

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 1420

SPONSOR: Senator Posey

SUBJECT: Rulemaking Authority of the Department of State

DATE: March 26, 2001                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Fox	Bradshaw	EE	Favorable
2.	_____	_____	RC	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

The Department of State (DOS) reported 33 rules to the Joint Administrative Procedures Committee (JAPC), pursuant to s. 120.536(2)(b), F.S., as exceeding the DOS's statutory rulemaking authority. This section requires the Legislature to determine whether specific legislation should be enacted to authorize the rules, or portions thereof, identified by the agency. This bill provides specific statutory authority to authorize 17 of the rules reported by the DOS:

- Rule 1S-2.0001, F.A.C., relating to the filing of materials by candidates for election;
- Rule 1S-2.0011, F.A.C., relating to constitutional amendments and revisions;
- Rule 1S-2.013, F.A.C., relating to absentee ballots for overseas electors;
- Rule 1S-2.023, F.A.C., relating to campaign treasurer reports;
- Rule 1S-2.025, F.A.C., relating to the voter fraud hotline;
- Rule 1S-2.010, F.A.C., relating to advisory opinions;
- Rule 1S-2.005, F.A.C., relating to incorporating materials by reference.
- Rules 1A-31.0015, 1A-31.0035, 1A-31.0055, 1A-31.0065, 1A-31.010, and 1A-31.011, F.A.C., relating to historic shipwreck exploration and salvage; and
- Rules 1A-44.003 through 1A-44.006, F.A.C., relating to unmarked human burials.

This bill substantially amends the following sections of the Florida Statutes: 20.10, 99.061, 101.161, 101.62, 106.07, 106.22, 106.23, 120.54, 267.061, and 872.05.

## II. Present Situation:

### Administrative Procedures Act

The Administrative Procedure Act (APA), contained in ch. 120, F.S., sets forth the general standards and procedures that all agencies must follow when adopting administrative rules. Agencies do not have inherent rulemaking authority.<sup>1</sup> Shaping public policy through lawmaking is the exclusive power of the Legislature.<sup>2</sup> The Legislature, however, may delegate to agencies the authority to adopt rules<sup>3</sup> that implement, enforce, and interpret a statute.<sup>4</sup> An enabling statute that delegates rulemaking authority to an agency cannot provide unbridled authority to an agency to decide what the law is,<sup>5</sup> but must be complete,<sup>6</sup> must declare the legislative policy or standard,<sup>7</sup> and must operate to limit the delegated power.<sup>8</sup>

Agencies are not authorized to determine whether or not they want to adopt rules.<sup>9</sup> They are required by law to adopt as a rule each agency statement that meets the definition of a rule as soon as feasible and practicable. Rulemaking is presumed to be feasible and practicable unless the agency proves certain statutory standards. Whenever an act of the Legislature requires implementation by rule, an agency has 180 days after the effective date of the act to do so, unless the act provides otherwise.<sup>10</sup>

While agencies are required to adopt as a rule each agency statement that implements, interprets, or prescribes law or policy, there are limitations on the content and scope of these rules. When the Legislature adopted changes to the APA in 1996, it overturned case law that had permitted broader bases for rulemaking, and significantly narrowed the standard for rulemaking.<sup>11</sup> In 1996, ss. 120.52(8) and 120.536(1), F.S., provided in relevant part that, “A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the *particular powers and duties* granted by the enabling statute. [*emphasis added*].”

<sup>1</sup>Grove Isle, Ltd. v. State Dept. of Envtl. Reg., 454 So.2d 571, 573 (Fla. 1st DCA 1984).

<sup>2</sup>Jones v. Department of Rev., 523 So.2d 1211, 1214 (Fla. 1st DCA 1988).

<sup>3</sup>A rule is defined by s. 120.52(15), F.S., to mean, A . . . 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 . . . .

<sup>4</sup>State v. Atlantic C.L.R. Co., 47 So. 969 (1909).

<sup>5</sup>State ex rel. Davis v. Fowler, 114 So. 435, 437 (Fla. 1927).

<sup>6</sup>Spencer v. Hunt, 147 So. 282, 286 (Fla. 1933); accord Florida Beverage Corp. v. Wynne, 306 So.2d 200, 202 (Fla. 1st DCA 1975).

<sup>7</sup>Chiles v. Children A, B, C, D, E, & F, 589 So.2d 260, 268 (Fla. 1991).

<sup>8</sup>Palm Beach Jockey Club, Inc. v. Florida State Racing Comm'n., 28 So.2d 330 (Fla. 1946).

<sup>9</sup>Section 120.54(1)(a), F.S.

<sup>10</sup>Section 120.54(1)(b), F.S.

<sup>11</sup>Before the 1996 revision to the APA, the courts had held that a rule is a valid exercise of delegated legislative authority if it is reasonably related to the enabling statute and not arbitrary and capricious. See, *General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n.*, 446 So.2d 1063 (Fla. 1984); *Department of Labor and Employment Sec., Div. of Workers=Compensation v. Bradley*, 636 So.2d 802 (Fla. 1st DCA 1994); *Florida Waterworks Ass'n v. Florida Pub. Serv. Comm'n.*, 473 So.2d 237 (Fla. 1st DCA 1985); *Department of Prof'l Regulation, Bd. of Med. Exam'rs v. Durrani*, 455 So.2d 515 (Fla. 1st DCA 1984); *Agrico Chem. Co. v. State, Dept. of Envtl. Regulation*, 365 So.2d 759 (Fla. 1st DCA 1978); *Florida Beverage Corp., Inc. v. Wynne*, 306 So.2d 200 (Fla. 1st DCA 1975).

When this new provision was challenged, the courts had difficulty construing the “particular powers and duties” language. In an administrative proceeding, a judge ruled that the phrase meant an enabling statute must detail the powers and duties that would be the subject of the rule.<sup>12</sup> On appeal, however, the First District Court of Appeals held that a broader interpretation was proper, and stated that the test to determine whether a rule is a valid exercise of delegated authority is whether:

the rule falls within the *range of powers* the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter *directly within the class of powers and duties identified in the statute* to be implemented. This approach meets the legislative goal of restricting the agencies’ authority to promulgate rules, and, at the same time, ensures that the agencies will have the authority to perform the essential functions assigned to them by the Legislature [*emphasis added*].<sup>13</sup>

In 1999, the Legislature rejected the First District’s broad “class of powers and duties” test when it enacted 99-379, L.O.F. The APA now provides:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the *specific powers and duties* granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute (*emphasis added*).<sup>14</sup>

The Legislature recognized that as a result of this amendment some existing rules might no longer be authorized, and consequently, also provided that agencies could temporarily shield unauthorized rules from rule challenges based on the amendment until July 1, 2001.<sup>15</sup> In order to have shielded a rule, agencies were required to have submitted to the Joint Administrative Procedures Committee (JAPC) by October 1, 1999, a list of rules, or portions thereof, adopted prior to June 18, 1999, which exceeded the newly amended rulemaking authority standard.

The statutory directive further provided that the Legislature is required to consider at the 2000 Regular Session whether specific legislation authorizing the shielded rules, or portions thereof, should be enacted. Thereafter, agencies must begin repeal proceedings by January 1, 2001, for shielded rules for which authorizing legislation does not exist. On or after July 1, 2001, the JAPC or any substantially affected person may petition an agency to repeal any rule because it exceeds the rulemaking authority permitted by the new standard.

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<sup>12</sup>*St. Johns River Water Management District v. Consolidated-Tomoka Land Co., et al*, 717So.2d 72 (Fla. 1st DCA 1998).

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

<sup>14</sup>Sections 120.52(8) and 120.536(1), F.S.

<sup>15</sup>Section 120.536(2)(b), F.S.

## Department of State

The Department of State (DOS) shielded 33 rules. The following summarizes 17 of these rules which are addressed by the bill, along with the related statutes:

Throughout the statutes, departments are provided with broad grants of general rulemaking authority, which permit the promulgation of rules to implement the provisions of law conferring duties upon the department. For example s. 624.308, F.S., provides that the Department of Insurance, “has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties upon it.” The statutes concerning the DOS, however, do not contain this broad grant of authority.

Rule 1S-2.0001, F.A.C., provides that the Division of Elections in Tallahassee, Florida, is the official location for all candidates for election, excepting county court judges, and specifies that materials should be filed with the division, must be originals if filed under oath, and are deemed filed on the date actually received by the division.

Section 99.061, F.S., prescribes the method for qualifying for nomination or election to office, and generally specifies the type of qualifying documents which must be filed with the DOS, and the time for filing. The section, however, does not give the DOS specific rulemaking authority to prescribe by rule the details of filing.

Rule 1S-2.0011, F.A.C., prescribes the manner in which designating numbers are to be assigned for proposed constitutional amendments and revisions; e.g., the numbers must be assigned no later than 5:00 p.m. of the 90th day before an election, and the amendment and revision titles must state the number.

Section 101.161(2), F.S., provides that the DOS must number each proposed constitutional amendment, and that the numbers are to be assigned in the order of filing or certification of the amendments. The section refers only to amendments; however, the Florida Constitution provides for both amendments and revisions.<sup>16</sup> Like the Constitution, Rule 1S-2.0011, F.A.C., refers to amendments and revisions, but the rule is without statutory authority to refer to revisions.

Rule 1S-2.013, F.A.C., specifies the manner in which absentee ballots are distributed to overseas electors. The rule’s provisions include requiring that absentee ballots must be mailed by the supervisors of elections to overseas electors at least 35 days before the first and second primaries, and specifying how the ballot should be titled.

Section 101.62, F.S., concerns requests for absentee ballots. Subsection (4) specifically addresses how ballots are to be distributed to overseas electors by the supervisors of elections; however, the statute does not provide the DOS with any rulemaking authority regarding this distribution.

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<sup>16</sup>The term **A**amendment@refers to changing a section of the Constitution, while the term **A**revision@refers to changing an article or articles of the Constitution. *See* Article XI, s. 1, of the State Constitution.

Rule 1S-2.023, F.A.C., provides that campaign treasurer reports must be filed by 5 p.m. of the filing date, specifies where the report must be filed, and prescribes fines for untimely filed reports.

Section 106.07, F.S., prescribes the date when campaign treasurer reports are due, where the reports should be filed, the contents of the report, and fines for untimely filed reports. The section, however, does not provide the DOS with rulemaking authority concerning its provisions.

Rule 1S-2.025, F.A.C., provides that the Division of Elections is charged with maintaining a voter fraud hotline, specifies the information that is to be requested when a person contacts the hotline, and specifies what a complaint alleging voter fraud must contain.

Section 97.012(12), F.S., requires the DOS to maintain a voter fraud hotline and provide election fraud education to the public. Section 106.22(11), F.S., requires the Division of Elections to conduct preliminary investigations of voter fraud, but does not specify that the division or the DOS may promulgate rules concerning the requirements of a complaint alleging voter fraud, nor of the investigation.

Rule 1S-2.010, F.A.C., specifies the requirements for a form to request from the Division of Elections an advisory opinion, pursuant to s. 106.23(2), F.S.

Section 106.23(2), F.S., provides that the Division of Elections is required to provide advisory opinions when requested by certain persons, including any supervisor of elections, candidate, or local officer having election-related duties. The subsection does not, however, provide the DOS with authority to promulgate rules concerning the form of requests for advisory opinions.

Rule 1S-2.005, F.A.C., prescribes the requirements for incorporating materials by reference in to a rule adopted by an agency pursuant to s. 120.54, F.S. It provides that the material must be generally available to affected persons, must be published by a government agency or a generally recognized professional organization, and must be filed with the DOS by the agency.

Section 120.54(1)(i), F.S., permits a rule to incorporate material by reference, but does not specify that the DOS may prescribe by rule requirements for incorporating materials by reference.

Rule Chapter 1A-31, F.A.C., provides the procedures for the Division of Historical Resources of the DOS to implement a program of historic shipwreck exploration and salvage. The following rules from this chapter are without specific statutory authority:

1A-31.0015, F.A.C.: Provides definitions of the rules relating to the exploration for and salvage of artifacts from state-owned sovereignty submerged lands.

1A-31.0035, F.A.C.: Requires persons desiring to explore for, excavate, or salvage archaeological materials from sovereignty submerged lands to first enter into an exploration or salvage agreement with the division.

1A-31.0055, F.A.C.: Sets forth the criteria necessary to find that an applicant for an exploration agreement is professionally qualified. Requires coordination with the division prior to removing archaeological materials.

1A-31.0065, F.A.C.: Sets forth the criteria necessary to find that an applicant for a salvage agreement is professionally qualified. Requires all salvaged materials to be given to the division as owner of the state's archaeological materials.

1A-31.010, F.A.C.: Requires the division to limit the number of exploration and salvage agreements to those which the division can properly supervise and administer. Requires one person onboard during exploration and salvage operations to be responsible for compliance with the rules of the agreement. Requires a crew list to be submitted to the division prior to beginning operations.

1A-31.011, F.A.C.: Requires all exploration and salvage contractors to provide the division with a list of vessels to be used in the operation. All vessels must be marked with identifying information which is visible from air and sea, and must have the written identification provided by the division on board at all times.

Section 267.031, F.S., provides the division with the authority to adopt rules and to execute contracts to implement the provisions of law conferring duties and powers upon it. Section 267.061(3), F.S., sets forth the division's duties, which include: (a) maintaining a statewide inventory of historic resources and protecting and preserving these resources; (b) developing a comprehensive statewide historic preservation plan; (c) working with federal, state, and local governments to ensure that historic resources are considered at all levels of planning and development, and in carrying out their historic preservation responsibilities and programs; and (d) acquiring and preserving, and making available state archaeological objects. The section, however, does not prescribe duties concerning exploration, excavation, and salvage; thus, the aforementioned rules are without statutory authority.

Rules 1A-44.003 through 1A-44.006, F.A.C., set forth the procedures to be followed when unmarked burials are discovered during an archaeological excavations and otherwise. These procedures include notifying the District Medical Examiner and the State Archaeologist. Additionally, the rules cover when the division has jurisdiction, rather than others, over the remains.

Section 872.05, F.S., requires that unmarked human burials be immediately reported to local law enforcement, prescribes the procedures to be followed when such is discovered during an archaeological excavation or otherwise, and when the division has jurisdiction of the remains. These above discussed rules parallel this statutory section; however, the section does not specify that the DOS has rulemaking authority in this area.

### III. Effect of Proposed Changes:

**Section 1.** This section would amend s. 20.10, F.S., the provision which creates the DOS and establishes its seven divisions, to also provide that the DOS may adopt rules pursuant to ch. 120, F.S., which administer the provisions of law conferring duties on the department.

**Section 2.** Conforms s. 20.10, F.S., to account for the restructuring of the Florida Cabinet in 2003.

**Section 3.** This section authorizes Rule 1S-2.0001, F.A.C., by amending s. 99.061, F.S., to provide that the DOS may prescribe by rule requirements for filing papers to qualify as a candidate under the section.

**Section 4.** This section authorizes Rule 1S-2.0011, F.A.C., by amending s. 101.161, F.S., to provide that designation numbers shall be assigned in the order of filing or certification, and in accordance with rules adopted by the DOS.

**Section 5.** This section authorizes Rule 1S-2.013, F.A.C., by amending s. 101.62(4), F.S., to provide that the DOS may prescribe by rule the requirements for preparing and mailing absentee ballots to absent qualified electors overseas.

**Section 6.** This section authorizes Rule 1S-2.023, F.A.C., by amending s. 106.07, F.S., to provide that the DOS may prescribe by rule the requirements for filing campaign treasurer reports as set forth in the chapter.

**Section 7.** This section authorizes Rule 1S-2.025, F.A.C., by amending s. 106.22(11), F.S., to provide that the DOS may prescribe by rule the requirements for filing a complaint of voter fraud and for investigating any such complaint.

**Section 8.** This section authorizes Rule 1S-2.010, F.A.C., by amending s. 106.23(2), F.S., to provide that requests for advisory opinions must be submitted in accordance with rules adopted by the DOS.

**Section 9.** This section authorizes Rule 1S-1.005, F.A.C., by amending s. 120.54(1)(i), F.S., to provide that the DOS may prescribe by rule requirements for incorporating materials by reference pursuant to this paragraph.

**Section 10.** This section authorizes Rules 1A-31.0015, 1A-31.0035, 1A-31.0055, 1A-31.0065, 1A-31.010, and 1A-31.011, F.A.C., by amending s. 267.071, F.S. The bill adds subsection (3)(p) which will provide that it is a duty of the Division of Historic Resources to:

- protect and administer historical resources abandoned on state-owned lands and state-owned sovereignty submerged lands;
- issue permits for survey and exploration activities to identify historical resources, for excavation and salvage activities to recover historical resources, for archaeological excavation for scientific or educational purposes, and for exploration and salvage of historic shipwreck sites; and

- adopt rules to administer the issuance permits and the transfer of objects recovered by commercial salvors under permit in exchange for recovery services provided by the state.

**Section 11.** This section authorizes Rules 1A-44.003 through 1A-44.006, F.A.C., by amending s. 872.05, F.S., to provide that the DOS may prescribe rules for reporting an unmarked human burial and for determining jurisdiction over the burial.

**Section 12.** This section provides that the bill takes effect upon becoming a law.

**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:

There should be no direct impact, as the changes will only authorize rules that are currently in effect.

C. Government Sector Impact:

There should be no direct impact, as the changes will only authorize rules that are currently in effect.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.



**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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