial images taken in 2003 were compared with the aerial images used in the 1995 report.<sup>3</sup> During this same period, vessel registrations grew from 16,896 to 22,252 boats in Charlotte County, an increase of 32 percent.<sup>4</sup> These findings are consistent with observed high-density growth and development in coastal areas, which will continue to bring growing vessel traffic in the shallow vegetated estuary waters of the state. Shallow water operated vessels, commonly referred to as “flats boats,” are one of the fastest growing segments of the watercraft industry. Sales of such vessels reflect the desire on the part of the boating public to operate vessels in shallow waters where seagrass can be damaged by propellers or other motorized watercraft.

The growing problem with seagrass damaged by boat propellers has compelled further management action. An active outreach campaign to instill marine resource stewardship has produced brochures, boater’s guides, public service announcements, and boat ramp information kiosks. Non-regulatory management efforts include signs that mark shallow seagrass beds. Many of these efforts involve partnerships with stakeholders.

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<sup>1</sup> 2005 Boating Accident Statistical Analysis, Lt. Kent Harvey, Assistant Boating Safety Coordinator, Florida Fish and Wildlife Conservation Commission, at <http://myfwc.com/law/council/presentations/2005BoatingAccidentAnalys.pdf>.

<sup>2</sup> F.J. Sargent, T.J. Leary, D.W. Crewz & C.R. Kruer, *Scarring of Florida’s Seagrasses: Assessment and Management Options*. FMRI Tech. Rep. TR-1. Executive Summary, Florida Marine Research Institute, St. Petersburg, Florida (1995).

<sup>3</sup> Florida Fish and Wildlife Conservation Comm’n, *2008 Session Legislative Proposal, Establishing Penalties for Seagrass Damage* (on file with the Senate Committee on Judiciary).

<sup>4</sup> *Id.*

An interagency Seagrass Working Group consisting of Fish and Wildlife Conservation Commission (commission) and Department of Environmental (department) staff was assembled in 2004 to address the seagrass damage issue. At the initial stakeholder meeting in February, 2005, representatives from the boating, commercial and recreational fishing, environmental, and regulatory community assessed the extent of the problem and recommended resource management options. Many stakeholders agreed to partner with the Seagrass Working Group to provide guidance for implementation of agreed upon actions. One of the priorities was for the agencies to acquire the necessary legislative authority to address seagrass damage caused by vessel operation, and another was to explore the use of existing legislative authority to do so, if it existed. The Seagrass Working Group began to develop a refined operational guidance procedure to more effectively implement seagrass protection regulations available to regulatory agencies. This regulatory ability is based upon the department's statutory authority to pursue civil penalties for natural resource damage on state lands and the commission's statutory responsibility to enforce state marine law.<sup>5</sup>

The working group developed a pilot project protocol associated with implementing the operational guidance procedure and presented it to the stakeholders in August 2006. A consensus was reached to support legislation implementing a noncriminal infraction system where vessel operators causing propeller scarring could be fined for damaging seagrasses in aquatic preserves. A penalty system similar to the one being proposed by this legislation exists in some state parks and in Pinellas County. A more comprehensive federal penalty system exists in the Florida Keys National Marine Sanctuary.<sup>6</sup>

### **Disposition of Illegally Taken Wildlife**

A process for handling the forfeiture of confiscated commercially harvested saltwater products is outlined in s. 370.061, F.S., but no such provision exists for recreationally harvested saltwater fish that are deemed to be in violation of statute or rule. Additionally, s. 372.73, F.S., allows game and freshwater fish to "be forfeited and given to some hospital or charitable institution," but Florida law does not have such a provision for recreationally caught saltwater fish.

The forfeiture process for commercially harvested saltwater products requires conviction as a condition precedent to the disposal of any perishable seafood product or proceeds of the sale. Section 372.73, F.S., provides for disposal of game and freshwater fish "upon conviction of the offender or sooner if the court so orders." In most counties statewide, there is a standing administrative order with the courts authorizing the pre-conviction disposal of freshwater fish and game. This provision is not available for saltwater fish.

In the majority of cases, illegally harvested fish and wildlife that are seized are seldom presented as evidence at trial and become severely freezer burned and unwholesome after being stored in the evidence freezers for an extensive amount of time. After the case is closed, the items retained as evidence are no longer useful to the court, charity, or the defendant and are disposed of at a landfill.

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<sup>5</sup> Sections 403.121 and 20.331, F.S.

<sup>6</sup> See footnote 3.

### **Evidentiary Materials**

At present, fish and wildlife are being seized and stored at a faster rate than they are being removed from evidence by court order. A large number of local police and sheriff departments that seize fish and wildlife do not have freezers to accommodate such evidence and use commission freezers for storage. This adds to the volume and places an additional administrative burden on commission staff to process additional evidence. These situations have required the commission to purchase and create space for more freezers. All evidence facilities must be in compliance with accreditation standards and expanding evidence facilities often requires the installation of fencing and other security measures, further increasing the cost to store evidence.

To complete the evidence process, an officer may be required to spend several hours away from patrol. The process begins from the initial seizure and ends when the officer returns from the evidence storage facility. Officers are usually patrolling in remote areas and may drive an excess of 50 miles one way to a storage facility.

### **III. Effect of Proposed Changes:**

The bill amends s. 253.04, F.S., to create a noncriminal violation for any person who operates a vessel outside a lawfully marked channel in a careless manner that causes propeller scarring within an aquatic preserve. Each violation is a separate offense and must be charged on a uniform boating citation as provided in s. 327.74, F.S. Persons who refuse to post a bond or accept and sign a uniform boating citation commit a second-degree misdemeanor, punishable as provided in ss. 775.082 or 775.083, F.S.

The bill creates a new noncriminal boating infraction for seagrass scarring by amending s. 327.73, F.S. The penalties for violations are \$50 for a first violation, \$250 for a second violation within 12 months after the first, \$500 for a third violation occurring within 36 months of a previous conviction, and \$1,000 for a fourth or subsequent offense.

The bill amends s. 372.73, F.S., to create provisions that allow the investigating law enforcement agency to dispose of illegally taken wildlife, freshwater fish, or saltwater fish by the following methods.

- They may retain it for the agencies official use.
- They may transfer it to another unit of state or local government for official use.
- They may donate it to a charitable organization.
- They may sell it at a public sale, with conditions.
- They may destroy it if none of the other options are practicable or if it is unwholesome or otherwise of no appreciable value.

This bill provides that all live wildlife, freshwater fish, or saltwater fish shall be properly documented and returned to the habitat unharmed, except that non-native wildlife may only be released as allowed by rule of the Fish and Wildlife Conservation Commission. It also requires that any unclaimed wildlife, freshwater fish, or saltwater fish be retained by the investigating agency and disposed of in accordance with the provisions of this section.

Unless otherwise provided, the proceeds from the sale of illegally taken wildlife, freshwater fish, and saltwater fish shall be remitted to the Department of Revenue for deposit into the Marine Resources Conservation Trust Fund. Any state, municipal, or county law enforcement agency that assists the commission in enforcement of the above provisions shall be entitled to all or a share of any property, based on participation.

The bill creates s. 372.731, F.S., providing that photographs of illegally taken wildlife, freshwater fish, or saltwater fish may be deemed competent evidence of such property and admissible to the same extent as if the wildlife, freshwater fish, or saltwater fish were introduced as evidence. Such photographs must possess:

- A written description of the wildlife, freshwater fish, or saltwater fish alleged to have been illegally taken.
- The name of the violator.
- The location of where the alleged wrongful taking occurred.
- The name of the investigating law enforcement officer.
- The date of the photograph.
- The name of the photographer.

Such writings are to be made under oath by the investigating officer and the photograph shall be identified by the signature of the photographer.

This provision essentially parallels s. 90.91, F.S., which, as part of the Florida Evidence Code, deals with photographs of property in criminal prosecutions. This provision would create a new exception to the “best evidence rule,” which is discussed in further detail in Section IV of this analysis.

The bill provides an effective date of October 1, 2008.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. Other Constitutional Issues:**

The “best evidence rule” requires that the best obtainable evidence should be adduced to prove every disputed fact, and a failure to produce it authorizes the inference that the party does not furnish the best evidence because it would tend to defeat, instead of

sustaining, the issue on his part.<sup>7</sup> In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had.<sup>8</sup> The new provision appears to be a modified version of an existing exception to this rule.<sup>9</sup>

Any statute that modifies the rules of evidence must be considered in light of the separation of powers doctrine.<sup>10</sup> There is a balance that exists in evidentiary matters, where the legislature may elect to create or modify substantive rights, while the court retains the constitutional exclusive right to determine procedural matters before the courts.<sup>11</sup> For rules of evidence, the constitutionality of the rule depends on whether the provisions are substantive or procedural.<sup>12</sup>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

Persons who violate the provisions of the bill may be charged with a noncriminal boating infraction that can carry a fine of \$50 to \$1,000 based on type or subsequent number of offenses.

<sup>7</sup> *Liddon v. Board of Pub. Instruction*, 175 So. 806 (Fla. 1937).

<sup>8</sup> *Id.* at 808.

<sup>9</sup> Section 90.91, F.S., states: “In any prosecution for a crime involving the wrongful taking of property, a photograph of the property alleged to have been wrongfully taken may be deemed competent evidence of such property and may be admissible in the prosecution to the same extent as if such property were introduced as evidence. Such photograph shall bear a written description of the property alleged to have been wrongfully taken, the name of the owner of the property, the location where the alleged wrongful taking occurred, the name of the investigating law enforcement officer, the date the photograph was taken, and the name of the photographer. Such writing shall be made under oath by the investigating law enforcement officer, and the photograph shall be identified by the signature of the photographer. Upon the filing of such photograph and writing with the law enforcement authority or court holding such property as evidence, the property may be returned to the owner from whom the property was taken.”

<sup>10</sup> *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). “Article II, section 3 of the Florida Constitution prohibits the members of one branch of government from exercising ‘any powers appertaining to either of the other branches unless expressly provided herein.’ Article V, section 2(a) states that the Florida Supreme Court has the exclusive authority to ‘adopt rules for the practice and procedure in all courts, including the time for seeking appellate review.’ The Legislature has the authority to repeal judicial rules by a two-thirds vote, but the authority to initiate rules rests with the Court.”

<sup>11</sup> Jeffery I. Jacobs, *Annual Report, Committees of the Florida Bar*, 78 Fla. B.J. 40, 47 (Jun 2004). “Since the code’s creation in the 1970s, Florida has adopted a statutory scheme in which changes are advance through legislation, and then considered by the Florida Supreme Court biennially for adoption as rules of procedure.”

<sup>12</sup> *Id.* “Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law.” See also *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972). “Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. ‘Practice and procedure’ may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term ‘procedure,’ I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term ‘rules of practice and procedure’ includes all rules governing the parties, their council and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.”

Currently, there is a standing administrative court order that allows for the donation of freshwater fish and game; however, this is not available for saltwater fish. The bill would provide charities and non-profit organizations the ability to receive donated saltwater fish, which may help to defer food costs.

**C. Government Sector Impact:**

**Seagrasses**

Currently, funds collected from damages to seagrass beds are placed into the General Revenue Fund or the Internal Improvement Trust Fund. An unknown amount of revenue may be generated based on the number of infractions for boating violations in aquatic preserves and the fines or penalties collected.

**Illegally taken wildlife and evidentiary materials**

The bill would save time and costs associated with officers' transporting, securing, and managing evidence. In a three month period, from August 1, 2006, to October 31, 2006, there were 98 evidence numbers issued for the seizure of saltwater products. Three-fourths of those numbers (73) were for recreational cases. The transportation costs average \$44.00 per case involving seizure. The average officer's time involved in transporting and checking in the evidence is approximately two and one-half hours at an average hourly officer rate of \$33.93 per hour. The total positive fiscal impact for Fish and Wildlife Conservation Commission could exceed \$40,000 annually.<sup>13</sup>

**Local Governments**

This bill could potentially have a positive fiscal impact on the local police and sheriff, because there would be a reduction in the amount of evidence that would need to be seized and stored.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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<sup>13</sup> Florida Fish and Wildlife Conservation Comm'n, *2008 Session Legislative Proposal, Confiscation and Disposition of Illegally Taken Wildlife, Freshwater Fish and Saltwater Fish* (on file with the Senate Committee on Judiciary).

**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 Committee on March 19, 2008:**

The committee substitute amends s. 253.04, F.S., creating civil-infracton penalties for persons who operate vessels in a careless manner outside of a lawfully marked channel, within an aquatic preserve, that causes seagrass scarring. It also provides definitions for “seagrasses” and “seagrass scarring.” Additionally, it creates noncriminal-infracton penalties for violations pertaining to seagrasses under s. 327.73, F.S.

The committed substitute amends s. 372.73, F.S., providing for the disposition of illegally taken wildlife, freshwater fish, and saltwater fish as determined by the investigating law enforcement agency, except that live wildlife, freshwater fish, and saltwater fish shall be properly documented and returned to the habitat unharmed. Unless otherwise provided, if the disposition method chosen was sale of the wildlife, freshwater fish, or saltwater fish, the proceeds of such a sale will be remitted to the Department of Revenue for deposit into the Marine Resources Conservation Trust Fund. Any state, municipal, or county law enforcement agency that assisted with the enforcement of such actions shall be entitled to receive all or a share of the property.

The committee substitute creates s. 372.731, F.S., providing for provisions that allow for photographs of illegally taken wildlife, freshwater fish, and saltwater fish to be deemed as competent evidence and admissible in the prosecution of such takings, with certain conditions.

- B. **Amendments:**

None.