

**Constitution Revision Commission
Judicial Committee
Proposal Analysis**

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

Proposal #: P 23

Relating to: GENERAL PROVISIONS, Natural resources and scenic beauty

Introducer(s): Commissioner Thurlow-Lippisch

Article/Section affected:

Date: December 11, 2017

	REFERENCE	ACTION
1.	JU	Pre-meeting
2.	GP	

I. SUMMARY:

The proposal states that “natural resources of the state are the legacy of present and future generations.” The proposal creates rights to a “clean and healthful environment” and substantive rights to clean air, water, pollution control and conservation. The proposal creates a cause of action and gives standing to anyone to enforce these rights “subject to reasonable limitations as provided by law.”

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Florida Constitution currently has a provision that declares state policy on conservation and protection of the environment and mandates that there be “adequate provision in law” for pollution control and conservation of natural resources.¹ Under state law the Department of Legal Affairs (DLA), any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations.² They may also maintain an action for injunctive relief against any person, natural or corporate, or governmental agency or authority to enjoin such persons,

¹ Fla. Const. Art II § 7.

² Fla. Stat. § 403.412(2)(a)1.

agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.³

However, as a condition precedent to the institution of an action against a governmental agency or authority, the complaining party shall first file with the governmental agencies or authorities charged by law with the duty of regulating or prohibiting the act or conduct complained of a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected.⁴ Upon receipt of a complaint, the governmental agency or authority shall forthwith transmit, by registered or certified mail, a copy of such complaint to those parties charged with violating the laws, rules, and regulations for the protection of the air, water, and other natural resources of the state.⁵ The agency receiving such complaint shall have 30 days after the receipt thereof within which to take appropriate action.⁶ If such action is not taken within the time prescribed, the complaining party may institute the judicial proceedings for injunctive relief.⁷ However, failure to comply with the statutory process shall not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the conduct or activity complained of.⁸

The court, in the interest of justice, may add as party defendant any governmental agency or authority charged with the duty of enforcing the applicable laws, rules, and regulations for the protection of the air, water, and other natural resources of the state.⁹ The DLA may intervene to represent any interest of the state in any suit filed.¹⁰

Venue of any causes brought under this law shall lie in the county or counties wherein the cause of action is alleged to have occurred.¹¹

No action may be maintained if the person (natural or corporate) or governmental agency or authority charged with pollution, impairment, or destruction of the air, water, or other natural resources of the state is acting or conducting operations pursuant to currently valid permit or certificate covering such operations, issued by the appropriate governmental authorities or agencies, and is complying with the requirements of said permits or certificates.¹²

In such action, other than an action involving a state National Pollutant Discharge Elimination System (NPDES) permit authorized under s. 403.0885, F.S., the prevailing party or parties shall be entitled to costs and attorney's fees.¹³ Any award of attorney's fees in an action involving such a state NPDES permit shall be discretionary with the

³ Fla. Stat. § 403.412(2)(a)2.

⁴ Fla. Stat. § 403.412(2)(c).

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Fla. Stat. § 403.412(2)(d).

¹⁰ Fla. Stat. § 403.412(2)(b).

¹¹ Fla. Stat. § 403.412(8).

¹² Fla. Stat. § 403.412(2)(e).

¹³ Fla. Stat. § 403.412(2)(f).

court.¹⁴ If the court has reasonable ground to doubt the solvency of the plaintiff or the plaintiff's ability to pay any cost or judgment which might be rendered against him or her in an action brought under this section, the court may order the plaintiff to post a good and sufficient surety bond or cash.¹⁵

The court may grant injunctive relief and impose conditions on the defendant which are consistent with and in accordance with law and any rules or regulations adopted by any state or local governmental agency which is charged to protect the air, water, and other natural resources of the state from pollution, impairment, or destruction.¹⁶ The doctrines of res judicata and collateral estoppel shall apply.¹⁷ The court shall make such orders as necessary to avoid multiplicity of actions.¹⁸

In any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, DLA, a political subdivision or municipality of the state, or a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state.¹⁹

A citizen whose substantial interests will be determined or affected by a proposed agency action from initiating a formal administrative proceeding under s. 120.569 or s. 120.57, F.S.²⁰ A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by chapter 403, F.S.²¹ No demonstration of special injury different in kind from the general public at large is required.²² A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by chapter 403, F.S.²³

Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, F.S., provided that the Florida corporation not for profit was formed at least 1 year prior to the date of

¹⁴ Id.

¹⁵ Id.

¹⁶ Fla. Stat. § 403.412(3).

¹⁷ Fla. Stat. § 403.412(4).

¹⁸ Id.

¹⁹ Fla. Stat. § 403.412(5). The term "intervene" means to join an ongoing s. 120.569 or s. 120.57 proceeding; this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under s. 120.569 or s. 120.57, F.S.

²⁰ Fla. Stat. § 403.412(5).

²¹ Id.

²² Id.

²³ Id.

the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.²⁴

In a matter pertaining to a federally delegated or approved program, a citizen of the state may initiate an administrative proceeding under this subsection if the citizen meets the standing requirements for judicial review of a case or controversy pursuant to Article III of the United States Constitution.²⁵

B. EFFECT OF PROPOSED CHANGES:

The proposal provides that the natural resources of the state are the legacy of present and future generations. The proposal gives every person a right to a clean and healthful environment, including clean air and water; control of pollution; and the conservation and restoration of the natural, scenic, historic, and aesthetic values of the environment as provided by law. The proposal allows any person to enforce this right against any party, public or private, subject to reasonable limitations, as provided by law.

The proposal appears to expand the parties that may have legal standing to initiate or intervene in civil or administrative legal actions.²⁶ It may create a new legal cause of action that previously did not exist.²⁷ It also could have the effect of allowing a legal action against “an entity that is impacting the environment in accordance with law.”²⁸

The proposal provides that enforcement is subject to “reasonable limitations as provided by law.” The phrase by law means by act of the legislature.²⁹ The exact extent or nature of such enforcement is unknown, but may include administrative, civil, or criminal legal actions.³⁰

C. FISCAL IMPACT:

Indeterminate.

III. Additional Information:

A. Statement of Changes:

(Summarizing differences between the current version and the prior version of the proposal.)

None.

²⁴ Fla. Stat. § 403.412(6).

²⁵ Fla. Stat. § 403.412(7).

²⁶ Department of Environmental Protection Analysis on file with the CRC.

²⁷ Analysis by Kai Su on file with the CRC.

²⁸ Department of Environmental Protection Analysis on file with the CRC.

²⁹ *See, Holzendorf v. Bell* 606 So.2d 645, 648 (Fla. 1st DCA 1992). Under the Constitution, the phrase "as provided by law" means as passed "by an act of the legislature."

³⁰ Department of Environmental Protection Analysis on file with the CRC.

B. Amendments:

Amendment 367752 was adopted limiting the right of enforcement to residents of Florida not including corporations from any person.

C. Technical Deficiencies:

None.

D. Related Issues:

None.