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 910

SPONSOR: Senator King

SUBJECT: Administrative Procedure

DATE: April 14, 2001 REVISED: 4/18/01

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Fav/3 amendments
2.			JU	
3.			AGG	
4.			AP	
5.				
6.				

I. Summary:

This bill modifies various provisions of the Administrative Procedure Act, Ch. 120, F.S., including:

- Modifies the Equal Access to Justice Act to increase the number of small businesses that may receive attorney's fees awards, and increases the maximum amounts of those awards from $15,000 to $50,000.
- Redesignates "summary hearing" in s. 120.574, F.S., as "expedited hearing", revises the conditions under which such hearings may be held, and provides an administrative law judge with recommended order authority, instead of final authority for expedited hearings.
- Amends s. 120.68, F.S., to add that the court must order a nonprevailing third party appellant to pay costs, damages, and attorney's fees in cases involving judicial review of an agency decision to issue a license or permit.
- Removes authority from the Land and Water Adjudicatory Commission to review orders resulting pursuant to ss. 120.57 and 120.69, F.S., evidentiary hearings.
- Modifies s. 403.412(5), F.S., to provide that a resident who is not substantially affected by the permitted activity may not initiate, institute, petition or request a proceeding pursuant to ss. 120.569 or 120.57, F.S.

This bill substantially amends the following sections of the Florida Statutes: 57.111, 120.52, 120.569, 120.57, 120.574, 120.595, 120.60, 120.68, 120.81, 373.114, 373.1501, 403.088, 403.412, 403.973, 408.7056, 409.913, 501.608, 628.461, 628.4615, 633.161, and 766.207.

II. Present Situation:

Florida Equal Access to Justice Act: Section 57.111, F.S., provides for the award of attorney's fees and costs to prevailing small business parties in ch. 120, F.S., administrative proceedings that are initiated by a state agency, except where the agency was substantially justified or special circumstances existed to make the award unjust. A small business party is currently defined in relevant part as:

- A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million, including both personal and business investments; or

- A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than $2 million.[1]

Attorney's fees for a prevailing party in an action initiated by a state agency are limited to $15,000.[2]

Ch. 120, F.S., the Administrative Procedures Act (APA): Chapter 120, F.S., allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions.[3] For purposes of ch. 120, F.S., the term "agency" is defined in s. 120.52, F.S. as each:

- State officer and state department, and each departmental unit described in s. 20.04, F.S.[4]
- Authority, including a regional water supply authority.
- Board and commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
- Regional planning agency.
- Multicounty special district with a majority of its governing board comprised of nonelected persons.
- Educational units.
- Entity described in chapters 163 (Intergovernmental Programs), 373 (Water Resources), 380 (Land and Water Management), and 582 (Soil and Water Conservation) and s. 186.504 (regional planning councils).
- Other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

[1] Section 57.111(3)(d), F.S.
[2] Section 57.111(4)(d)2., F.S.
[3] *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, by Judge Linda M. Rigot, The Florida Bar Journal, Jan. 2001, at 14.
[4] Section 20.04, F.S., sets for the structure of the executive branch of state government.

The definition expressly excludes any legal entity or agency created in whole or in part pursuant to chapter 361, part II (Joint Electric Power Supply Projects), an expressway authority pursuant to chapter 348, any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in the section, or any multicounty special district with a majority of its governing board comprised of elected persons. The definition expressly includes a regional water supply authority.

Administrative hearings involving disputed issues of fact are generally referred to the Division of Administrative Hearings (DOAH), an independent group of administrative law judges (ALJs) who hear cases involving most state agencies.[5] The DOAH's ALJs also determine whether proposed and existing agency rules are invalid exercises of delegated legislative authority based on certain statutory grounds, and based on constitutional grounds in the case of proposed rules. DOAH proceedings are conducted like nonjury trials and are governed by ch. 120, F.S., and the rules adopted to implement those statutory provisions.[6]

In the mid-1990s, ch. 120, F.S., underwent sweeping review, analysis, and amendment. The Legislature, after receiving a report from the Governor's APA Review Commission, enacted significant amendments for the purposes of simplifying the APA, and increasing flexibility in the application of administrative rules and procedures, and agency accountability to the Legislature and the public. "Among other things these amendments created a variance and waiver procedure to allow agencies more flexibility when the strict application of rules resulted in unfairness, the award of attorneys' fees to administrative litigants, increased opportunities for informal resolution of administrative disputes, and additional rulemaking requirements for agencies."[7] Furthermore, as a result of amendments in 1996 and 1999, the substantive standard for rulemaking and for determining the validity of rules was made more restrictive, although administrative law judges continue to be entrusted with final order authority in rule challenges.[8]

In adjudicatory cases, where a decision affects "substantial interests," the ALJ normally has the role of making findings of fact and drawing conclusions of law and providing a recommended order. The affected agency is responsible for entering a final order. Findings of fact by administrative law judges continue to be presumptively correct, and may not be lightly set aside by the agency. An agency may enter a final order rejecting or modifying findings of fact upon review of the entire record and after stating with particularity that the findings were not based upon competent substantial evidence or did not comply with essential requirements of law.[9] As a consequence of recent amendments, however, an ALJ's conclusions of law are even more insulated from change by the agency. "In view of these new responsibilities, it is plain that the

[5] Although DOAH is administratively assigned to the Department of Management Services (DMS), *see* s. 20.22, F.S., the DMS does not have statutory authority over DOAH; it is responsible directly to the Governor and Cabinet. The director is appointed by a majority vote of the Administration Commission, that is the Governor and the Cabinet, and the appointment must be confirmed by the Senate. Section 120.65, F.S. The DOAH is a separate budget entity. It is funded, however, entirely from trust funds rather than from general revenue. Thus, the funding is directly correlated to the work the division does for executive agencies. *The Florida Division of Administrative Hearings*, by Judge William C. Sherril, Jr., The Florida Bar Journal, Jan. 2001, at 23.

[6] *Id*.

[7] *Why Florida Needs the Administrative Procedure Act*, by William E. Williams and S. Curtis Kiser, The Florida Bar Journal, Jan. 2001, at 20.

[8] *The Florida Division of Administrative Hearings*, at 24.

[9] Section 120.57(1), F.S.

division and ALJs continue to enjoy the confidence of the legislature."[10] An agency may enter a final order rejecting or modifying conclusions of law over which it has substantive jurisdiction. The agency must state its reasons with particularity, and must find that its substituted conclusion of law is at least as reasonable as the conclusion of law it rejected.[11]

The APA also provides that certain hearings must be conducted in an expedited manner. More particularly, a hearing on a bid protest must commence within 30 days of receipt by the DOAH of a request for hearing, and a recommended order generally must be entered within 30 days after receipt of the transcript of the hearing.[12] Cases involving exceptional education students are also expedited, and a final order must be issued 45 days after the request for a hearing is filed. Rule challenges must be heard within 40 days of filing and a final decision rendered within 30 days following the hearing.[13] Summary hearing procedures have expedited provisions as well.

Summary hearings are governed by s. 120.574, F.S. This procedure is analogous to the federal procedure that permits a U.S. magistrate judge to try a civil case and enter final judgment with the consent of the parties.[14] Within five business days following the DOAH's receipt of a petition or request for hearing, the DOAH must issue and serve on all original parties an initial order that assigns the case to a specific ALJ, and which provides general information regarding practice and procedure before DOAH. The initial order must also contain a statement advising the addressees that a summary hearing is available upon the agreement of all parties, and briefly describing the expedited time sequences, limited discovery, and final order provisions of the summary procedure.

Within 15 days after service of the initial order, any party may file a motion for summary hearing with the DOAH. If all original parties agree, in writing, to the summary proceeding, the proceeding must be conducted within 30 days of the agreement.

Section 120.574, F.S., sets forth the types of motions that are allowed in this type of proceeding; e.g., the parties are authorized to file a motion requesting discovery beyond the informal exchange of documents and witness lists, otherwise required. Upon a showing of necessity, additional discovery may be permitted in the discretion of the administrative law judge, but only if it can be completed no later than 5 days prior to the final hearing.

Finally, during or after any preliminary hearing or conference, any party or the administrative law judge may suggest that the case is no longer appropriate for summary disposition, and the judge may so order. To date, there have been only 22 consent summary hearing cases heard by administrative law judges.[15]

[10] *The Florida Division of Administrative Hearings*, at 24.
[11] Section 120.57(1), F.S.
[12] Section 120.57(3)(e), F.S.
[13] Section 120.56(1)(c), F.S.
[14] *See* 28 U.S.C. s. 636. The Florida Division of Administrative Hearings, fn 26, at 27.
[15] *Id*.

III. Effect of Proposed Changes:

Section 1. The bill amends s. 57.111, F.S., the Equal Access to Justice Act, to change the definition of a "small business party" that may be entitled to an award of attorney's fees from an employer who may not have: (a) more than 25 full-time employees to an employer who may not have more than 50 full-time employees, and (b) a net worth in excess of $2 million to an employer who may not have a net worth in excess of $10 million. The bill also increases the award of attorney's fees under this act from $15,000 to $50,000.

Section 2. The bill clarifies the definition of "agency" contained in s. 120.52(1), F.S., to provide that only state authorities, state boards and state commissions are subject to ch. 120, F.S.

Section 3. The bill amends s. 120.569, F.S., relating to agency decisions that affect a person's substantial interests, to include new language that concerns "any proceeding brought by a third party to challenge a permit application under part IV of chapter 373." Part IV of Ch. 373, F.S., deals with management and storage of surface waters. Any person proposing to construct or alter a stormwater management system, dam, impoundment, reservoir, or appurtenant work must apply to the governing board [of a water management district] or the Department of Environmental Protection for a permit.

Under this new language, once challenged, a respondent may file a motion to show cause why the permit should not be granted. All issues must be framed with sufficient particularity and the scope of anticipated evidence to be presented at the final hearing must be presented. The administrative law judge must hold a hearing to determine if the issues are framed adequately and whether the scope of anticipated evidence is sufficient to put the petitioner on notice as to what specific elements of the permit application are at issue, or whether the petition should be dismissed.

The bill further amends s. 120.569, F.S., to add new language that requires either the party or an attorney or qualified representative to sign every pleading, motion, or paper filed. The signator must certify that the document is not filed for any improper purpose, is not frivolous, is factual with evidentiary support, and that any denials of factual contentions are warranted. If a "presiding officer" finds a violation of one of these certification requirements, the officer must impose sanctions that include an order to pay the other party's or parties' costs and reasonable attorney's fees due to the filing of the pleading, motion or other paper. The sanctions may be initiated on motion or on the presiding officer's own initiative. A motion shall not be acted upon by a presiding officer for at least 14 days. During this period, the party may correct or withdraw the paper. If the presiding officer determines to impose a sanction on his or her own initiative, the officer must first enter an order to show cause.

Section 4. The bill reclassifies a summary hearing under s. 120.574, F.S., as an "expedited" hearing. It requires the initial order[16] to advise the original parties to the litigation that an expedited hearing is available, provided that the affected agency agrees, and to describe the accelerated nature of the expedited procedure.

[16] Under current law, after receiving a petition or request for a hearing, the DOAH must issue an initial order to all original parties that assigns the case to a specific administrative law judge, provides information about practice and procedure before the DOAH, and advises that a summary hearing is available if all parties agree. Section 120.574, F.S.

Under current law, any party may file a motion for a summary hearing (termed "expedited hearing" by the bill). The bill adds that the motion for expedited hearing must be granted if:

- a non-agency party files such a motion, and if the affected agency does not file a written objection within 7 days after service of such a motion; or
- the affected agency files such a motion, and if the original parties do not file a written objection within 7 days after service of the motion.

An order must then be entered setting a hearing date within 30 days of the date the response period to the motion expires. If an affected agency files a motion for expedited hearing and the party who is the subject of the agency action objects within 7 days after service that the ALJ shall, within 5 days from the filing of that objection, grant the motion for the expedited hearing, unless the judge determines that any of the original parties will be unduly prejudiced. Intervenors to the litigation are governed by the decision of the ALJ with respect to whether the case will proceed on an expedited basis (under current law, intervenors are governed by the decision of the original parties).

The bill creates a new paragraph to provide that the parties may file exceptions to the recommended order within 10 days after its issuance. Responses to the exceptions may be filed within 5 days after the exceptions. The agency must issue the final order within 30 days after the issuance of the administrative law judge's recommended order.

Section 5. The bill amends s. 120.595, F.S., which provides that an ALJ shall award prevailing party costs and attorney's fees where a nonprevailing adverse party has participated in the proceeding for an improper purpose, to amend the definition of "improper purpose" to include needlessly increasing the cost of litigation.

Section 6. The bill amends s. 120.60, F.S., regarding licensing, to provide that a license is deemed approved, if it is not approved or denied by the latest of the following possible dates: (a) within the 90-day or shorter time period; (b) within 15 days after the conclusion of a public hearing held on the application; or (c) within 45 days after the recommended order is submitted to the agency and the parties. Further, the bill provides that a license must be issued if an examination is required as a prerequisite to licensure and the license applicant has satisfactorily completed the examination.

Section 7. The bill amends s. 120.68, F.S., regarding judicial review, to add that in cases involving judicial review of an agency decision resulting in the issuance of a license or permit, the court must order any nonprevailing third party appellant to pay costs, damages, and attorney's fees.

Section 8. The bill amends s. 373.114, F.S., regarding the Land and Water Adjudicatory Commission. Currently, except as otherwise provided, the Governor and Cabinet, sitting as the Land and Water Adjudicatory Commission, have the exclusive authority to review any order or rule of a water management district, other than a rule relating to an internal procedure of the district. The bill removes authority from the commission, to review orders or rules of water management districts resulting from ss. 120.569 or 120.7, F.S., evidentiary hearings.

Sections 9 and 10. The bill amends ss. 373.1501 and 403.088, F.S., to conform the bill's use of the term "expedited" with respect to hearings under s. 120.574, F.S.

Section 11. The bill amends s. 403.412, F.S., regarding the Environmental Protection Act. Currently, in any administrative, licensing, or other proceeding authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state will have standing to intervene as a party upon filing a verified pleading that asserts that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state.

This bill adds that a citizen of this state whose substantial interests have not been determined by agency action may not institute, initiate, petition, or request a proceeding under s. 120.569, F.S., or under s. 120.57, F.S. The bill states that this provision does not limit the ability of a non-profit corporation or association organized for purposes of conservation, protection of the environment, or other biological values, or preservation of historical sites, from initiating any of the above proceedings upon asserting by verified petition that an activity, conduct, or product to be licensed or permitted has harmed or will harm the natural resources of the state. The verified petition must also assert that the corporation or association itself has, or a substantial number of its members have, substantial interests that will be affected by the conduct, activity, or product to be licensed or permitted. These substantial interests include the use and enjoyment of air, water, or other natural resources which will be affected by issuance of the license or permit.

Section 12. The bill amends s. 403.973, F.S., regarding expedited permitting. It requires the expedited hearing process to be used for challenges to state agency action in the expedited permitting process for projects processed under the section. This bill also adds that the use of the expedited hearing process does not require consent of the affected agency or a determination by the administrative law judge as to the propriety of the use of the expedited process; however, the hearing schedule may be extended by written agreement of all parties.

Sections 13–23. The bill provides conforming amendments.

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:

Opponents[17] of the bill argue that the bill's amendments to:

- Section 120.574, F.S., which require intervenors to be governed by the decision of an agency and permit applicant to use the expedited hearing process, could force intervenors to have to be ready to proceed within a few days depending upon when they learn of the proceeding.
- Section 373.114, F.S., which remove the Land and Water Adjudicatory Commission's authority to review orders or rules of water management districts resulting from ss. 120.569 or 120.7, F.S., evidentiary hearings, results in eliminating the Governor's and Cabinet's authority to make certain that water management decisions are consistent among districts.
- Section 403.412(5), F.S., will require environmental groups to unnecessarily spend substantial amounts of money to hire attorneys and put on evidence to prove standing in the manner required under the bill.

Under the bill's amendments to s. 57.11, F.S., the "Equal Access to Justice Act," a greater number of small businesses will be subject to the act as the net worth limitation of $2 million is raised to $10 million. Moreover, the amount of attorneys' fees awarded under the act will be higher because the attorneys' fees award limit is increased from $15,000 to $50,000. Accordingly, these amendments will result in private attorneys being able to bill for greater fees.

C. Government Sector Impact:

According to the DOAH, Section 4. of the bill may fiscally impact the division. This section repeals the existing summary hearing process, available for a limited number of cases and statutorily required to be utilized in disputes between HMOs [health maintenance organizations] and their subscribers. Section 4. substitutes a procedure under which potentially all cases filed with DOAH must be heard within 30 days. (Under the bill, comprehensive plan amendments must be tried within 30 days without fail). Further, the new procedure precludes parties from engaging in discovery, which means that the hearings themselves will take longer because none of the parties will have had the opportunity to interview witnesses or meet with the opposing party to narrow the issues remaining to be tried. Thus, the impact on DOAH of expediting potentially all proceedings with the likelihood that all evidentiary hearings will require more hearing time could be significant but cannot be quantified at this time.

[17] The Florida Wildlife Federation, Florida League of Anglers, Save the Manatee Club, Florida Sierra Club, Florida Audubon Society, Florida League of Conservation Voters, and the Florida Consumer Action Network

The agencies litigating before DOAH will also experience the same impact as their legal staff lose case preparation time and spend more time in evidentiary hearings. The bill also makes agencies responsible for larger attorney's fee awards under more circumstances than are available now under the APA.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In Section 3., the bill amends s. 120.569, F.S., to add new language that requires the party, attorney, or qualified representative to certify that every pleading, motion, or paper filed is not filed for an improper purpose, is not frivolous and is warranted by existing law, is factual with evidentiary support, and that any denials of factual contentions contained therein are warranted. Much of this new language mirrors Rule 11, F.R.C.P., the long standing federal rule that was enacted to deter abuses in the signing of civil pleadings. The bill's amendment, however, does differ in at least one significant way. Under Rule 11, F.R.C.P., the decision to impose sanctions is within the discretion of the court; thus, the court has the ability to determine what, if any sanctions, are appropriate based on the nature of the violation. Under the bill, however, monetary sanctions ***must*** be imposed when a violation occurs, notwithstanding whether the presiding officer believes such sanctions are appropriate based on the violation. The bill does not require a finding that the violation was in bad faith nor that it was intentional.

In Section 7., the bill amends s. 120.68, F.S., to add that the court **must** order a nonprevailing third party appellant to pay costs, damages, and attorney's fees in cases involving judicial review of an agency decision to issue a license or permit. This provision is automatic and there is no requirement of bad faith, as is oft times required in mandatory cost and fee award statutes. Its application is limited to "third parties"; thus, neither permit applicants nor agencies are subject to its requirements. This provision may result in effectively precluding third parties groups from appealing ALJ decisions.

VIII. Amendments:

#1 by Governmental Oversight and Productivity:
Deletes the bill's provision that created a new procedure for the challenge of permit applications under part IV of ch. 373, F.S., by third parties.

#2 by Governmental Oversight and Productivity:
Deletes the bill's provision that amended s. 120.60, F.S., concerning licensing.

#3 by Governmental Oversight and Productivity:
Deletes the bill's provision that amended s. 120.68, F.S., to provide for automatic cost and attorney's fee awards.