

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 861 Environmental Regulation Commission
SPONSOR(S): Natural Resources & Public Lands Subcommittee and Willhite
TIED BILLS: IDEN./SIM. **BILLS:** SB 198

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Natural Resources & Public Lands Subcommittee	14 Y, 0 N, As CS	Gregory	Shugar
2) Oversight, Transparency & Administration Subcommittee		Grosso	Harrington
3) Government Accountability Committee			

SUMMARY ANALYSIS

The Environmental Regulation Commission (ERC) exists within the Department of Environmental Protection (DEP). Seven members appointed by the Governor and approved by the Senate serve on the ERC. When making appointments, the Governor must provide reasonable representation from all sections of the state. Membership of the ERC must be representative of agriculture, the development industry, local government, the environmental community, lay citizens, and members of the scientific and technical community. The ERC members serve for four years. The Governor may fill a vacancy on the ERC at any time.

The secretary of DEP must submit any proposed rule containing a standard to the ERC for approval, modification, or disapproval. A "standard" is any DEP rule relating to air or water quality, noise, solid waste management, or electric and magnetic fields associated with electrical transmission and distribution lines and substation facilities.

The bill changes how the Governor may fill vacancies on the ERC and changes the voting requirements for certain standards approved, modified, or disapproved by the ERC. Specifically, the bill:

- Requires the Governor to fill vacancies on the ERC within 90 days, subject to confirmation by the Senate;
- Removes the Governor's power to fill vacancies on the ERC at any time for an unexpired term;
- Requires any proposed rules containing standards submitted to the ERC for approval, modification, or disapproval to receive a simple majority vote for approval or modification, except for the air quality standards, water quality standards, and water quantity standards, that must receive a supermajority of five votes for approval or modification; and
- Deems proposed rules presented to the ERC that fail to receive the votes required for approval or modification, disapproved.

The bill does not appear to have a fiscal impact on the state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Environmental Regulation Commission

The Environmental Regulation Commission (ERC) exists within the Department of Environmental Protection (DEP). Seven members appointed by the Governor and approved by the Senate serve on the ERC. When making appointments, the Governor must provide reasonable representation from all sections of the state. Membership of the ERC must be representative of agriculture; the development industry; local government; the environmental community; lay citizens; and members of the scientific and technical community who have substantial expertise in the areas of the fate and transport of water pollutants, toxicology, epidemiology, geology, biology, environmental sciences, or engineering.¹

The Governor must appoint a chair of the ERC. The members of the ERC may then elect a vice-chair. The ERC members serve for four years.²

The secretary of DEP must submit any proposed rule containing a standard to the ERC for approval, modification, or disapproval.³ A “standard” is any DEP rule relating to air or water quality, noise, solid-waste management, or electric and magnetic fields associated with electrical transmission and distribution lines and substation facilities. The term “standard” does not include rules of DEP that relate exclusively to the internal management of DEP, the procedural processing of applications, the administration of rulemaking or adjudicatory proceedings, the publication of notices, the conduct of hearings, or other procedural matters.⁴ The ERC possesses the power to set standards for the following topics:

- Environmental control, including air quality standards; water quality and water quantity standards; waste regulation and cleanup, including hazardous waste regulation; power plant and transmission line siting; water supply; water treatment plants; and natural gas transmission lines;
- Consumptive use of water permitting;
- Certain aspects of water well construction;
- Criteria for wetlands that receive and treat domestic wastewater;
- Water quality for wetlands;
- Regulation of the construction, operation, alteration, maintenance, abandonment, and removal of stormwater management systems;
- Delineating the extent of wetlands;
- Phosphorus criteria in the Everglades Protection Area and water quality standards applicable to the Everglades Agricultural Area canals; and
- Water quality standards for the Everglades Protection Area.⁵

The ERC does not possess the power to set standards related to total maximum daily load calculations and allocations.⁶ Further, the ERC may not establish DEP policies, priorities, plans, or directives. The ERC may adopt procedural rules governing the conduct of its meetings and hearings.⁷

¹ Section 20.255(6), F.S.

² *Id.*

³ Section 403.805(1), F.S.

⁴ Section 403.803(13), F.S.

⁵ Section 403.804(1), F.S.

⁶ Section 403.805(1), F.S.

⁷ Section 403.804(1), F.S.

The following individuals currently serve on the ERC:⁸

Name	Term	City	Represents
Frank Gummy	12/16/16 to 07/01/17	City of New Smyrna Beach	Local Governments
Joe Joyce	10/02/15 to 07/01/19	Gainesville	Agriculture
Adam R. Gelber	10/02/15 to 07/01/19	Miami	Science & Technical
Cari Roth	03/31/10 to 07/01/17	Tallahassee	Development
Sarah S. Walton	03/07/14 to 07/01/17	Pensacola	Lay Citizens
Craig D. Varn	05/10/16 to 03/01/19	Tallahassee	Lay Citizens
Jim McCarthy	12/16/16 to 07/01/19	Jacksonville	Environmental Community

Office Vacancies filled by the Governor

Unless otherwise provided by the Florida Constitution, the Governor must fill by appointment any vacancy in a state, district, or county office for the remainder of the term of an appointed officer.⁹ For any office that requires Senate confirmation, the appointee may hold an interim term until the Senate takes up their confirmation.¹⁰ When the Senate rejects an officer, they may hold over for no more than thirty days until the Governor appoints their successor, and the successor is qualified.¹¹

If the Senate votes to take no action on a confirmation or otherwise fails to consider an appointee, the seat becomes vacant and the appointee may hold over for no more than forty-five days. The Governor may reappoint this appointee.¹² If the Senate votes to take no action or for any other reason fails to consider the reappointment of the same person to the same office during the regular session immediately following the effective date of the reappointment, the reappointment of such person to such office shall be deemed to have been rejected. The office shall become vacant upon the adjournment sine die of the regular session immediately following the effective date of the reappointment and the appointee shall not hold over in that office or be eligible for reappointment in that office for one year thereafter.¹³

The Governor may fill a vacancy on the ERC at any time.¹⁴

Human Health Criteria Rule Changes

During the summer of 2016, the ERC took up a rule proposal to change certain human health based water quality criteria, including the establishment of a new classification of waters. DEP used a new methodology to update these standards. Some standards became more protective, while others became less protective.¹⁵

At the time the ERC considered the proposed rule changes, two vacancies existed on the ERC. These vacancies were meant to represent local government and the environmental community. Some groups complained the ERC should have waited to take up the proposed human health criteria until the Governor filled the two vacancies. The ERC voted 3-2 to approve the new standards.¹⁶ The revised rules became effective on November 17, 2016.¹⁷

⁸ DEP, *Environmental Regulation Commission*, <http://www.dep.state.fl.us/legal/ERC/members.htm> (last visited March 7, 2017).

⁹ Section 114.04, F.S.

¹⁰ *Id.*

¹¹ Section 114.05(1)(d), F.S.

¹² Section 114.05(1)(e), F.S.

¹³ Section 114.05(1)(f), F.S.

¹⁴ Section 20.255(6), F.S.

¹⁵ DEP, *Surface Water Quality Standards*, <http://www.dep.state.fl.us/water/wqssp/> (last visited March 16, 2017); Jeff Burlew, *ERC signs off on controversial water standards*, Tallahassee Democrat (July 26, 2016), <http://www.tallahassee.com/story/news/2016/07/26/erc-signs-off-controversial-water-standards/87585308/> (last visited March 7, 2017).

¹⁶ *Id.*

¹⁷ Rules 62-302.400 and 62-302.530, F.A.C.

EFFECT OF THE PROPOSED CHANGES

The bill changes how the Governor must fill vacancies on the ERC and changes the voting requirements for certain standards approved, modified, or disapproved by the ERC. The bill requires the Governor to fill vacancies on the ERC within 90 days, subject to confirmation by the Senate. The bill removes the Governor's authority to fill a vacancy on the ERC at any time for an unexpired term. The Governor must fill vacancies on the ERC using the procedures of ch. 114, F.S.

The bill also requires any proposed rules containing standards submitted to the ERC for approval, modification, or disapproval to receive a simple majority vote for approval or modification, except for air quality standards, water quality standards, and water quantity standards that must receive a supermajority of five votes for approval or modification.

The bill deems proposed rules presented to the ERC that fail to receive an adequate number of votes disapproved.

B. SECTION DIRECTORY:

Section 1. Amends s. 20.255, F.S., relating to the Department of Environmental Protection.

Section 2. Amends s. 403.805, F.S., relating to the Secretary of the Department of Environmental Protection, its powers and duties, and review of specified rules.

Section 3. Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not provide rulemaking authority or require executive branch rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 20, 2017, the Natural Resources and Public Lands Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed the procedures for filling vacancies on the ERC that were inconsistent with ch. 114, F.S.;
- Consolidated the list of standards that require five votes from the ERC that were duplicative; and
- Removed “hazardous standard release notification” from the list of standards requiring five votes from the ERC because “hazardous standard release notification” is not a standard within the meaning of ch. 403, F.S.

This analysis is drawn to the committee substitute reported favorably by the Natural Resources and Public Lands Subcommittee.