

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 Judiciary Committee

BILL: CS/CS/SB 1004

INTRODUCER: Judiciary Committee, Environmental Preservation and Conservation Committee, and Senator Constantine

SUBJECT: Coral Reefs

DATE: April 8, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Uchino</u>	<u>Kiger</u>	<u>EP</u>	<u>Fav/CS</u>
2.	<u>Treadwell</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>GA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill creates the Florida Coral Reef Protection Act, which enables the Department of Environmental Protection (department) to:

- Recover both compensatory damages and civil penalties for injuries to coral reefs from responsible parties;
- Use habitat equivalency analysis as a method to calculate damages;
- Require the responsible party to notify the department within 24 hours of running aground, and to remove the vessel within 72 hours, with provided exceptions;
- Delegate enforcement authority to other state agencies or coastal counties with coral reefs within their jurisdictions;
- Deposit funds recovered for damages to coral reefs into the Ecosystem Management and Restoration Trust Fund to be used for the rehabilitation and preservation of coral reefs; and
- Enter into settlement agreements with third parties to fund coral reef restoration and mitigation from funds paid by responsible parties.

The bill creates section 403.9335, Florida Statutes. The bill also substantially amends section 403.1651, Florida Statutes. The bill repeals sections 253.04(3) and 380.0558, Florida Statutes.

II. Present Situation:

Coral Reefs in Florida

Florida sits at the northern end of a latitudinal band of the earth that has extensive coral reef growth and communities. Coral reefs are important to the ecological and economic wealth of Florida and are threatened by human activity. In addition to their biological diversity and abundance, Florida's reefs are estimated to provide 61,000 jobs in the fishing, diving, and boating industries and \$5.7 billion dollars annually in sales and income from both commercial and private sector uses. Currently, the Department of Environmental Protection (department) does not have the authority to adequately protect these fragile and valuable resources, or the ability to establish a timely, cost-efficient response to coral reef injuries. Further, the department reports that it does not have the ability to recover adequate compensatory damages from responsible parties. The department also reports that the current penalty schedules do not address recovery for the loss of use of coral reefs due to injury.¹

Southeast Florida Coral Reef Initiative

Some of the provisions of the bill originate from the issues identified in the Southeast Florida Coral Reef Initiative's (SEFCRI) "Rapid Response and Restoration for Coral Reef Injuries in Southeast Florida: Guidelines and Recommendations."² The SEFCRI team is comprised of local, state, and federal agency and non-agency marine resource professionals, scientists, resource users, and other stakeholders.

The SEFCRI reports that reef injuries may occur as a result of both permitted and unpermitted activities.³ The SEFCRI's guidelines and recommendations focus on unpermitted activities such as "recreational misuse, vessel groundings, and injury resulting from anchoring, propeller wash, and salvage efforts, including towing cable drags."⁴ Some of SEFCRI's recommendations include the following:

- Regulatory agencies issuing permits for activities that may affect reef resources should re-examine and improve permitting, compliance, enforcement, and penalty assessment processes to ensure that permit conditions provide the maximum protection for, and the least impact to, reef resources;
- A public education campaign should be undertaken to inform the public of the necessity of, and correct protocol for, reporting reef injuries;
- The department should explore the various avenues of potential enforcement authority and develop the one identified as producing the best results;

¹ Information provided by the Department of Environmental Protection.

² Southeast Florida Coral Reef Initiative, *Rapid Response and Restoration for Coral Reef Injuries in Southeast Florida: Guidelines and Recommendations* (June 2007).

³ *Id.* at 8.

⁴ *Id.*

- Criteria should be developed for evidence collection associated with reef injury incidents, based on their anticipated future litigation needs;
- The department should develop a joint proprietary/regulatory authorization process or employ an existing process (i.e., Environment Resource Permitting) that incorporates the conditions requiring Trustees' approval for the authorization and regulation of primary restoration, compensatory restoration, and monitoring activities associated with reef injuries. An efficient authorization process is needed to facilitate a rapid response;
- The department and the Florida Fish and Wildlife Conservation Commission should develop a Memorandum of Understanding establishing delegation of authority in order to streamline authorization processes necessary for the oversight of primary restoration, compensatory restoration, and monitoring activities associated with reef injuries;
- The department should develop a penalty assessment schedule by rule, including explicit authority for any law enforcement officer to enforce the provision in the rule, or request that the Legislature establish a penalty assessment schedule to be used for assessing civil penalties; and
- Section 253.04, F.S., should be amended to require restoration to the maximum extent possible of sovereignty submerged lands and associated biological resources to their original function and value.⁵

Damage to Coral Reefs

Currently, most responsible parties cooperate with the department to address coral reef injuries caused by vessel groundings or anchoring; however, the lack of specificity regarding procedure and what the state is entitled to recover for these injuries often results in lengthy and costly legal settlement negotiations. In some cases, the lack of specificity for what is procedurally required has resulted in the responsible party adopting a “wait-and-see” position while the department proceeds to costly assessment and restoration activities. The department must then file suit in order to compel the responsible party to pay any penalties or collect compensation for damages.

Department of Environmental Protection Enforcement Procedure

Existing law affords the department authority to pursue judicial and administrative remedies for violations of ch. 403, F.S.⁶ More specifically, the department may initiate a civil action in a court of competent jurisdiction to establish liability and to recover damages for any injury to the air, waters, or property, including animal, plant, and aquatic life, of the state.⁷ In addition, the department may seek recovery of a civil penalty for each violation in an amount of not more than \$10,000 per offense.⁸ The department reports that these civil actions are primarily initiated for permitted activity resulting in damage to coral reefs, such as dredging.

The department may also institute an administrative proceeding to establish liability and to recover damages for any injury to the air, waters, or property, including animal, plant, or aquatic

⁵ *Id.* at 52-57.

⁶ Section 403.121, F.S.

⁷ Section 403.121(1)(a), F.S.

⁸ Section 403.121(1)(b), F.S. The court may hear mitigating evidence from the responsible party.

life.⁹ The department may order that the responsible party pay a specified sum as damages to the state.¹⁰ In addition, if the department has reason to believe a violation has occurred, it may institute an administrative proceeding to order the prevention, abatement, or control of the conditions creating the violation or other appropriate corrective action.¹¹ The department reports that administrative remedies are pursued less frequently than judicial remedies.

Board of Trustees of the Internal Improvement Trust Fund

The Board of Trustees of the Internal Improvement Trust Fund (board) is vested and charged with the acquisition, administration, management, control, supervision, conservation, protection, and disposition of all lands owned by, or which may inure to, the state or any of its agencies, departments, boards, or commissions, with certain exceptions.¹² With respect to administering, controlling, and managing sovereignty submerged lands, the board may adopt rules governing all uses of sovereignty submerged lands by vessels, floating homes, or any other watercraft, which must be limited to regulations for anchoring, mooring, or otherwise attaching to the bottom.¹³ The board must also encourage the use of sovereign submerged lands for water-dependent uses and public access.¹⁴

In conjunction with its duty to protect state lands, the board may police, protect, conserve, improve, and prevent trespass, damage, or depredation upon state-owned lands. The board may bring in the name of the board all suits in ejectment, suits for damage, and suits in trespass which in the judgment of the board may be necessary to protect and conserve these lands.¹⁵ In lieu of seeking monetary damages against a person who has been found to have willfully damaged state-owned lands, to have willfully violated the provisions of ch. 253, F.S., or to have failed to comply with an order of the board to remove or alter any structure or vessel that is not in compliance with applicable rules or with conditions of authorization to locate a structure or vessel on state-owned land, the board may impose a fine for each offense in an amount up to \$10,000.¹⁶ If a person knowingly refuses to comply with or willfully violates any of the provisions of ch. 253, F.S., resulting in damage to state-owned lands or products of those lands, the violator is liable for damages. All moneys collected pursuant to fines imposed or damages awarded under s. 253.04, F.S., must be deposited into the Internal Improvement Trust Fund.¹⁷

⁹ Section 403.121(2)(a), F.S.

¹⁰ *Id.* The judgment for the amount of damages determined by the department may be entered in any court having proper jurisdiction and may be enforced as any other judgment.

¹¹ Section 403.121(2)(b), F.S.

¹² Section 253.03, F.S.

¹³ Section 253.03(7)(b), F.S.

¹⁴ Section 253.03(15), F.S.

¹⁵ Section 253.04, F.S.

¹⁶ Section 253.04(2), F.S. The fine is to be fixed by rule and imposed and collected by the board in accordance with the provisions of ch. 120, F.S.

¹⁷ Section 253.04(7), F.S. All revenues accruing from sources designated by law for deposit into the Internal Improvement Trust Fund must be used for the acquisition, management, administration, protection, and conservation of state-owned lands. Section 253.01(2), F.S. All fines imposed and damages awarded pursuant to this section are a lien upon the real and personal property of the violator or violators.

Civil Penalties for Damages to Coral Reefs

Existing law provides for awards of civil penalties for actions resulting in damage to coral reefs. The department is authorized to develop by rule a schedule for the assessment of civil penalties for damage to coral reefs in state waters.¹⁸ The highest penalty must not exceed \$1,000 per square meter of reef area damaged. The schedule may include additional penalties for aggravating circumstances, not to exceed \$250,000 per occurrence.¹⁹ A determination of aggravating circumstances must be based on factors relating to the cause of the damage, such as, but not limited to:

- Absence of extenuating circumstances, such as weather conditions or other factors beyond the control of the vessel operator;
- Disregard for safe boating practices;
- Whether the vessel operator was under the influence of alcohol or drugs;
- Navigational error;
- Disregard for speed limits or other boating regulations;
- Failure to use available charts and equipment or to have such equipment on board;
- Willful or intentional nature of the violation; and
- Previous coral reef damage caused by the vessel operator.²⁰

Penalties assessed for damages to coral reefs located within the boundaries of John Pennekamp Coral Reef State Park will be doubled.²¹

Ecosystem Management and Restoration Trust Fund

The Ecosystem Management and Restoration Trust Fund is to be administered by the department for the purpose of:

- Funding the detailed planning for and implementation of programs for the management and restoration of ecosystems;
- Funding the development and implementation of surface water improvement and management plans and programs under ss. 373.451-373.4595, F.S.;
- Funding activities to restore polluted areas of the state;
- Funding activities to restore or rehabilitate injured or destroyed coral reefs; and
- Funding activities authorized for the implementation of the Leah Schad memorial Ocean Outfall Program implemented in s. 403.086(9), F.S.²²

Under existing law, the trust is used for the deposit of all moneys recovered by the state for injury to or destruction of coral reefs, which would otherwise be deposited into the General Revenue Fund or the Internal Improvement Trust Fund.²³

¹⁸ Section 253.04(3), F.S.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Section 403.1651(1), F.S.

²³ Section 403.1651(2)(b), F.S.

III. Effect of Proposed Changes:

The bill includes several provisions to enhance the Department of Environmental Protection's (department) ability to protect and preserve coral reefs, and to authorize recovery of compensatory damages from those responsible for damaging these natural resources. Following is a section-by-section analysis of the bill:

Florida Coral Reef Protection Act

Section 1 creates s. 403.9335, F.S., the Florida Coral Reef Protection Act (Act).

Definitions

The bill defines the following terms:

- “Aggravating circumstances” means operating, anchoring, or mooring a vessel in a reckless or wanton manner; under the influence of drugs or alcohol; or otherwise with disregard for boating regulations concerning speed, navigation, or safe operation.
- “Coral” means species of the phylum *Cnidaria* found in state waters including:
 - Class *Anthozoa*, including the subclass *Octocorallia*, commonly known as gorgonians, soft corals, and telestaceans; and
 - Orders *Scleractinia*, commonly known as stony corals; *Stolonifera*, including, among others, the organisms commonly known as organ-pipe corals; *Antipatharia*, commonly known as black corals; and *Hydrozoa*, including the family *Millaporidae* and family *Stylasteridae*, commonly known as hydrocoral.
- “Coral reefs” mean limestone structures composed wholly or partially of living stony corals, their skeletal remains, or both, and hosting other coral, associated benthic invertebrates, and plants; or hard-bottom communities, also known as live bottom habitat or colonized pavement, characterized by the presence of stony coral and associated reef organisms or worm reefs created by the *Phragmatopoma* species.
- “Damages” means moneys paid by any person or entity, whether voluntarily or as a result of administrative or judicial action, to the state as compensation, restitution, penalty, or mitigation for causing injury to or destruction of coral reefs.
- “Department” means the Department of Environmental Protection.
- “Fund” means the Ecosystem Management and Restoration Trust Fund.
- “Person” means any and all persons, natural or artificial, foreign or domestic, including any individual, firm, partnership, business, corporation, and company and the United States and all political subdivisions, regions, districts, municipalities, and public agencies thereof.
- “Responsible party” means the owner, operator, manager, or insurer of any vessel.

Legislative Findings and Intent

The bill includes findings by the Legislature that coral reefs are valuable natural resources that contribute ecologically, aesthetically, and economically to the state and must be protected. The Legislature declares its intent that it is in the best interest of the state to clarify the department's

powers and authority to protect coral reefs through the timely and efficient recovery of monetary damages resulting from vessel groundings and anchoring-related injuries.

The bill further expresses the Legislature's intent that the department, as staff to the Board of Trustees of the Internal Improvement Trust Fund and by virtue of its own regulatory powers, must be recognized as the state's lead trustee for coral reef resources associated with sovereignty submerged lands unless preempted by federal law. The bill provides that the Act does not divest other state agencies and political subdivisions of the state of their interests in protecting coral reefs.

Notification and Cooperation with DEP to Reduce Damages

The Act includes several provisions designed to protect coral reefs by minimizing and recouping damages when vessel operators run aground or strike coral reefs by:

- Requiring notification within 24 hours to the department by responsible parties that know or should have known that they ran aground and damaged coral reefs;
- Requiring vessels that have run aground be removed within 72 hours of the occurrence, with exceptions for extenuating circumstances or when prohibited by the United States Coast Guard; and
- Requiring that the responsible party must cooperate with the department to remove the vessel and assess the damage and restoration of the coral reef.

Compensation for Damages

Under the Act, the department, on its own, or acting on behalf of the Board, is authorized to recover the following damages from the responsible party in suits initiated under chs. 253, 373,²⁴ or 403, F.S. to recover for damages to coral reefs:

- Compensation for the cost of replacing, restoring, or acquiring the equivalent of the coral reef injured and the value of the lost use and services of the coral reef pending its restoration, replacement, or acquisition of the equivalent coral reef, or the value of the coral reef if the coral reef cannot be restored or replaced or if the equivalent cannot be acquired;
- Cost of damage assessments, including staff time;
- Cost of activities undertaken by or at the request of the department to minimize or prevent further injury to coral or coral reefs pending restoration, replacement, or acquisition of an equivalent;
- Reasonable cost of monitoring the injured, restored, or replaced coral reef for at least 10 years; however, monitoring is not required for a single occurrence of damage to a coral reef damage totaling less than or equal to 1 square meter; and
- Court costs, attorney's fees, and expert witness fees associated with enforcement actions.

²⁴ The department may initiate suit for damages to coral reefs related to unauthorized dredge and fill activities under part IV of ch. 373, F.S.

The Act authorizes the department to adopt rules and parameters to use habitat equivalency analysis as the method to calculate the compensation required from the responsible party. Habitat equivalency analysis (HEA) is a methodology used to determine compensation for injuries to natural resources.²⁵ “The principal concept underlying the method is that the public can be compensated for past losses of habitat resources through habitat replacement projects providing additional resources of the same type.” To develop the restoration plan, “trustees must determine and quantify injury, develop restoration alternatives that consist of primary and compensatory actions, scale restoration alternatives, and select a preferred restoration alternative.”²⁶

Civil Penalties

The Act provides for an award of civil penalties in addition to compensatory damages according to the following schedule:

- \$150 for damage to coral reefs less than or equal to one square meter, with an additional \$150 for aggravating circumstances and an additional \$150 for damage occurring within a state park or an aquatic preserve. A responsible party of a recreational vessel as defined in s. 327.02, F.S., that is lawfully registered or exempt from registration pursuant to chapter 328, F.S., shall receive a warning letter in lieu of a penalty for a first occurrence of any anchoring of a recreational vessel on a coral reef or any other damage to a coral reef totaling less than or equal to an area of 1 square meter;²⁷
- \$300 per meter for damage to coral reefs greater than one square meter but less than or equal to 10 square meters, with an additional \$300 per meter for aggravating circumstances and an additional \$300 per meter for damage occurring within a state park or an aquatic preserve;
- \$1,000 per meter for damage in excess of 10 square meters, with an additional \$1,000 per meter for aggravating circumstances and an additional \$1,000 per meter for damage occurring within a state park or an aquatic preserve;
- Double the penalties for a second infraction;
- Triple the penalties for a third infraction; and
- Quadruple the penalties for a fourth or subsequent infractions.

Assessed civil penalties are capped at \$250,000 per occurrence.

Delegation Agreements

The department is authorized to enter into delegation agreements with other state agencies or any coastal county with coral reefs within its jurisdiction. Before executing a delegation agreement, the department must consider the ability of the potential delegee to adequately and competently perform the duties required to fulfill the intent of the Act. Upon the execution of the delegation agreement and incorporation of the agreement in department rule, the delegee will have all rights accorded the department under the Act. The bill expressly provides that nothing in the Act

²⁵ National Oceanic and Atmospheric Administration and U.S. Department of Commerce, *Habitat Equivalency Analysis: An Overview*, 1 (Revised May 23, 2006).

²⁶ *Id.* at 2.

²⁷ Section 327.02(34), F.S., defines a “recreational vessel” as any vessel manufactured and used primarily for noncommercial purposes, or leased, rented, or chartered to a person for the person’s noncommercial use.

should be construed to require the department, another state agency, or a coastal county to enter into a delegation agreement.

Deposit of Damages into the Ecosystem Management and Restoration Trust Fund

All damages recovered by the department for injury to, or destruction of, the coral reef of the state that would otherwise be deposited in the general revenue accounts of the State Treasury or in the Internal Improvement Trust Fund shall be deposited in the Ecosystem Management and Restoration Trust Fund (trust) in the department and shall remain in such account until expended by the department. The department must use these funds to:

- Provide funds to the department for reasonable costs incurred in obtaining payment of the damages for injury to, or destruction of, coral reefs, including administrative costs and costs of experts and consultants. Such funds may be provided in advance of recovery of damages if the department determines;
- Pay for restoration or rehabilitation of the injured or destroyed coral reefs or other natural resources by a state agency or through a contract to any qualified person; or
- Pay for alternative projects selected by the department. Any project shall be selected on the basis of its anticipated benefits to the residents of Florida who used the injured or destroyed coral reefs or other natural resources or will benefit from the alternative project.

The bill provides that “damages” are to be deposited into the Ecosystem Management and Restoration Trust Fund. However, the reference to damages does not include any civil penalties assessed against a responsible party. If it is the intent of the Legislature to require civil penalties to be deposited into this trust fund, it may wish to specify that both damages and civil penalties will be deposited into the trust fund.

Any claim for reimbursement from the trust must be made within 90 days after payment of damages is made to the state. Private recipients of fund disbursements will be required to agree in advance that its accounts and records of expenditures are subject to audit at any time by the appropriate state officials. Additionally, private recipients must submit a final written report describing the expenditures within 90 days after the funds are expended.

When payments are made to a state agency from the fund, the bill specifies that the expenditures must be considered as being for extraordinary expenses, and that no agency appropriation will be reduced by any amount as a result of the reimbursement.

Florida Keys National Marine Sanctuary

The bill provides that nothing in the act should be construed to prevent the department or other state agencies from entering into agreements with federal authorities related to the administration of the Florida Keys National Marine Sanctuary.

General Rulemaking Authority

Under the bill, the department is authorized to adopt rules pursuant to ss. 120.536 and 120.54, F.S., to administer this section.

Settlement Agreements

Section 2 amends s. 403.1651, F.S., to authorize the department to enter into settlement agreements that direct responsible parties to pay third parties for restoration or mitigation projects, or to support law enforcement activities related to coral reef damage assessment.

Repeal of Current Civil Penalty Provision

Section 3 repeals subsection (3) of s. 253.04, F.S., which, under current law, authorizes the department to establish by rule a schedule for the assessment of civil penalties for damage to coral reefs in state waters.

Repeal of Current Coral Reef Restoration Provisions

Section 4 repeals s. 280.0558, F.S, which establishes the current framework for the protection and restoration of coral reefs.

Effective Date

Section 5 provides for an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The costs to individuals who damage coral reefs will increase. The Department of Environmental Protection (department) is authorized to collect both compensatory damages and civil penalties from the responsible party. This will increase the total amount of penalties and damages that may be paid to the department. The actual costs for damaging a coral reef are unknown, because they will be determined per occurrence, but will not exceed \$250,000.

The bill will not affect boaters who do not damage coral reefs. In addition, first occurrences of coral reef damage by responsible parties of recreational vessels will not be subject to civil penalties, if the damage to the coral reefs is less than one square meter.

C. Government Sector Impact:

It is indeterminate how much revenues for the Department of Environmental Protection (department) might increase due to an enhanced ability to enforce the coral protection measures and recover both compensatory damages and civil penalties. The department is currently not able to recover the actual costs of assessment, restoration, mitigation or monitoring. The department reports that the bill should increase its ability to respond to and recover damages to coral reefs without necessitating organizational or fiscal changes. Enforcement costs would likely remain similar as the bill does not require any new enforcement activities, but they are indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on April 6, 2009:

The committee substitute:

- Relocates the Florida Coral Reef Protection Act (act) from ch. 380, F.S., to ch. 403, F.S.;
- Provides definitions of the terms “fund” and “person”;
- Expands the recovery of compensatory damages to include actions or suits initiated pursuant to ch. 373, F.S.;
- Provides an exception for the assessment of civil penalties for first occurrences of damage to coral reefs totaling less than or equal to one square mile by responsible parties of a recreational vessels;

- Provides that all damages recovered by the state for damage to coral reefs that would otherwise be deposited into the General Revenue Fund or the Internal Improvement Trust Fund must be deposited in the Ecosystem Management and Restoration Trust Fund;
- Specifies the purposes for use of funds deposited into the Ecosystem Management and Restoration Trust Fund; and
- Repeals s. 380.0558, F.S., the current coral reef protection provisions.

CS by Environmental Preservation and Conservation on March 24, 2009:

The committee substitute replaced the originally filed bill and provides for coral reef protection in the following ways:

- Providing definitions.
- Authorizing the Department Environmental Protection (department) to recover both compensatory damages and civil penalties for injuries to coral reefs from responsible parties;
- Authorizing the department to use habitat equivalency analysis as a method to calculate damages;
- Requiring the responsible party to notify the department with 24 hours of running aground, and to remove the vessel within 72 hours, with exceptions for extenuating circumstances or if prohibited by the United States Coast Guard;
- Allowing the department to delegate enforcement authority to other state agencies or coastal counties with coral reefs within their jurisdictions; and
- Authorizing the department to enter into settlement agreements with third parties to fund coral reef restoration and mitigation from funds paid by responsible parties.

B. Amendments:

None.