



# The Florida Senate

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Committee on Environmental Preservation and Conservation

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## ENVIRONMENTAL REGULATION COMMISSION

### Issue Description

The Environmental Regulation Commission (ERC, Commission), established in Section 20.255(7), F.S., exercises the standard-setting authority of the Department of Environmental Protection (DEP) under chapter 403, part II of chapter 376 and various sections of chapter 373, F.S. It is a non-salaried, seven-member board selected by the Governor, who represent agriculture, the development industry, local government, the environmental community, citizens and members of the scientific and technical community. The ERC sets standards and rules that protect Floridians and the environment based on sound scientific and technical validity, economic impacts, and risks and benefits to the public and Florida's natural resources. However, the ERC does not establish DEP policies, priorities, plans or directives. Common issues presented to the ERC relate to air pollution, water quality and waste management. The DEP staffs the ERC to provide the technical and scientific expertise necessary to conduct its business. Based on recent changes to the rulemaking provisions of chapter 120, F.S., and the need for legislative ratification for many agency rules, the relevance of the ERC will be examined in this report.

### Background

#### Creation and Organization

The ERC was created in 1975 concurrent with the creation of the Department of Environmental Regulation (DER),<sup>1</sup> which was subsequently reorganized into the current DEP. The ERC was an integral part of the regulatory system in place with the new DER, which was headed by a Secretary. The ERC is composed of seven residents from various areas of expertise and appointed by the Governor, subject to confirmation by the Florida Senate.<sup>2</sup> The specific backgrounds and expertise include: two lay citizens and one each from agriculture, science and technical, development, environmental community, and local government. In addition, the Governor is required to make a reasonable effort to ensure the members represent all sections of the state.<sup>3</sup> The Governor appoints the chair, while the vice chair is elected from the Commission's membership. Each member is appointed to a four-year term, without a term limit. The members serve in a volunteer capacity but are entitled to paid travel and per diem while in the performance of their duties.<sup>4</sup> The ERC's administrative and personnel requirements are provided by DEP staff. The ERC is also allowed to contract with outside legal counsel and other technical consultants when necessary.<sup>5</sup> The Commission may take four actions for any given rule that comes before it: approve, approve with modifications, disapprove or defer. It schedules monthly meetings but may meet less often as workload dictates. While the ERC usually meets in Tallahassee, it may hold meetings in other parts of the state, if the need arises, for rules and standards that affect specific areas in order to allow the public greater access to testify.

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<sup>1</sup> Chapter 75-22, s. 6, Laws of Fla. See also section 20.255(7), F.S.

<sup>2</sup> Section 20.255(7), F.S.

<sup>3</sup> *Id.*

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

<sup>5</sup> *Id.*

## Amendments

Section 403.804, F.S., which lists the ERC's powers and duties, has been amended several times since its inception in 1975. Originally, the ERC was the exclusive standard-setting authority for the DER, with provided exceptions. The ERC also served as an adjudicatory body to rule on final agency actions.<sup>6</sup> In addition, the Commission approved all applications for and disbursements of federal grants. The ERC's role was significantly altered in 1980. Senate Bill 1260 (1980) removed the Commission's role as an adjudicatory body and reduced its authority over federal disbursements and grants to just those concerning the construction of wastewater or water treatment works.<sup>7</sup> The Secretary was also given certain rulemaking authority. The Secretary's authority was still limited by the ERC's existing authority as the exclusive standard-setting body for the DER.<sup>8</sup> However, the Secretary's powers were further expanded to allow him or her to adopt rules or standards that were substantively the same as federal standards without having to submit them to the ERC for approval.<sup>9</sup>

In 1983, the Commission's powers were expanded to authorize it to establish priorities and have final approval for state applications for grants and disbursements for state wastewater or water treatment works. The Commission's authority over federal grants and disbursements remained unchanged.<sup>10</sup>

The ERC's role was again modified in 1995 and 2002 to further reduce the ERC's role. House Bill 855 (1995) removed the Commission's authority as the exclusive standard-setting body for the now DEP.<sup>11</sup> The Commission's authority over standard-setting was reduced to chapter 403; Part II of chapter 376 and various sections of chapter 373, FS.<sup>12</sup> The Legislature also required the ERC, in its exercise of its authority, to consider scientific and technical validity, economic impacts and relative risks and benefits to the public and the environment.<sup>13</sup> The 1995 amendment also specifically prohibited the ERC from establishing DEP policies, priorities, plans or directives.<sup>14</sup> In 2002, the ERC's authority over final approvals of state and federal grants for wastewater and water treatment works was repealed.<sup>15</sup>

Section 20.255(7), F.S., was amended in 2008 based on a Senate Sunset Review of the DEP.<sup>16</sup> The report indicated the Commission was not authorized to hire outside counsel or technical experts. To preserve the Commission's independent nature, the report recommended the Legislature consider granting this authority to the ERC. The Legislature did so during the 2008 Regular Session.<sup>17</sup>

Finally, in 2010, the Legislature passed House Bill 1565.<sup>18</sup> The law provides the Legislature veto authority over certain rules that are presented to the ERC for consideration. The law imposes a requirement on all agencies, including DEP, that if a proposed rule would adversely affect any small business, or if it would result in additional regulatory costs of \$200,000 in the first year after implementation, an expanded Statement of Estimated Regulatory Costs (SERCs) must be prepared.<sup>19</sup> In addition to previously required components of SERCs, the law

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<sup>6</sup> Chapter 403.804(1), F.S. (1975). *See also* ch. 75-22, s. 6, Laws of Fla.

<sup>7</sup> Chapter 80-66, s. 4, Laws of Fla.

<sup>8</sup> E-mail from Jon Steverson, Director of Legislative Affairs, DEP, (July 6, 2011) (on file with Senate Committee on Environmental Preservation and Conservation).

<sup>9</sup> *Id.*

<sup>10</sup> Chapter 83-310, s. 54, Laws of Fla.

<sup>11</sup> The Department of Environmental Regulation and the Department of Natural Resources were merged into one agency, the DEP, in 1993.

<sup>12</sup> Chapter 95-295, s. 3., Laws of Fla.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Chapter 2002-296, s. 41, Laws of Fla.

<sup>16</sup> The Florida Senate, *Agency Sunset Review of the Department of Environmental Protection – Report Number 2008-210* (2008), available at [http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim\\_reports/pdf/2008-210eplong.pdf](http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-210eplong.pdf) (last visited July 19, 2011).

<sup>17</sup> Chapter 2008-250, s. 1, Laws of Fla.

<sup>18</sup> Chapter 2010-279, Laws of Fla. The bill was passed during Special Session A in November 2010. It was a veto override of then Governor Crist.

<sup>19</sup> *Id.*

requires agencies to assess the impacts of a proposed rule on economic growth, private sector job creation and employment, private sector investment, competitiveness, productivity, innovation, and regulatory costs.<sup>20</sup> If impacts on any of these criteria exceed \$1 million dollars, the rule may be adopted, but will not go into effect until ratified by the Legislature. Since many, if not most, standards and rules presented to the ERC would trigger these provisions, the Legislature ultimately controls whether such rules will be implemented.<sup>21</sup>

### Evolution of Agency Rulemaking

Over the past 35 years, since the creation of DER, agency discretion with respect to rulemaking has been steadily limited. As DEP staff reports:

In 1975, an agency was free to adopt rules that were reasonably related to the purpose of the statute being implemented, and that were not arbitrary or capricious. Now, an agency must have not only general rulemaking authority, but also specific authority for each rule it adopts. In addition, agencies must adopt the lowest cost alternative proposed for a rule that substantially accomplishes the purpose of the statute being implemented.<sup>22</sup>

Changes to the Administrative Procedures Act (APA) dealing with administrative challenges to rules have also shifted the burden of proof with respect to rulemaking from the petitioner to the agency. In the past, the petitioner had the burden to prove the proposed rule exceeded the delegated legislative authority given to the agency. Currently, when a proposed rule is challenged, the petitioner has the burden of going forward while the agency has the burden of proving through a preponderance of the evidence in a de novo proceeding before an Administrative Law Judge (ALJ) that the rule does not exceed its delegated legislative authority.<sup>23</sup>

Additionally, the rulemaking process has become increasingly more structured and available to the public. In 1975, agencies were only required to give notice that a rule was being considered when it was ready to propose a rule. They were not required to hold any workshops for rulemaking or consider the ramifications of rules on small businesses, municipalities or counties.<sup>24</sup> Persons desiring to challenge the proposed rule had 14 days from the date of publication.<sup>25</sup> Currently, agencies have many more steps and public notices before a rule can be finalized and adopted.<sup>26</sup> Agencies must publish a notice of rule development as the first step in the rulemaking process.<sup>27</sup> It also must hold a rulemaking workshop if requested by any affected person, unless the agency head explains why a workshop is unnecessary.<sup>28</sup> The timing has also been extended for any affected person to challenge a proposed rule. A challenge may be initiated within 21 days after a rule is published, within 10 days after the final public hearing on the proposed rule, within 20 days after publication of a SERC, or within 20 days after a notice of change is published.<sup>29</sup>

### 2008 Department of Environmental Protection Sunset Review

In the 2008 DEP sunset review, Senate staff made some DEP relevant findings regarding the ERC. It found that the Commission relies on DEP to provide technical and scientific expertise for air pollution, water quality and waste management issues.<sup>30</sup> The report also indicated that questions as to the Commission's independence had arisen.<sup>31</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Supra* note 8.

<sup>22</sup> *Supra* note 8.

<sup>23</sup> Section 120.56(2)(a), F.S. *See also Fla. Dep't of Transportation v. J.W.C.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

<sup>24</sup> Section 120.536(3)(b)2., F.S.

<sup>25</sup> *Supra* note 8.

<sup>26</sup> See generally ss. 120.525-120.55, F.S. (agency rulemaking requirements of the Administrative Procedures Act).

<sup>27</sup> Section 120.536(2)(a), F.S.

<sup>28</sup> Section 120.536(c), F.S.

<sup>29</sup> Section 120.56(2), F.S.

<sup>30</sup> The Florida Senate, *Agency Sunset Review of the Department of Environmental Protection – Report Number 2008-210* (2008), available at [http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim\\_reports/pdf/2008-210eplong.pdf](http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-210eplong.pdf) (last visited July 19, 2011).

<sup>31</sup> *Id.* at 65.

To alleviate such concerns, Senate staff recommended that the ERC be allowed to contract with outside counsel and technical consultants. In light of the recommendation, the Legislature gave the Commission the authority to do so.<sup>32</sup> In a 2007 Sunset Memorandum, the Office of Program Policy Analysis and Government Accountability also determined the ERC serves an important public function in the rulemaking process and recommended retention of the Commission.<sup>33</sup> The Senate report also found the cost to the DEP was nominal in fiscal year 2006-2007 at \$13,790 and was funded from the Administrative Trust Fund, though the costs provided in the report do not include travel and per diem expenses for Commission members.<sup>34</sup> Ultimately, the Senate report recommended the ERC be retained with minor modifications.<sup>35</sup> However, it should be noted that this report was completed prior to the Legislature passing the requirement that certain rules come before the Legislature for ratification.

### ERC's Evolving Role

As stated earlier, the Commission's original roles in 1975 were as the exclusive standard-setting authority for the DER and as an adjudicatory body for final agency actions. These roles must be viewed in the proper historical context. Two landmark pieces of federal legislation had recently been passed, the Clean Air Act, in 1970,<sup>36</sup> and the Clean Water Act, in 1972.<sup>37</sup> These two laws significantly revised the way the United States viewed and regulated both air and water. One tenet of both laws was allowing states the latitude to implement many of the required standards. Air and water were at the forefront of standard-setting for the state and the ERC played a pivotal role in guiding and developing those standards for Florida.

Over time, as Florida's air and water policy and standards have matured, the ERC's role has depended largely upon the Chair. There have been some Chairs who have believed the purpose of the Commission was to initiate rule development and review existing agency rules, which was not prohibited in statute until 1995.<sup>38</sup> Dick Batchelor, who headed the commission from 1991 to 1997, worked closely with the secretaries of the DER and later the DEP in the rulemaking process.<sup>39</sup> After 1995, subsequent Chairs of the Commission have been unable to initiate rulemaking or give policy guidance to the department.

Given the ERC's currently limited role in reviewing highly technical air and water standards, there has been a precipitous decline in the number of meetings the ERC has held. The Commission met seven times in 2008 and only three times in 2009 and 2010. The most recent activity has been heavily related to the setting of numeric nutrient criteria for Florida's water bodies to comply with the U.S. Environmental Protection Agency's implementation of the Clean Water Act.<sup>40</sup> Before the EPA adopted numeric nutrient standards for Florida's water bodies, the DEP was creating similar rules and standards.

The ERC has not met in 2011 as all scheduled meetings have been cancelled thus far. The Commission has four scheduled meetings remaining in 2011.<sup>41</sup>

<sup>32</sup> Chapter 2008-250, s. 1, Laws of Fla.

<sup>33</sup> Office of Program Policy Analysis and Government Accountability, Florida Legislature, *Sunset Memorandum – Department of Environmental Protection Advisory Committees*, Report No. 07-S07 (Sep. 2007), <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/07-S07.pdf> (last visited July 22, 2011).

<sup>34</sup> *Supra* note 30, at 65.

<sup>35</sup> *Id.*

<sup>36</sup> U.S. Environmental Protection Agency (EPA), *Clean Air Act – History of the Clean Air Act*, [http://www.epa.gov/air/caa/caa\\_history.html](http://www.epa.gov/air/caa/caa_history.html) (last visited July 19, 2011).

<sup>37</sup> EPA, *Laws and Regulations – History of the Clean Water Act*, <http://www.epa.gov/regulations/laws/cwahistory.html> (last visited July 19, 2011).

<sup>38</sup> Chapter 95-295, s. 3., Laws of Fla.

<sup>39</sup> Bruce Ritchie, *Florida environmental commission is a shell of its former self*, FloridaEnvironments.com, July 6, 2011, <http://bruceritchie.blogspot.com/2011/07/florida-environmental-commission-is.html> (last visited July 20, 2011).

<sup>40</sup> Florida was sued by a number of environmental groups for violations of the Clean Water Act. The EPA signed a consent decree with the environmental groups and found that Florida was in violation of the Clean Water Act for using narrative water quality standards rather than numeric ones. Florida and several stakeholder groups are now suing the EPA over implementation of federal numeric nutrient criteria for Florida.

<sup>41</sup> DEP, *Environmental Regulation Commission – Schedule of Meetings*, <http://www.dep.state.fl.us/legal/ERC/default.htm> (last visited July 20, 2011).

## Findings and/or Conclusions

Sections 20.255(7) and 403.804, F.S., govern the organization and powers and duties of the Commission. They have been amended numerous times since 1975 to modify and clarify the ERC's roles. Most recently, the Commission has been granted the ability to hire outside consultants and technical experts as the need arises in order to maintain the idea that it is an independent body. Additionally, the ERC is the only citizen body in Florida that has the authority to adopt agency standards and rules.

While the ERC is still a standard-setting body for the DEP, its role has evolved to become less significant in the rulemaking process. As originally conceived, the Commission was the exclusive standard-setting authority for the then DER, as well as an adjudicatory body for final agency actions. In addition, the Commission, under certain leadership, helped guide agency policy and initiate rulemaking. Through multiple amendments to its governing statutes over the years, the ERC's continued role is to approve, modify, disapprove or defer standards that the DEP brings to it.

The rulemaking process is constantly evolving. The public is now granted much more time and access to the rulemaking process than when the ERC was created. The DEP is required to publish notices throughout the process to inform the public. Challenges to rules have also evolved. Previously, petitioners had the burden of proof when challenging that a rule exceeded delegated legislative authority. Currently, petitioners have the burden of going forward; however an agency has the burden of proof by a preponderance of the evidence in a de novo proceeding before an ALJ that the challenge rule is not an invalid exercise of delegated legislative authority.

The Legislature, in passing HB 1565 in 2010, has taken on a larger role in rule implementation. Rules that meet certain criteria must be sent to the Legislature for ratification. This law applies to rules that come before the ERC. If a rule is approved by the ERC, it may still require Legislative ratification before the DEP can begin implementation and enforcement. This process has shifted some of the rulemaking process from the Executive branch to the Legislative branch.

Numerous stakeholders in both the environmental and regulated communities have expressed that the ERC still has many important functions even if the Legislature requires ratification of many of the rules that come before it. Three of the ERC's most important continuing roles are to take public testimony, provide independent technical expertise and feedback to the department to enhance and potentially fine tune proposed rules, and provide review of rules by an unbiased lay board constituted from members of varying technical and geographical backgrounds.

The ERC, acting as an independent citizen board, is an important public access point in the rulemaking process. The public may lobby individual members, and attend or testify before the ERC on proposed rules. If the Commission is abolished, this function would be lost. Although the public still has access at other points in the rulemaking process, neither agency meetings nor Legislative hearings on a rule purport to offer the same independent review that the Commission strives to undertake. However, an affected party's right to bring a chapter 120, F.S. (APA) challenge remains as one of the most powerful tools interested parties have. Even if the ERC were eliminated, the right to challenge agency rules in an independent proceeding before an administrative law judge remains.

## Options and/or Recommendations

While the ERC could potentially be eliminated, some important Commission functions must be considered. First, the Legislature would have to allow the Secretary of the DEP (or some other authority) to adopt rules that are currently within the Commission's purview.

Second, even though some rules will come to the Legislature for ratification, the fine tuning aspect of the ERC may be lost. This is due in large part to the fact that the Commission is a citizen board that represents various backgrounds and areas of the state. While members of the Legislature represent varying backgrounds and levels

of expertise as well, the ERC can meet more frequently throughout the year and may defer any rules that need further work on a time frame that the Legislature cannot match.

Last, the Commission's authority to adopt rules is not affected by the Legislature's new ratification requirement. However, the reality is rules adopted by the ERC that require legislative ratification are unenforceable until ratified. In this respect, the ERC's role as an authority for adopting such rules is redundant.

Ultimately, the ERC serves some important functions that cannot be easily replaced, or at all, if it is eliminated. While its authority to adopt rules and standards has been reduced by the requirement that some rules receive legislative ratification, this amounts to just one function that may be redundant. However, the Commission is an important public access point in the rulemaking process and can hold meetings around the state when needed. The recent amendment allowing it to hire outside counsel and experts preserves and protects its purpose as independent from the DEP. In addition, the Legislature may be well served by the Commission's ability to fine tune and vet rules before they come to the Legislature for ratification. Based on the findings above, it is recommended that the ERC be retained in its current form.