

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 19, 1998 Revised: _____

Subject: Administrative Procedures Act; Rulemaking Adoption Procedures

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Nebelsiek</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
2.	<u>_____</u>	<u>_____</u>	<u>JU</u>	<u>Withdrawn</u>
3.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
4.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
5.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>

I. Summary:

Under this bill agencies are required to file both an “initial” notice and a “final” notice of intended action. The four separate points of entry into the rulemaking process allowing the public an opportunity to challenge a proposed are consolidated into one point of entry which occurs after filing of the final notice of intended action.

This bill substantially amends section 120.54, Florida Statutes.

II. Present Situation:

Chapter 120, F.S. the Administrative Procedures Act (APA) governs agency adjudication and rulemaking. When an agency conducts investigations, grants or denies licenses or permits, and disciplines employees and licensees, it is performing executive functions. The Legislature, however, may delegate to an agency the power to adopt rules. When an agency promulgates rules, the agency performs a quasi-legislative function.

A rule is defined by s. 120.52(15), F.S., to mean:

...each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule...

Rulemaking is not a matter of agency discretion. Section 120.54(1), F.S., provides that each agency statement defined as a rule must be adopted by the rulemaking procedure provided in the APA as soon as feasible¹ and practicable.²

An agency often devotes substantial amounts of time in formulating, drafting, and revising a proposed rule before a rule is adopted. Public participation in the formulation of rules is encouraged under the APA and, as a result, provision of public notice of rulemaking is emphasized. Generally, notice must be published in the Florida Administrative Weekly (FAW). Section 120.54(2)(a), F.S., requires an agency to provide a notice of the development of a proposed rule in the FAW. This notice must be provided prior to publication of a notice of the adoption of the proposed rule. Additionally, the public has four separate points of entry into the rulemaking process to challenge a proposed rule beginning as soon as the proposed rule is noticed.

An agency is authorized to hold public workshops for the purpose of rule development. An agency must hold public workshops for rule development purposes, including workshops in various regions of the state, if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary.³ If an agency conducts a public workshop for rule development purposes, the agency must give notice in the FAW not less than 14 days prior to the scheduled date and ensure that persons responsible for preparing the proposed rule are available to explain the agency's proposal in order to respond to questions or comments regarding the rule that is being developed. Rule development workshops may be facilitated or mediated by a neutral third person. Additionally, an agency may employ negotiated rulemaking⁴ in developing rules, as well as use other unidentified types of dispute resolution alternatives for the rule development workshop that are appropriate for rule development.

Prior to the adoption, amendment, or repeal of a non-emergency rule, an agency must, upon approval of the agency head, give notice of its intended action pursuant to s. 120.54(3)(a)1., F.S. This notice must be published in the FAW not less than 28 days prior to the intended action. It

¹Rulemaking is presumed feasible unless the agency proves that: (a) the agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; (b) related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or (c) the agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

²Rulemaking is presumed practicable to the extent necessary to provide fair notice to affected person of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that: (a) detail or precision in the establishment of principles, criteria, or standards for agency decision is not reasonable under the circumstances; or (b) the particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

³The explanation is not final agency action subject to review under ss. 120.569 and 120.57, F.S., 1997.

⁴Negotiated rule development is recommended when a complex rule is being drafted or when strong opposition to the rule is anticipated. Negotiated rulemaking uses a committee of designated representatives to draft a mutually acceptable proposed rule. When this process is used, an agency must publish in the FAW a notice of the process that includes a listing of the representative groups that will be invited to participate in the process.

also must be mailed to all persons named in the proposed rule and to all persons who have requested, within 14 days prior to the mailing, that the agency provide them with advance notice of the proceedings. The agency also must provide the Joint Administrative Procedures Committee (JAPC) with a copy of the notice at least 21 days prior to the proposed adoption date.⁵ The JAPC, pursuant to s. 120.545, F.S., examines each proposed agency rule as a legislative check on legislatively created authority.

The notice of intent to adopt, amend, or repeal a rule must set forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes being implemented, interpreted, or made specific. Additionally, the notice must include a summary of the agency's statement of the estimated regulatory costs (SERC), if one has been prepared.⁶ The notice also must contain a statement that any person who wishes to provide the agency with information regarding the SERC, or to provide a proposal for a lower cost regulatory alternative, that they must do so in writing within 21 days after publication of the notice. The notice also must state the procedure for requesting a public hearing on the proposed rule.

Section 120.54(3)(c), F.S., authorizes an agency to hold a public hearing on the proposed action, and requires the agency, upon the request of any affected person received within 21 days after the date of publication of the notice of intended action, to give affected persons an opportunity to present evidence and argument on all issues under consideration. Any material pertinent to the issues under consideration that are submitted to the agency within 21 days after the date of publication of the notice or submitted at a public hearing must be considered by the agency and made a part of the record of the rulemaking proceeding.

If a person asserts that his or her substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests, and the agency agrees, the agency must suspend the rulemaking proceeding and convene a separate proceeding under ss. 120.569 and 120.57, F.S. This separate proceeding is commonly called a "draw out" proceeding. Upon conclusion of the draw out, the rulemaking proceeding resumes.

After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, if the rule has not been changed or contains only technical changes, the adopting agency

⁵In addition to filing the notice with the JAPC, the agency must file a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of any statement of estimated regulatory costs that has been prepared; a statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and a copy of the proposed rule.

⁶Section 120.54(3)(b), F.S., encourages agencies to prepare a statement of estimated regulatory costs or SERC for a proposed rule, but an agency is only required to prepare a SERC if a substantially affected person submits a written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. Upon the submission of a lower cost regulatory alternative, an agency must prepare a SERC, revise an existing SERC, adopt the alternative, or state the reasons for rejecting the alternative in favor of the proposed rule. An automatic 21 day extension of the 90 day period for filing a rule is granted when lower cost regulatory alternatives are offered.

must file a notice to that effect in the FAW, with the JAPC, as well as provide copies to persons who request notice in writing, at least 21 days prior to filing the rule for adoption. After such notice is provided to the committee and prior to adoption, however, the agency can withdraw the rule in whole or in part. Written material used to make substantive changes can be received at any time prior to the filing of the rule for final adoption. After adoption and before the effective date, a rule can be modified or withdrawn only in response to an objection from the JAPC or the effective date could be extended by not more than 60 days.

If an agency is required to publish its rules in the Florida Administrative Code (FAC), it must file with the Department of State three certified copies of the rule it proposes to adopt, a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule. Agencies that are not required to publish in the FAC must file one certified copy of the proposed rule, as well as the other information required, in the office of the agency head.

At the time a rule is filed, which must be within 90 days of the notice required by s. 120.54(3)(a), F.S., an agency must certify that the time limitations prescribed have been met, that all statutory rulemaking requirements have been met, and that there is no administrative determination pending on the rule. At the time a rule is filed, the JAPC must certify whether the agency has responded in writing to all material and timely written comments or written inquiries made on behalf of the committee. The Department of State must reject any rule not filed within prescribed time limits, that does not satisfy all statutory rulemaking requirements, for which an agency has not responded in writing to all material and timely written inquiries, for which an administrative determination is pending, or which does not include a SERC, if one is required.

A proposed rule is adopted on being filed with the Department of State and becomes effective 20 days after being filed, unless a later date is specified.

III. Effect of Proposed Changes:

Section 1. The changes to s. 120.54, F.S. modify the rulemaking process by delineating the requirements under the newly created terms “initial” notice of intended action and publication of “final” notice. Currently, agencies are required only to file notice of intended action. Under this bill, agencies are required to file both an “initial” notice and a “final” notice of intended action. The references to “notice” are generally changed to “initial notice” while references to “filing the rule for adoption, proposed adoption date, and intended action” are replaced with “publication of final notice.” Initial notice of intended action must be given by the agency prior to the adoption, amendment, or repeal of any rule other than an emergency rule. All information required under the current law must be included in the initial notice.

The bill changes the rulemaking publication time lines. Instead of 28 days, the initial notice must be published in the FAW not less than 45 days before the publication of final notice. Additionally, the time of filing the necessary documents with the JAPC before the publication of final notice is moved from 21 to 45 days.

Section 120.54(3)(b), F.S., is amended to require that when an agency determines that the proposed action will affect a small business, instead of the current 28 days, the agency shall be required to provide notice to Office of Tourism, Trade and Economic Development (OTTED) not less than 45 days before the publication of the final notice. This bill eliminates the automatic 21-day extension of the 90-day period for filing the rule when regulatory alternatives are offered by the small business ombudsman. If the agency fails to adopt all alternatives offered by the small business ombudsman, the agency will be required to file a detailed report with the ombudsman as well with JAPC before publication of the final notice.

As amended, s. 120.54(3)(d), F.S., provides a procedure for publication of the newly created final notice; it also reorganizes the process for modifying and withdrawing proposed rules. After the hearings or time for hearings on the proposed rule have passed, the agency shall file notice of its intent to adopt, amend, or repeal the rule. The agency shall provide a copy of the notice to the JAPC not less than 10 days, increased from 7 days, before publication of the final notice. The new language provides that the final notice must contain: a summary of changes to the proposed rule or a statement indicating that the rule has not been changed; a reference to the FAW which contains the initial text of the proposed rule; the text of the changes or the complete final text; a statement of the estimated regulatory costs; a notice of right to challenge; and the deadline for challenging.

After initial notice and before providing a copy of the final notice to the JAPC, the agency may withdraw the rule upon publication of notice in the FAW. At this stage any substantive changes made to the rule in response to written material must be received within 30 days after the initial notice. After a copy of the final notice is provided to the JAPC, the agency may modify the rule only in response to an objection by the JAPC, make technical changes, or withdraw the rule upon publication of notice in the FAW. After adoption and before the effective date of the rule, an agency may modify the rule only in response to an objection by the JAPC or make technical changes to the rule. The agency must provide, through certified mail or actual delivery, a copy of the final notice to persons who have made timely requests for advance notice of proceedings and to those who request notice in writing.

Section 120.54(3)(e), F.S., is amended to provide that final adoption must be filed within 120 days after the initial notice. If a notice of public hearing is published before the expiration of the time to file the rule for adoption, an extension of up to 45 days will be granted. No extensions beyond the 120 day period are authorized. This section currently requires that filing shall be made no less than 28 days and no more than 90 days after the notice. This bill eliminates the specific provision authorizing a 45 day extension when a notice of change is filed.

Section 2. Amends s. 120.541, F.S., to provide that when a substantially affected person submits to an agency a good faith written proposal for a lower cost regulatory alternative, it must be submitted within 21 days after publication of the initial notice. The bill also provides that an agency which is required to prepare or revise a statement of estimated regulatory costs shall make it available to the person who submits the lower cost regulatory alternative and to the public

before the publication of final notice of agency action, instead of providing that information prior to filing the rule for adoption.

Section 3. Section 120.545(1)(e), F.S., is amended to accommodate the use of “initial” and “final” notices of intended agency action. Sections 120.545(4) and (5), F.S., are amended to provide that when an agency elects to amend or repeal an existing rule to meet a JAPC objection, publication of a notice of rule development is not required, but initial notice is required in the next available issue of the FAW. Section 120.545(6), F.S., is amended to require that the amendment or repeal of an existing rule as a result of committee objection must be complete within 90 days after initial notice in the FAW.

Section 4. Amends s. 120.55(1)(b), F.S., by requiring that the Department of State publish in the FAW all rulemaking notices required by s. 120.54, F.S.

Section 5. This section amends ss. 120.56(2)(a) and (b) F.S. The four separate points of entry into the rulemaking process allowing the public an opportunity to challenge a proposed rule are consolidated into one point of entry which occurs after publication of the final notice of intended agency action. This section also provides that rules may not be filed for adoption until 28 days after the final notice, rather than 21 days as allowed under current law.

Section 6. The act would take effect October 1, 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

At the present time the public has four separate points of entry into the rulemaking process to challenge a proposed rule beginning as soon as the proposed rule is noticed. Under this bill, many items that might be the subject of a rule challenge presumably will be remedied prior to the public's only point of entry into the rulemaking process. If this is true, affected persons may save money in attorney's fees since most issues will be resolved prior to the public's opportunity to challenge a proposed rule.

C. Government Sector Impact:

In order to facilitate the time frames for review in this bill, the JAPC would have to meet more frequently than it does now. The magnitude of this fiscal impact is contingent upon the number of additional meetings that would be required of the Committee which will undoubtedly vary from year to year.

The rulemaking process would be slightly longer as a result of the changes proposed in SB 1482, which could have fiscal impact on agencies adopting rules for various reasons, such as, when a proposed rule imposes a fee.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.