

By Representative Bense

1 A bill to be entitled
2 An act relating to administrative procedure;
3 amending s. 57.111, F.S.; increasing the
4 maximum net worth for qualification as a small
5 business party under the Florida Equal Access
6 to Justice Act; increasing the limitation on
7 the amount of attorney's fees and costs that
8 may be awarded under the act; amending s.
9 120.573, F.S., which provides for mediation of
10 disputes under the Administrative Procedure
11 Act; revising the parties who must agree to
12 mediation and to the length of the mediation
13 period; revising requirements relating to the
14 mediation agreement; providing requirements for
15 the conduct of such mediation; providing
16 conditions under which the party subject to
17 agency action is entitled to recover attorney's
18 fees and costs after a subsequent hearing;
19 amending s. 120.574, F.S., which provides for
20 summary hearings under said act; redesignating
21 such hearings as expedited hearings; revising
22 conditions under which such hearings may be
23 held; specifying time periods for filing
24 objections to a motion for such a hearing;
25 removing the requirement that the
26 administrative law judge's decision is final
27 agency action and providing for a recommended
28 order and final agency action on that order;
29 amending s. 373.1501, F.S., relating to
30 administrative action with respect to project
31 components of the Central and Southern Florida

1 Project, s. 403.088, F.S., relating to
2 proceedings regarding permits for certain
3 facilities in the Everglades Protection Area,
4 and s. 408.7056, F.S., relating to certain
5 proposed orders under the Statewide Provider
6 and Subscriber Assistance Program, to conform
7 language with respect to expedited hearings;
8 amending s. 403.973, F.S., which provides for
9 expedited permitting for certain projects;
10 revising conditions under which the expedited
11 hearing provisions of the Administrative
12 Procedure Act apply to the expedited permitting
13 process; conforming language; amending s.
14 120.595, F.S.; providing for award of
15 attorney's fees and costs to the petitioner
16 when an agency statement is challenged under
17 the Administrative Procedure Act as not having
18 been properly adopted as a rule and the agency
19 has proceeded to rulemaking; amending s.
20 373.4141, F.S.; providing that an applicant for
21 a permit for a stormwater management system,
22 dam, impoundment, or other work under part IV
23 of ch. 373, F.S., may elect to publish notice
24 of such application; specifying effect of such
25 publication on the rights of substantially
26 affected persons and others to initiate
27 administrative proceedings with respect to such
28 application; providing conditions under which
29 approval or denial of an application by a water
30 management district governing board is presumed
31 correct in a subsequent administrative

1 proceeding; specifying the date by which a
2 final hearing must be held when a permit
3 application is challenged and providing that
4 certain construction activities may be
5 authorized during the pendency of the
6 administrative proceeding; providing an
7 effective date.

8

9 Be It Enacted by the Legislature of the State of Florida:

10

11 Section 1. Paragraph (d) of subsection (3) and
12 paragraph (d) of subsection (4) of section 57.111, Florida
13 Statutes, are amended to read:

14 57.111 Civil actions and administrative proceedings
15 initiated by state agencies; attorneys' fees and costs.--

16 (3) As used in this section:

17 (d) The term "small business party" means:

18 1.a. A sole proprietor of an unincorporated business,
19 including a professional practice, whose principal office is
20 in this state, who is domiciled in this state, and whose
21 business or professional practice has, at the time the action
22 is initiated by a state agency, not more than 25 full-time
23 employees or a net worth of not more than \$5~~\$2~~ million,
24 including both personal and business investments; or

25 b. A partnership or corporation, including a
26 professional practice, which has its principal office in this
27 state and has at the time the action is initiated by a state
28 agency not more than 25 full-time employees or a net worth of
29 not more than \$5~~\$2~~ million; or

30 2. Either small business party as defined in
31 subparagraph 1., without regard to the number of its employees

1 or its net worth, in any action under s. 72.011 or in any
2 administrative proceeding under that section to contest the
3 legality of any assessment of tax imposed for the sale or use
4 of services as provided in chapter 212, or interest thereon,
5 or penalty therefor.

6 (4)

7 (d) The court, or the administrative law judge in the
8 case of a proceeding under chapter 120, shall promptly conduct
9 an evidentiary hearing on the application for an award of
10 attorney's fees and shall issue a judgment, or a final order
11 in the case of an administrative law judge. The final order
12 of an administrative law judge is reviewable in accordance
13 with the provisions of s. 120.68. If the court affirms the
14 award of attorney's fees and costs in whole or in part, it
15 may, in its discretion, award additional attorney's fees and
16 costs for the appeal.

17 1. No award of attorney's fees and costs shall be made
18 in any case in which the state agency was a nominal party.

19 2. No award of attorney's fees and costs for an action
20 initiated by a state agency shall exceed \$75,000 ~~\$15,000~~.

21 Section 2. Section 120.573, Florida Statutes, is
22 amended to read:

23 120.573 Mediation of disputes.--

24 (1) Each announcement of an agency action that affects
25 substantial interests shall advise whether mediation of the
26 administrative dispute for the type of agency action announced
27 is available and that choosing mediation does not affect the
28 right to an administrative hearing. If the agency and the
29 party subject to the agency ~~all parties to the administrative~~
30 action agree to mediation, in writing, within 10 days after
31 the time period stated in the announcement for election of an

1 administrative remedy under ss. 120.569 and 120.57, the time
2 limitations imposed by ss. 120.569 and 120.57 shall be tolled
3 to allow the agency and parties to mediate the administrative
4 dispute. The mediation shall be concluded within 60 days of
5 such agreement unless otherwise agreed by the agency and the
6 party subject to the agency action ~~parties~~. The mediation
7 agreement shall include provisions for mediator selection, the
8 allocation of costs and fees associated with mediation, and
9 the mediating parties' understanding regarding the
10 confidentiality of discussions and documents introduced during
11 mediation, and may address the allocation of attorney's fees
12 and costs. If mediation results in settlement of the
13 administrative dispute, the agency shall enter a final order
14 incorporating the agreement of the parties. If mediation
15 terminates without settlement of the dispute, the agency shall
16 notify the parties in writing that the administrative hearing
17 processes under ss. 120.569 and 120.57 are resumed.

18 (2) Mediation shall be conducted in the following
19 manner:

20 (a) Each party shall have all persons necessary, with
21 complete settlement authority, present at the mediation.

22 (b) Each party shall mediate in good faith.

23 (c) All aspects of the mediation which are not
24 specifically established by this section must be conducted
25 according to the Florida Rules for Certified and
26 Court-Appointed Mediators adopted by the Florida Supreme
27 Court.

28 (d) If the parties do not settle the case pursuant to
29 mediation, the last offer of the party subject to agency
30 action made at mediation shall be recorded by the mediator in
31 a written report that describes the offer, states the amount

1 or content of the offer, the date the offer was made in
2 writing, and the date the offer was rejected. If the matter
3 subsequently proceeds to hearing under ss. 120.569 and 120.57
4 and the party subject to agency action prevails and the result
5 is the same or more favorable than the last offer made by that
6 party at mediation, then that party is entitled to recover
7 attorney's fees and costs from the petitioner.

8 Section 3. Section 120.574, Florida Statutes, is
9 amended to read:

10 120.574 Expedited ~~Summary~~ hearing.--

11 (1)(a) Within 5 business days following the division's
12 receipt of a petition or request for hearing, the division
13 shall issue and serve on all original parties an initial order
14 that assigns the case to a specific administrative law judge
15 and provides general information regarding practice and
16 procedure before the division. The initial order shall also
17 contain a statement advising the original parties addressees
18 that an expedited ~~a summary~~ hearing is available, provided the
19 affected agency agrees, upon the agreement of all parties
20 under subsection (2) and briefly describing the accelerated
21 ~~expedited~~ time sequences, limited discovery, and final order
22 provisions of the expedited summary procedure.

23 (b) Within 15 days after service of the initial order,
24 any party may file with the division a motion for expedited
25 ~~summary~~ hearing in accordance with subsection (2). If a
26 nonagency party files such a motion, and the affected agency
27 does not file a written objection within 7 days after the
28 service of that motion, or if the affected agency files such a
29 motion, and the party who is the subject of the agency action
30 does not file a written objection within 7 days after the
31 service of the motion, then the motion shall be granted and an

1 order shall be entered setting the hearing date, which shall
2 be held within 30 days from the date the response period to
3 the motion expires. If the affected agency files such a
4 motion, and the party who is the subject of the agency action
5 files a response within 7 days after service of that motion
6 objecting to the expedited hearing, the administrative law
7 judge shall, within 5 days from the filing of that response,
8 enter an order granting the motion for expedited hearing,
9 unless he or she determines that any of the original parties
10 will be unduly prejudiced thereby, which hearing shall be held
11 within 30 days from the date the order granting the expedited
12 hearing is entered.~~If all original parties agree, in writing,~~
13 ~~to the summary proceeding, the proceeding shall be conducted~~
14 ~~within 30 days of the agreement, in accordance with the~~
15 ~~provisions of subsection (2).~~

16 (c) Intervenors in the proceeding shall be governed by
17 the decision of the administrative law judge ~~original parties~~
18 regarding whether the case will proceed in accordance with the
19 expedited summary hearing process and shall not have standing
20 to challenge that decision.

21 (d) If a motion for expedited summary hearing is not
22 filed within 15 days after service of the division's initial
23 order, the matter shall proceed in accordance with ss. 120.569
24 and 120.57.

25 (2) In any case to which this subsection is
26 applicable, the following procedures apply:

27 (a) Motions shall be limited to the following:

- 28 1. A motion in opposition to the petition.
- 29 2. A motion requesting discovery beyond the informal
30 exchange of documents and witness lists described in paragraph

31 (b). Upon a showing of necessity, additional discovery may be

1 permitted in the discretion of the administrative law judge,
2 but only if it can be completed not later than 5 days prior to
3 the final hearing.

4 3. A motion for continuance of the final hearing date.

5 4. A motion requesting a prehearing conference, or the
6 administrative law judge may require a prehearing conference,
7 for the purpose of identifying: the legal and factual issues
8 to be considered at the final hearing; the names and addresses
9 of witnesses who may be called to testify at the final
10 hearing; documentary evidence that will be offered at the
11 final hearing; the range of penalties that may be imposed upon
12 final hearing; and any other matter that the administrative
13 law judge determines would expedite resolution of the
14 proceeding. The prehearing conference may be held by
15 telephone conference call.

16 5. During or after any preliminary hearing or
17 conference, any party or the administrative law judge may
18 suggest that the case is no longer appropriate for expedited
19 ~~summary~~ disposition. Following any argument requested by the
20 parties, the administrative law judge may enter an order
21 referring the case back to the formal adjudicatory process
22 described in s. 120.57(1), in which event the parties shall
23 proceed accordingly.

24 (b) Not later than 5 days prior to the final hearing,
25 the parties shall furnish to each other copies of documentary
26 evidence and lists of witnesses who may testify at the final
27 hearing.

28 (c) All parties shall have an opportunity to respond,
29 to present evidence and argument on all issues involved, to
30 conduct cross-examination and submit rebuttal evidence, and to
31 be represented by counsel or other qualified representative.

1 (d) The record in a case governed by this subsection
2 shall consist only of:

3 1. All notices, pleadings, motions, and intermediate
4 rulings.

5 2. Evidence received.

6 3. A statement of matters officially recognized.

7 4. Proffers of proof and objections and rulings
8 thereon.

9 5. Matters placed on the record after an ex parte
10 communication.

11 6. The written decision of the administrative law
12 judge presiding at the final hearing.

13 7. The official transcript of the final hearing.

14 (e) The agency shall accurately and completely
15 preserve all testimony in the proceeding and, upon request by
16 any party, shall make a full or partial transcript available
17 at no more than actual cost.

18 (f) The decision of the administrative law judge shall
19 be rendered within 30 days after the conclusion of the final
20 hearing or the filing of the transcript thereof, whichever is
21 later. The administrative law judge's recommended order
22 ~~decision, which shall be final agency action subject to~~
23 ~~judicial review under s. 120.68,~~ shall include the following:

24 1. Findings of fact based exclusively on the evidence
25 of record and matters officially recognized.

26 2. Conclusions of law.

27 3. Imposition of a fine or penalty, if applicable.

28 4. Any other information required by law or rule to be
29 contained in a final order.

30 (g) The parties may file exceptions to the
31 administrative law judge's recommended order within 10 days

1 after its issuance. The agency shall issue the final order
2 within 30 days after the issuance of the administrative law
3 judge's recommended order.~~For a period of 2 years following~~
4 ~~October 1, 1996, the division shall maintain a register of the~~
5 ~~total number of formal proceedings filed with the division~~
6 ~~under s. 120.57(1).~~

7 Section 4. Subsection (8) of section 373.1501, Florida
8 Statutes, is amended to read:

9 373.1501 South Florida Water Management District as
10 local sponsor.--

11 (8) Final agency action with regard to any project
12 component subject to s. 373.026(8)(b) shall be taken by the
13 department. Actions taken by the district pursuant to
14 subsection (5) shall not be considered final agency action.
15 Any petition for formal proceedings filed pursuant to ss.
16 120.569 and 120.57 shall require a hearing under the expedited
17 ~~summary~~ hearing provisions of s. 120.574, which shall be
18 mandatory. The final hearing under this section shall be held
19 within 30 days after receipt of the petition by the Division
20 of Administrative Hearings.

21 Section 5. Paragraph (g) of subsection (2) of section
22 403.088, Florida Statutes, is amended to read:

23 403.088 Water pollution operation permits;
24 conditions.--

25 (2)

26 (g) The Legislature finds that the restoration of the
27 Everglades Protection Area, including the construction,
28 operation, and maintenance of stormwater treatment areas
29 (STAs) is in the public interest. Accordingly, whenever a
30 facility to be constructed, operated, or maintained in
31 accordance with s. 373.4592 is subjected to permitting

1 requirements pursuant to chapter 373 or this chapter, and the
2 issuance of the initial permit for a new source, a new
3 discharger, or a recommencing discharger is subjected to a
4 request for hearing pursuant to s. 120.569, the administrative
5 law judge may, upon motion by the permittee, issue a
6 recommended order to the secretary who, within 5 days, shall
7 issue an order authorizing the interim construction,
8 operation, and maintenance of the facility if it complies with
9 all uncontested conditions of the proposed permit and all
10 other conditions recommended by the administrative law judge
11 during the period until the final agency action on the permit.

12 1. An order authorizing such interim construction,
13 operation, and maintenance shall be granted if requested by
14 motion and no party opposes it.

15 2. If a party to the administrative hearing pursuant
16 to ss. 120.569 and 120.57 opposes the motion, the
17 administrative law judge shall issue a recommended order
18 granting the motion if the administrative law judge finds
19 that:

20 a. The facility is likely to receive the permit; and

21 b. The environment will not be irreparably harmed by
22 the construction, operation, or maintenance of the facility
23 pending final agency action on the permit.

24 3. Prior to granting a contested motion for interim
25 construction, operation, or maintenance of a facility
26 authorized by s. 373.4592, the administrative law judge shall
27 conduct a hearing using the expedited ~~summary~~ hearing process
28 defined in s. 120.574, which shall be mandatory for motions
29 made pursuant to this paragraph. Notwithstanding the
30 provisions of s. 120.574(1), expedited ~~summary~~ hearing
31 proceedings for these facilities shall begin within 30 days of

1 the motion made by the permittee. Within 15 days of the
2 conclusion of the expedited ~~summary~~ proceeding, the
3 administrative law judge shall issue a recommended order
4 either denying or approving interim construction, operation,
5 or maintenance of the facility, which shall be submitted to
6 the secretary who shall within 5 days thereafter, enter an
7 order granting or denying interim construction operation or
8 maintenance of the facility. The order shall remain in effect
9 until final agency action is taken on the permit.

10 Section 6. Subsections (8), (13), and (15) of section
11 403.973, Florida Statutes, are amended to read:

12 403.973 Expedited permitting; comprehensive plan
13 amendments.--

14 (8) At the option of the participating local
15 government, appeals of its final approval for a project may be
16 pursuant to the expedited ~~summary~~ hearing provisions of s.
17 120.574, pursuant to subsection (15), or pursuant to other
18 appellate processes available to the local government. The
19 local government's decision to enter into an expedited ~~a~~
20 ~~summary~~ hearing must be made as provided in s. 120.574 or in
21 the memorandum of agreement.

22 (13) The applicant, the regional permit action team,
23 and participating local governments may agree to incorporate
24 into a single document the permits, licenses, and approvals
25 that are obtained through the expedited permit process. This
26 consolidated permit is subject to the expedited ~~summary~~
27 hearing provisions set forth in subsection (15).

28 (15) The expedited hearing process as provided for in
29 s. 120.574 shall be used with regard to challenges to state
30 agency action in the expedited permitting process for projects
31 processed under this section. Notwithstanding s. 120.574, use

1 of the expedited hearing process does not require consent of
2 the affected agency or a determination by the administrative
3 law judge as to its propriety.~~are subject to the summary~~
4 ~~hearing provisions of s. 120.574, except that the~~
5 ~~administrative law judge's decision, as provided in s.~~
6 ~~120.574(2)(f), shall be in the form of a recommended order and~~
7 ~~shall not constitute the final action of the state agency.~~In
8 those proceedings where the action of only one agency of the
9 state is challenged, the agency of the state shall issue the
10 final order within 10 working days of receipt of the
11 administrative law judge's recommended order. In those
12 proceedings where the actions of more than one agency of the
13 state are challenged, the Governor shall issue the final order
14 within 10 working days of receipt of the administrative law
15 judge's recommended order. The participating agencies of the
16 state may opt at the preliminary hearing conference to allow
17 the administrative law judge's decision to constitute the
18 final agency action. If a participating local government
19 agrees to participate in the expedited ~~summary~~ hearing
20 provisions of s. 120.574 for purposes of review of local
21 government comprehensive plan amendments, s. 163.3184(9) and
22 (10) apply.

23 Section 7. Subsection (14) of section 408.7056,
24 Florida Statutes, is amended to read:

25 408.7056 Statewide Provider and Subscriber Assistance
26 Program.--

27 (14) A proposed order issued by the agency or
28 department which only requires the managed care entity to take
29 a specific action under subsection (7) is subject to an
30 expedited ~~a summary~~ hearing in accordance with s. 120.574,
31 unless all of the parties agree otherwise. If the managed care

1 entity does not prevail at the hearing, the managed care
2 entity must pay reasonable costs and attorney's fees of the
3 agency or the department incurred in that proceeding.

4 Section 8. Paragraph (a) of subsection (4) of section
5 120.595, Florida Statutes, is amended to read:

6 120.595 Attorney's fees.--

7 (4) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION
8 120.56(4).--

9 (a) Upon entry of a final order that all or part of an
10 agency statement violates s. 120.54(1)(a), the administrative
11 law judge shall award reasonable costs and reasonable
12 attorney's fees to the petitioner, unless the agency
13 demonstrates that the statement is required by the Federal
14 Government to implement or retain a delegated or approved
15 program or to meet a condition to receipt of federal funds.
16 Notwithstanding any other provision of law to the contrary, if
17 a final hearing regarding the agency statement has been
18 scheduled, and a final order has not been entered because the
19 agency has proceeded to rulemaking or a final order has been
20 entered in favor of the agency because the agency has
21 proceeded to rulemaking and has effectively relied upon s.
22 120.56(4)(e), the administrative law judge shall nevertheless
23 enter an order awarding the petitioner reasonable attorney's
24 fees and costs.

25 Section 9. Section 373.4141, Florida Statutes, is
26 amended to read:

27 373.4141 Permits; processing.--

28 (1) Within 30 days after receipt of an application for
29 a permit under this part, the department or the water
30 management district shall review the application and shall
31 request submittal of all additional information the department

1 or the water management district is permitted by law to
2 require. If the applicant believes any request for additional
3 information is not authorized by law or rule, the applicant
4 may request a hearing pursuant to s. 120.57. Within 30 days
5 after receipt of such additional information, the department
6 or water management district shall review it and may request
7 only that information needed to clarify such additional
8 information or to answer new questions raised by or directly
9 related to such additional information. If the applicant
10 believes the request of the department or water management
11 district for such additional information is not authorized by
12 law or rule, the department or water management district, at
13 the applicant's request, shall proceed to process the permit
14 application.

15 (2) A permit shall be approved or denied within 90
16 days after receipt of the original application, the last item
17 of timely requested additional material, or the applicant's
18 written request to begin processing the permit application.

19 (3) An applicant may, within 30 days after filing an
20 application pursuant to this part, publish notice of his or
21 her application in a newspaper of general circulation in the
22 county or counties where the activity for which a permit is
23 requested may take place. The newspaper notice shall be in
24 accordance with the requirements of chapter 50, and shall set
25 forth, at a minimum, the name of the applicant; the name and
26 mailing address of the permitting agency; a brief description
27 of the activity the applicant is seeking a permit for and the
28 location of the activity; the location of the application
29 file; and that, within 21 days after the publication of the
30 newspaper notice, any substantially affected person, pursuant
31 to ss. 120.569 and 120.57, and any citizen, pursuant to s.

1 403.412(5), must notify the permitting agency, in writing, of
2 any objections or concerns with regard to the permit
3 application in order to preserve his or her right to initiate
4 an administrative proceeding pursuant to ss. 120.569 and
5 120.57 or s. 403.412(5). A substantially affected person, or
6 citizen, as applicable, who, prior to the publication of the
7 newspaper notice, notified the permitting agency in writing of
8 his or her objections or concerns regarding the permit
9 application is not affected by this subsection. Failure to
10 timely notify the permitting agency as required by this
11 subsection shall constitute a waiver of administrative rights
12 under ss. 120.569, 120.57, and 403.412(5), as applicable.

13 (4) When an application reviewed by a water management
14 district under this part is the subject of a notice of intent
15 to issue or deny and is approved or denied by a two-thirds
16 vote of the district's governing board, such approval or
17 denial by the governing board shall carry a presumption of
18 correctness in any administrative proceeding pursuant to ss.
19 120.569 and 120.57. A party opposed to the governing board's
20 action must overcome this presumption by a preponderance of
21 the evidence.

22 (5) The Division of Administrative Hearings shall
23 conduct a final hearing on a permit application under this
24 part challenged pursuant to ss. 120.569 and 120.57 within 90
25 days after receipt by the division of the petition or request
26 for hearing. During the pendency of the administrative
27 proceeding, the department or the water management district,
28 as applicable, may authorize construction activities which are
29 not subject to the allegations contained in the petition or
30 request for hearing initiating the administrative challenge.

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