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HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY
COUNCIL FOR COMPETITIVE COMMERCE
ANALYSIS

BILL #: CS/HB 819

RELATING TO: Environmental Protection

SPONSOR(S): Council for Competitive Commerce and Representative Cantens

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) NATURAL RESOURCES & ENVIRONMENTAL PROTECTION (CRI) YEAS 10 NAYS 3
(2) AGRICULTURE & CONSUMER AFFAIRS (CCC) YEAS 8 NAYS 1
(3) COUNCIL FOR COMPETITIVE COMMERCE YEAS 13 NAYS 0
(4)
(5)

I. SUMMARY:

This bill amends s. 373.114, F.S., to remove authority from the Florida Land and Water Adjudicatory Commission to review orders and rules of water management districts that result from evidentiary hearings held under ss. 120.56, 120.569, and 120.57, F.S.

The bill clarifies that "intervene" in s. 403.12(5), F.S., Florida's Environmental Protection Act, means to join in an ongoing proceeding. The bill also amends s. 403.412 (5), F.S., to clarify that citizens cannot institute, initiate, petition for, or request an administrative proceeding under ss. 120.569 or 120.57, F.S.

Section 403.412(5), F.S., is also amended to mandate the award of costs and attorneys' fees to prevailing parties in administrative proceedings under the Environmental Protection Act.

The bill becomes effective upon becoming law.

On February 21, 2002, the Council for Competitive Commerce adopted one amendment and then passed the bill as a council substitute, incorporating that amendment and the two traveling amendments. See section VI for further details.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes [X] No [] N/A []

2. Lower Taxes Yes [] No [] N/A [X]

3. Individual Freedom Yes [X] No [X] N/A []

The bill decreases third party participation in administrative proceedings, decreases appellate options, and increases the burden on the losing party by requiring the losing party to pay costs and attorneys' fees in an administrative proceeding. Conversely, the bill decreases the burden on the prevailing party by requiring the losing party to pay costs and attorneys' fees in an administrative proceeding.

4. Personal Responsibility Yes [] No [] N/A [X]

5. Family Empowerment Yes [] No [] N/A [X]

B. PRESENT SITUATION:

1. The Florida Land and Water Adjudicatory Commission- powers and responsibilities

The Florida Land and Water Adjudicatory Commission ("Commission") was created by The Florida Land and Water Management Act of 1972. The Commission is comprised of the Governor and Cabinet. Under s. 380.07, F.S., the Commission's power includes:

- Rulemaking authority to ensure compliance with the area of critical state concern program and the requirements for development of regional impact;
- Hearing appeals regarding development orders issued by local governments in areas of critical state concern or regarding developments of regional impact;
- Hearing appeals regarding issues within the scope of a permitting program authorized by ch. 161, F.S., (beach and shore preservation), ch. 373, F.S., (water resources), or ch. 403, F.S., (the Florida Air and Water Pollution Control Act) for which a conceptual review approval has been obtained before the issuance of a development order. The Commission can hear these appeals only by first deciding by a majority vote that statewide or regional interests may be adversely affected by the development.

The Commission, under s. 373.114, F.S., has the exclusive authority to review any order or rule of a water management district with the exception of rules concerning internal district procedures. This review is to ensure consistency with the Florida Water Resources Act of 1972, ch. 373, F.S., and may be initiated either by the Department of Environmental Protection or a party to the proceeding below. A party is defined as any affected person who submitted substantive testimony in support of or in objection to the rule or order, or any person who participated in a proceeding instituted under ch. 120, F.S.,[1] Requesting review under this section is not a precondition to seeking review under either s. 120.68, F.S., or s. 120.56, F.S.

[1] Note that pursuant to s. 373.114 (2), F.S. review by the Commission may also be initiated after the Department of Environmental Protection ("Department") enters an order determining that a water management district rule is inconsistent with the water resource implementation rule of the Department and, therefore, requires the water management district to initiate rulemaking proceedings to amend or repeal the rule. The water management district or any other party to the departmental proceeding may seek review. However, this route to the Commission appears unaffected by this bill, and thus is not discussed above.

In order to accept a request for review by a party below, 4 members of the Commission must determine, on the basis of the record below that the order would either:

- Substantially affect natural resources of statewide or regional significance; or
- Raise issues of policy, statutory interpretation, or rule interpretation that have statewide significance

The Commission, sitting in this appellate capacity, is limited to the record below. In the absence of an evidentiary hearing the facts contained in the proposed agency action, including any technical staff report shall be deemed undisputed.

The Commission after reviewing the rule or order may take the following actions:

- If the Commission determines that a water management district rule is inconsistent with ch. 373, F.S., or its purposes, it may require the district to amend or repeal the rule through rulemaking proceedings.
- If an order is found to be inconsistent and the Commission determines that natural resources of statewide or regional significance would be substantially affected, the Commission may rescind or modify the order or remand the proceeding for further action consistent with the Commission's order.
- If the order raises policy issues the Commission may direct the district to initiate rulemaking to amend its rules to ensure future consistency without modifying the order.

2. The Environmental Protection Act

Section 403.412, F.S., created the Environmental Protection Act of 1971. The act permits the Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state to maintain an action for injunctive relief against:

- Any agency with the duty of enforcing laws, rules, and regulation for the protection of the environment of the state to compel enforcement; or
- Any person, including corporations, or governmental agencies to stop them from violating laws intended to protect the environment.

The Florida Supreme Court has ruled that the act authorizes private citizens, both corporate and non-corporate, to institute a suit under the act without a showing of special injury (i.e. a violation that causes injury different both in kind and degree from that suffered by the public at large.)[2] However, to state a cause of action under the act, it must appear that the question raised is real and not merely theoretical, and that the plaintiff has a bona fide and direct interest in the result.[3] A mere allegation of an irreparable injury not sustained by any allegation of facts will not ordinarily warrant the granting of injunctive relief.[4]

Before filing such a suit, the party must file with the appropriate agency a verified complaint describing the facts and explaining how the party is affected. This verified complaint is then forwarded by the agency to the parties charged with the violation. The agency has 30 days to take appropriate action before the complaining party can start court proceedings. If appropriate action is not taken within that 30 days the complaining party may institute suit.

In that suit, the court may add as a defendant, any agency who is responsible for enforcing the applicable environmental laws, rules, and regulations. However, a person cannot sue if the party

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[2] *See Florida Wildlife Federation v. Dept. of Environmental Regulation*, 390 So.2d 64 (Fla. 1980).
[3] *Id.*
[4] *Id.*

charged with the violation is acting pursuant to a valid permit issued by the proper agency and is complying with that permit. The court may grant injunctive relief to stop the complained of activity and may also impose conditions on the defendant consistent with law and any rules or regulations adopted by any state or local environmental agency.

The prevailing party is entitled to costs and attorneys' fees. However, in an action involving a state NPDES[5] permit, attorneys' fees are discretionary with the court. Moreover, if the court is doubtful about the plaintiff's ability to pay such costs and fees, the court may order the plaintiff to post a good and sufficient surety bond or cash.

In an administrative, licensing, or other environmental proceedings, s. 403.12(5), F.S., grants the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state standing to intervene as a party. In order to intervene a verified pleading must be filed asserting that the activity, conduct, or product to be licensed or permitted has or will have a negative effect on the environment of the state. Courts have interpreted the term "intervene" broadly. In *Manasota-88, Inc. v. Department of Environmental Regulation*,[6] the First District Court of Appeals found that an environmental organization had standing to intervene under s. 420.12 (5), F.S., and to initiate a hearing under s. 120.57, F.S. In that case, the start of the agency proceeding was when the agency made a preliminary decision (a.k.a. proposed agency action) approving the permit application.[7] The organization was able to "intervene" by instituting a s. 120.57, F.S., hearing after the application was filed and the preliminary decision was made.[8] The organization was not, however required to wait until the agency made a final decision (a.k.a. final agency action) regarding the application. Thus, "intervene" under s. 403.12, F.S., has been interpreted to mean that a party can initiate a s. 120.57, F.S., or s. 120.569, F.S., hearing in an administrative, licensing, or other environmental proceeding after notice of proposed agency action.

Currently, an award for attorneys' fees appears unavailable to a party intervening in an administrative proceeding. In *Agrico Chemical Co. v. Department of Environmental Regulation*,[9] the Division of Administrative Hearings ("DOAH") concluded that, "it is apparent that the attorneys' fees award was intended to apply only to the circuit court actions described in s. 403.12(2), F.S., particularly since subsection (f) makes two references to the 'court' and never specifically authorizes an award by an administrative agency."

3. The Administrative Procedure Act

The Administrative Procedure Act ("APA") is located in ch. 120, F.S. The APA allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions.[10] In s. 120.52(1)(b)(8), F.S., "agency" is defined to include each entity described in chapter 380 which would include water management district governing boards. Administrative hearings involving disputed issues of fact are generally referred to the DOAH, an independent group of administrative law judges (ALJs) who hear cases involving most state agencies.

In a challenge to a rule under s. 120.56, F.S., any person substantially affected by a rule or proposed rule may seek a determination as to whether the proposed or existing agency rule is

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[5] National Pollutant Discharge Elimination System
[6] 481 So. 2d 948 (Fla. 1st DCA 1986).
[7] *Id*. at 950.
[8] *Id*.
[9] 6 FALR 4352 (Fla. DER June 27, 1984) *aff'd per curiam* 479 So. 2d 120 (Fla. 1st DCA 1985).
[10] *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, by Judge Linda M. Rigot, The Florida Bar Journal, Jan. 2001, at 14.

an invalid exercise of delegated legislative authority. In the case of proposed rules an invalid determination may be based on constitutional grounds. The hearings are conducted by an ALJ in the same way as provided in s. 120.569, F.S., and s. 120.57, F.S., discussed below.

Under s. 120.569, F.S., in adjudicatory cases, where a decision affects "substantial interests," the ALJ 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 ALJs continue to be presumptively correct, and may not be lightly set aside by the agency. Basically, the ALJ conducts an evidentiary hearing and makes a determination as to the facts in question. These proceedings are less formal than court proceedings and function in most respects like a non-jury trial, with the ALJ presiding. Section 120.57, F.S., sets out the procedures used. In a hearing involving disputed issues of material fact, 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.[11] 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.[12] Procedures applicable to cases not involving disputed issues of material fact are described in s. 120.57(2), F.S. Appellate review of agency actions is authorized by s. 120.68, F.S.

C. EFFECT OF PROPOSED CHANGES:

Section 1. This bill amends s. 373.114 (1), F.S., pertaining to the Commission's ability to review orders and rules of water management districts. This bill removes the Commission's ability to review an order resulting from an evidentiary hearing under s. 120.569, F.S., or s.120.57, F.S., or a rule adopted after an order has been issued from an evidentiary hearing under s. 120.56, F.S. Thus, if a party is unhappy with a water management district decision and chooses to have a hearing under s. 120.569, F.S., or s. 120.57, F.S., then that matter cannot be subsequently appealed to the Commission. Similarly, if a party challenges a rule under s. 120.56, F.S., there is no subsequent appeal to the Commission.

This raises a potential issue regarding the record before the Commission. A complaining party, after a board decision, may choose to go directly to the Commission, bypassing the triggering of a ch. 120, F.S., hearing. As long as an affected person has submitted testimony of a substantive nature supporting or opposing the rule or order considered by the board they are considered a "party" under s. 373.114, F.S., and may appeal the decision of the board directly to the Commission. The Commission is limited to the record below and s. 373.114(1)(b), F.S., states, "if there was no evidentiary proceeding below, the facts contained in the proposed agency action, including any technical staff report, shall be deemed undisputed." Some contend that there is a question as to whether the water management districts are to be considered agencies since they are not defined as such in ch. 373, F.S. If they are not considered agencies, there may not be a record below to guide the Commission. Others, however, point to ch. 120, F.S., which specifically includes such districts within the definition of agency. They contend that the Commission will thus be limited to the board's proposed action and that action, including any technical staff reports, will be deemed undisputed. Moreover, they contend that "proposed agency action" is a term of art to refer to a rule or order.[13]

[11] Section 120.57(1), F.S.
[12] Section 120.57(1), F.S.
[13] *See* 120.52(2).

Section 2. This bill amends s. 403.412(5), F.S., of the Environmental Protection Act to specify that the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state may only intervene in an "ongoing proceeding." It further specifies that a citizen is not authorized under the Act to "institute, initiate, petition for, or request" a s. 120.569, F.S., or s. 120.57, F.S., proceeding. This, in effect, overrules *Manasota-88, Inc. v. Department of Environmental Regulation*, which allowed a party to institute a s. 120.57, F.S., proceeding.

Section 2 also makes the mandatory attorneys' fees provision applicable to administrative actions. Thus, in administrative proceedings the losing party will be required to pay the other side's costs and attorneys' fees. This overrules *Agrico Chemical Co. v. Department of Environmental Regulation* where the attorneys' fees provision was determined applicable only to court proceedings.

Section 3. Provides that the bill shall become law on July 1, 2002.

D. SECTION-BY-SECTION ANALYSIS:

Please see Section C., Effect of Proposed Changes.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Some contend that one possible outcome of Section 1 of this bill will be that water management districts, in order to create a record will engage in elaborate evidentiary hearings resulting in increased costs.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill expands the award of costs and attorney's fees to prevailing parties to include such awards in administrative proceedings instituted under s. 403.412, F.S. This could have either a positive or negative effect on a private party depending on whether the party is successful in the administrative proceeding. If the party is successful, then the party will be entitled to costs and attorneys' fees from the other side, and thus their costs will be decreased. However, if instead the party is unsuccessful, then they will be required to pay the other side's costs and fees, thus increasing their costs.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties and municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The bill's provisions eliminating the Florida Land and Water Adjudicatory Commission's authority to review water management district rules and orders that result from evidentiary hearings under ss. 120.569 and 120.57, F.S., could streamline review of such rules and orders as the current law potentially allows for appellate review of such orders by the Commission and Florida courts. However, some sources contend that the bill could potentially eliminate the Commission's ability to ensure that water management decisions are consistent among districts as most water management district rules and orders are the subject of evidentiary hearings held under ch. 120, F.S.

According to the Florida Department of Environmental Protection (DEP), the bill's changes to s. 403.412(5), F.S., of the Environmental Protection Act of 1971, could limit to some degree citizen participation in DEP permitting cases. Currently, all a citizen needs to do to initiate an administrative action challenging a permitting decision is file a verified petition alleging citizenship, and state that the proposed action would impair, pollute, or otherwise injure air, water, or other natural resources of the state. The bill's proposed change, according to the DEP, would limit citizen involvement under this section to participation as interveners in an already existing action. According to the DEP, current case law indicates that interveners may not have the same rights as other parties as they may be limited in terms of the issues they may raise and they may be bound by settlements reached among the parties already participating in the action. Nevertheless, the DEP indicates that

most permitting cases involve allegations that the petitioner's substantial interests are being affected, thereby allowing the petitioner to seek review in an administrative proceeding under ss. 120.569 and 120.57, F.S. These substantially affected parties can initiate a s. 120.569, F.S., or s. 120.57, F.S., proceeding independently of s. 420.12(5), F.S., thus diminishing this bill's impact on citizen participation.

The DEP also notes that it cites s. 403.412, F.S., as one of the bases for adequate citizen participation when applying for delegation or approval of several federal programs. Under agreements with the federal Environmental Protection Agency (EPA), the DEP must notify the EPA of changes in s. 403.412, F.S. According to the DEP, the bill's changes to s. 403.412, F.S., could trigger EPA review of the affected agreements and may result in changes in the status of these programs. Proponents argue, however, that Florida standards currently, and would remain, far more citizen oriented than federal environmental law review requirements require.[14]

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The following amendments are incorporated in CS/HB 819.

On January 30, 2002, the Committee on Natural Resources and Environmental Protection adopted an amendment regarding Section 1 of the bill. The amendment clarifies s. 373.114(1)(b), F.S., to provide that absent an evidentiary administrative proceeding below, the facts in a proposed water management district action, including any technical staff report, shall be deemed undisputed.

On February 6, 2002, the Committee on Agriculture and Consumer Affairs adopted an amendment offered by the bill's sponsor, Representative Cantens. The amendment clarifies the term "intervene" to mean to join an ongoing administrative proceeding rather than just an ongoing proceeding.

On February 21, 2002, the Council for Competitive Commerce adopted an amendment changing the effective date from July 1, 2002, to upon becoming law.

VII. SIGNATURES:

COUNCIL FOR COMPETITIVE COMMERCE:

Prepared by:	Staff Director:
Kim Fedele	Wayne Kiger

AS REVISED BY THE COMMITTEE ON AGRICULTURE AND CONSUMER AFFAIRS:

Prepared by:	Council Director:
Benjamin G. Snipes	Matthew Carter

[14] *See* 33 U.S.C.13 65 (Federal Clean Water Act citizen suit provision).