

1 A bill to be entitled
2 An act relating to administrative procedures;
3 amending s. 120.52, F.S.; revising definition
4 of invalid exercise of delegated legislative
5 authority; providing conditions under which
6 changes to certain rules adopted by the
7 Department of Environmental Protection or a
8 water management district that are incorporated
9 by reference in rules of the other agency rule
10 will take effect as to the incorporating rule;
11 providing for notice; providing an objection
12 process; amending s. 120.54, F.S.; revising
13 provisions with respect to uniform rules;
14 providing requirements with respect to the
15 application of alleged facts to specific rules
16 or statutes; amending s. 120.56, F.S.; revising
17 rule challenges; providing hearings of such
18 challenges to be held de novo; providing for
19 the standard of proof to be used; revising
20 procedures for agency response in unadopted
21 rule proceedings; amending s. 120.569, F.S.;
22 revising provisions with respect to decisions
23 that affect substantial interest; providing for
24 initial scheduling orders by the administrative
25 law judge; providing for a discovery period;
26 amending s. 120.57, F.S.; revising provisions
27 with respect to additional procedures
28 applicable to hearings involving disputed
29 issues of material fact; revising procedures in
30 unadopted rule proceedings; providing that an
31 order relinquishing jurisdiction shall be

1 rendered under certain circumstances; providing
2 when an agency must rule on exceptions;
3 amending s. 120.595, F.S.; redefining the term
4 "improper purpose" and conforming a
5 cross-reference; declaring that other
6 provisions relating to attorney's fees and
7 costs are unaffected by s. 120.595, F.S.;
8 amending s. 120.60, F.S.; revising provisions
9 with respect to licensing; providing for
10 license issuance by default in specified
11 circumstances; amending s. 120.68, F.S.;
12 revising provisions with respect to judicial
13 review; providing additional grounds for
14 certain petitions challenging an agency rule as
15 an invalid exercise of delegated legislative
16 authority; amending s. 57.105, F.S.; providing
17 administrative law judge authority to award
18 attorney's fees and damages; amending s.
19 57.111, F.S.; revising attorney's fees on civil
20 actions and administrative proceedings
21 initiated by state agencies; providing an
22 effective date.

23

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

25

26 Section 1. Subsection (8) of section 120.52, Florida
27 Statutes, is amended to read:

28 120.52 Definitions.--As used in this act:

29 (8) "Invalid exercise of delegated legislative
30 authority" means action which goes beyond the powers,
31 functions, and duties delegated by the Legislature. A proposed

1 or existing rule is an invalid exercise of delegated
2 legislative authority if any one of the following applies:

3 (a) The agency has materially failed to follow the
4 applicable rulemaking procedures or requirements set forth in
5 this chapter;

6 (b) The agency has exceeded its grant of rulemaking
7 authority, citation to which is required by s. 120.54(3)(a)1.;

8 (c) The rule enlarges, modifies, or contravenes the
9 specific provisions of law implemented, citation to which is
10 required by s. 120.54(3)(a)1.;

11 (d) The rule is vague, fails to establish adequate
12 standards for agency decisions, or vests unbridled discretion
13 in the agency;

14 (e) The rule is arbitrary or capricious. A rule is
15 arbitrary if it is not supported by logic or the necessary
16 facts; a rule is capricious if it is adopted without thought
17 or reason or is irrational; or

18 ~~(f) The rule is not supported by competent substantial~~
19 ~~evidence; or~~

20 (f)(g) The rule imposes regulatory costs on the
21 regulated person, county, or city which could be reduced by
22 the adoption of less costly alternatives that substantially
23 accomplish the statutory objectives.

24
25 A grant of rulemaking authority is necessary but not
26 sufficient to allow an agency to adopt a rule; a specific law
27 to be implemented is also required. An agency may adopt only
28 rules that implement or interpret the specific powers and
29 duties granted by the enabling statute. No agency shall have
30 authority to adopt a rule only because it is reasonably
31 related to the purpose of the enabling legislation and is not

1 arbitrary and capricious or is within the agency's class of
2 powers and duties, nor shall an agency have the authority to
3 implement statutory provisions setting forth general
4 legislative intent or policy. Statutory language granting
5 rulemaking authority or generally describing the powers and
6 functions of an agency shall be construed to extend no further
7 than implementing or interpreting the specific powers and
8 duties conferred by the same statute.

9 Section 2. Paragraph (i) of subsection (1) and
10 paragraph (b) of subsection (5) of section 120.54, Florida
11 Statutes, are amended to read:

12 120.54 Rulemaking.--

13 (1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER
14 THAN EMERGENCY RULES.--

15 (i)1. A rule may incorporate material by reference but
16 only as the material exists on the date the rule is adopted.
17 For purposes of the rule, changes in the material are not
18 effective unless the rule is amended to incorporate the
19 changes. A rule may not be amended by reference only.
20 Amendments must set out the amended rule in full in the same
21 manner as required by the State Constitution for laws. The
22 Department of State may prescribe by rule requirements for
23 incorporating materials by reference pursuant to this
24 paragraph.

25 2. Notwithstanding any contrary provision in this
26 section, when an adopted rule of the Department of
27 Environmental Protection or a water management district is
28 incorporated by reference in the other agency's rule to
29 implement a provision of part IV of chapter 373, subsequent
30 amendments to the rule are not effective as to the
31 incorporating rule unless the agency incorporating by

1 reference notifies the committee and the Department of State
2 of its intent to adopt the subsequent amendment, publishes
3 notice of such intent in the Florida Administrative Weekly,
4 and files with the Department of State a copy of the amended
5 rule incorporated by reference. Changes in the rule
6 incorporated by reference are effective as to the other agency
7 20 days after the date of the published notice and filing with
8 the Department of State. The Department of State shall amend
9 the history note of the incorporating rule to show the
10 effective date of such change. Any substantially affected
11 person may, within 14 days after the date of publication of
12 the notice of intent in the Florida Administrative Weekly,
13 file an objection to rulemaking with the agency. The objection
14 shall specify the portions of the rule incorporated by
15 reference to which the person objects and the reasons for the
16 objection. The agency shall not have the authority under this
17 subparagraph to adopt those portions of the rule specified in
18 such objection. The agency shall publish notice of the
19 objection and of its action in response in the next available
20 issue of the Florida Administrative Weekly.

21 (5) UNIFORM RULES.--

22 (b) The uniform rules of procedure adopted by the
23 commission pursuant to this subsection shall include, but are
24 not ~~be~~ limited to:

25 1. Uniform rules for the scheduling of public
26 meetings, hearings, and workshops.

27 2. Uniform rules for use by each state agency that
28 provide procedures for conducting public meetings, hearings,
29 and workshops, and for taking evidence, testimony, and
30 argument at such public meetings, hearings, and workshops, in
31 person and by means of communications media technology. The

1 rules shall provide that all evidence, testimony, and argument
2 presented shall be afforded equal consideration, regardless of
3 the method of communication. If a public meeting, hearing, or
4 workshop is to be conducted by means of communications media
5 technology, or if attendance may be provided by such means,
6 the notice shall so state. The notice for public meetings,
7 hearings, and workshops utilizing communications media
8 technology shall state how persons interested in attending may
9 do so and shall name locations, if any, where communications
10 media technology facilities will be available. Nothing in this
11 paragraph shall be construed to diminish the right to inspect
12 public records under chapter 119. Limiting points of access to
13 public meetings, hearings, and workshops subject to the
14 provisions of s. 286.011 to places not normally open to the
15 public shall be presumed to violate the right of access of the
16 public, and any official action taken under such circumstances
17 is void and of no effect. Other laws relating to public
18 meetings, hearings, and workshops, including penal and
19 remedial provisions, shall apply to public meetings, hearings,
20 and workshops conducted by means of communications media
21 technology, and shall be liberally construed in their
22 application to such public meetings, hearings, and workshops.
23 As used in this subparagraph, "communications media
24 technology" means the electronic transmission of printed
25 matter, audio, full-motion video, freeze-frame video,
26 compressed video, and digital video by any method available.

27 3. Uniform rules of procedure for the filing of notice
28 of protests and formal written protests.

29 4. Uniform rules of procedure for the filing of
30 petitions for administrative hearings pursuant to s. 120.569

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1 or s. 120.57. Such rules shall require the petition to
2 include:

3 a. The identification of the petitioner.
4 b. A statement of when and how the petitioner received
5 notice of the agency's action or proposed action.
6 c. An explanation of how the petitioner's substantial
7 interests are or will be affected by the action or proposed
8 action.
9 d. A statement of all material facts disputed by the
10 petitioner or a statement that there are no disputed facts.
11 e. A statement of the ultimate facts alleged,
12 including a statement of the specific facts the petitioner
13 contends warrant reversal or modification of the agency's
14 proposed action.
15 f. A statement of the specific rules or statutes that
16 the petitioner contends require reversal or modification of
17 the agency's proposed action, including an explanation of how
18 the alleged facts relate to the specific rules or statutes.
19 g. A statement of the relief sought by the petitioner,
20 stating precisely the action petitioner wishes the agency to
21 take with respect to the proposed action.

22 5. Uniform rules of procedure for the filing and
23 prompt disposition of petitions for declaratory statements.
24 6. Provision of a method by which each agency head
25 shall provide a description of the agency's organization and
26 general course of its operations.
27 7. Uniform rules establishing procedures for granting
28 or denying petitions for variances and waivers pursuant to s.
29 120.542.
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1 Section 3. Paragraph (e) of subsection (1), paragraph
2 (a) of subsection (3), and paragraph (e) of subsection (4) of
3 section 120.56, Florida Statutes, are amended to read:

4 120.56 Challenges to rules.--

5 (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF
6 A RULE OR A PROPOSED RULE.--

7 (e) Hearings held under this section shall be de novo
8 in nature. The standard of proof shall be the preponderance of
9 the evidence. Hearings shall be conducted in the same manner
10 as provided by ss. 120.569 and 120.57, except that the
11 administrative law judge's order shall be final agency action.
12 The petitioner and the agency whose rule is challenged shall
13 be adverse parties. Other substantially affected persons may
14 join the proceedings as intervenors on appropriate terms which
15 shall not unduly delay the proceedings. Failure to proceed
16 under this section shall not constitute failure to exhaust
17 administrative remedies.

18 (3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--

19 (a) A substantially affected person may seek an
20 administrative determination of the invalidity of an existing
21 rule at any time during the existence of the rule. The
22 petitioner has a burden of proving by a preponderance of the
23 evidence that the existing rule is an invalid exercise of
24 delegated legislative authority as to the objections raised.

25 (4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES;
26 SPECIAL PROVISIONS.--

27 (e)1. If, prior to a final hearing to determine
28 whether all or part of any agency statement violates s.
29 120.54(1)(a), an agency publishes, pursuant to s.
30 120.54(3)(a), proposed rules that address the statement, then
31 for purposes of this section, a presumption is created that

1 the agency is acting expeditiously and in good faith to adopt
2 rules that address the statement, and the agency shall be
3 permitted to rely upon the statement or a substantially
4 similar statement as a basis for agency action if the
5 statement meets the requirements of s. 120.57(1)(e).

6 2. If, prior to the final hearing to determine whether
7 all or part of an agency statement violates s. 120.54(1)(a),
8 an agency publishes a notice of rule development which
9 addresses the statement pursuant to s. 120.54(2), or certifies
10 that such a notice has been transmitted to the Florida
11 Administrative Weekly for publication, then such publication
12 shall constitute good cause for the granting of a stay of the
13 proceedings and a continuance of the final hearing for 30
14 days. If the agency publishes proposed rules within this
15 30-day period or any extension of that period granted by an
16 administrative law judge upon showing of good cause, then the
17 administrative law judge shall place the case in abeyance
18 pending the outcome of rulemaking and any proceedings
19 involving challenges to proposed rules pursuant to subsection
20 (2).

21 3. If, following the commencement of the final hearing
22 and prior to entry of a final order that all or part of an
23 agency statement violates s. 120.54(1)(a), if an agency
24 publishes, pursuant to s. 120.54(3)(a), proposed rules that
25 which address the statement and proceeds expeditiously and in
26 good faith to adopt rules that which address the statement,
27 the agency shall be permitted to rely upon the statement or a
28 substantially similar statement as a basis for agency action
29 if the statement meets the requirements of s. 120.57(1)(e).

30 4. If an agency fails to adopt rules that which
31 address the statement within 180 days after publishing

1 proposed rules, for purposes of this subsection, a presumption
2 is created that the agency is not acting expeditiously and in
3 good faith to adopt rules. If the agency's proposed rules are
4 challenged pursuant to subsection (2), the 180-day period for
5 adoption of rules is tolled until a final order is entered in
6 that proceeding.

7 5. If the proposed rules addressing the challenged
8 statement are determined to be an invalid exercise of
9 delegated legislative authority as defined in s.
10 120.52(8)(b)-(f), the agency must immediately discontinue
11 reliance on the statement and any substantially similar
12 statement until the rules addressing the subject are properly
13 adopted.

14 Section 4. Paragraph (o) is added to subsection (2) of
15 section 120.569, Florida Statutes, to read:

16 120.569 Decisions which affect substantial
17 interests.--

18 (2)

19 (o) On the request of any party, the administrative
20 law judge shall enter an initial scheduling order to
21 facilitate the just, speedy, and inexpensive determination of
22 the proceeding. The initial scheduling order shall establish a
23 discovery period, including a deadline by which all discovery
24 shall be completed, and the date by which the parties shall
25 identify expert witnesses and their opinions. The initial
26 scheduling order also may require the parties to meet and file
27 a joint report by a date certain.

28 Section 5. Paragraphs (e), (i), and (k) of subsection
29 (1) of section 120.57, Florida Statutes, are amended to read:

30 120.57 Additional procedures for particular cases.--

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1 (1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS
2 INVOLVING DISPUTED ISSUES OF MATERIAL FACT.--

3 (e)1. Any agency action that determines the
4 substantial interests of a party and that is based on an
5 unadopted rule is subject to de novo review by an
6 administrative law judge.

7 2. The agency action shall not be presumed valid or
8 invalid. The agency must demonstrate that the unadopted rule:

9 a. Is within the powers, functions, and duties
10 delegated by the Legislature or, if the agency is operating
11 pursuant to authority derived from the State Constitution, is
12 within that authority;

13 b. Does not enlarge, modify, or contravene the
14 specific provisions of law implemented;

15 c. Is not vague, establishes adequate standards for
16 agency decisions, or does not vest unbridled discretion in the
17 agency;

18 d. Is not arbitrary or capricious. A rule is arbitrary
19 if it is not supported by logic or the necessary facts; a rule
20 is capricious if it is adopted without thought or reason or is
21 irrational;

22 e. Is not being applied to the substantially affected
23 party without due notice; and

24 ~~f. Is supported by competent and substantial evidence;~~
25 ~~and~~

26 ~~f.g.~~ Does not impose excessive regulatory costs on the
27 regulated person, county, or city.

28 3. The recommended and final orders in any proceeding
29 shall be governed by the provisions of paragraphs (k) and (l),
30 except that the administrative law judge's determination
31 regarding the unadopted rule shall not be rejected by the

1 agency unless the agency first determines from a review of the
2 complete record, and states with particularity in the order,
3 that such determination is clearly erroneous or does not
4 comply with essential requirements of law. In any proceeding
5 for review under s. 120.68, if the court finds that the
6 agency's rejection of the determination regarding the
7 unadopted rule does not comport with the provisions of this
8 subparagraph, the agency action shall be set aside and the
9 court shall award to the prevailing party the reasonable costs
10 and a reasonable attorney's fee for the initial proceeding and
11 the proceeding for review.

12 (i) When, in any proceeding conducted pursuant to this
13 subsection, a dispute of material fact no longer exists, any
14 party may move the administrative law judge to relinquish
15 jurisdiction to the agency. An order relinquishing
16 jurisdiction shall be rendered if the administrative law judge
17 determines from ~~In ruling on such a motion, the administrative~~
18 ~~law judge may consider~~ the pleadings, depositions, answers to
19 interrogatories, and admissions on file, together with
20 supporting and opposing affidavits, if any, that no genuine
21 issue as to any material fact exists. If the administrative
22 law judge enters an order relinquishing jurisdiction, the
23 agency may promptly conduct a proceeding pursuant to
24 subsection (2), if appropriate, but the parties may not raise
25 any issues of disputed fact that could have been raised before
26 the administrative law judge. An order entered by an
27 administrative law judge relinquishing jurisdiction to the
28 agency based upon a determination that no genuine dispute of
29 material fact exists, need not contain findings of fact,
30 conclusions of law, or a recommended disposition or penalty.

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1 (k) The presiding officer shall complete and submit to
2 the agency and all parties a recommended order consisting of
3 findings of fact, conclusions of law, and recommended
4 disposition or penalty, if applicable, and any other
5 information required by law to be contained in the final
6 order. All proceedings conducted pursuant to this subsection
7 shall be de novo. The agency shall allow each party 15 days in
8 which to submit written exceptions to the recommended order.
9 An agency need not rule on an exception that does not clearly
10 identify the disputed portion of the recommended order by page
11 number or paragraph, that does not identify the legal basis
12 for the exception, or that does not include appropriate and
13 specific citations to the record.

14 Section 6. Paragraphs (c) and (e) of subsection (1) of
15 section 120.595, Florida Statutes, are amended, and subsection
16 (6) is added to that section, to read:

17 120.595 Attorney's fees.--

18 (1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION
19 120.57(1).--

20 (c) In proceedings pursuant to s. 120.57(1), and upon
21 motion, the administrative law judge shall determine whether
22 any party participated in the proceeding for an improper
23 purpose as defined by this subsection ~~and s. 120.569(2)(e)~~. In
24 making such determination, the administrative law judge shall
25 consider whether the nonprevailing adverse party has
26 participated in two or more other such proceedings involving
27 the same prevailing party and the same project as an adverse
28 party and in which such two or more proceedings the
29 nonprevailing adverse party did not establish either the
30 factual or legal merits of its position, and shall consider
31 whether the factual or legal position asserted in the instant

1 proceeding would have been cognizable in the previous
2 proceedings. In such event, it shall be rebuttably presumed
3 that the nonprevailing adverse party participated in the
4 pending proceeding for an improper purpose.

5 (e) For the purpose of this subsection:

6 1. "Improper purpose" means participation in a
7 proceeding pursuant to s. 120.57(1) primarily to harass or to
8 cause unnecessary delay or for frivolous purpose or to
9 needlessly increase the cost of litigation,licensing,or
10 securing the approval of an activity.

11 2. "Costs" has the same meaning as the costs allowed
12 in civil actions in this state as provided in chapter 57.

13 3. "Nonprevailing adverse party" means a party that
14 has failed to have substantially changed the outcome of the
15 proposed or final agency action which is the subject of a
16 proceeding. In the event that a proceeding results in any
17 substantial modification or condition intended to resolve the
18 matters raised in a party's petition, it shall be determined
19 that the party having raised the issue addressed is not a
20 nonprevailing adverse party. The recommended order shall
21 state whether the change is substantial for purposes of this
22 subsection. In no event shall the term "nonprevailing party"
23 or "prevailing party" be deemed to include any party that has
24 intervened in a previously existing proceeding to support the
25 position of an agency.

26 (6) OTHER SECTIONS NOT AFFECTED.--Other provisions,
27 including ss. 57.105 and 57.111, authorize the award of
28 attorney's fees and costs in administrative proceedings.
29 Nothing in this section shall affect the availability of
30 attorney's fees and costs as provided in those sections.

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1 Section 7. Subsection (1) of section 120.60, Florida
2 Statutes, is amended to read:

3 120.60 Licensing.--

4 (1) Upon receipt of an application for a license, an
5 agency shall examine the application and, within 30 days after
6 such receipt, notify the applicant of any apparent errors or
7 omissions and request any additional information the agency is
8 permitted by law to require. An agency shall not deny a
9 license for failure to correct an error or omission or to
10 supply additional information unless the agency timely
11 notified the applicant within this 30-day period. An
12 application shall be considered complete upon receipt of all
13 requested information and correction of any error or omission
14 for which the applicant was timely notified or when the time
15 for such notification has expired. Every application for a
16 license shall be approved or denied within 90 days after
17 receipt of a completed application unless a shorter period of
18 time for agency action is provided by law. The 90-day time
19 period shall be tolled by the initiation of a proceeding under
20 ss. 120.569 and 120.57. Any An application for a license that
21 is not ~~must be~~ approved or denied within the 90-day or shorter
22 time period, within 15 days after the conclusion of a public
23 hearing held on the application, or within 45 days after a
24 recommended order is submitted to the agency and the parties,
25 whichever action and timeframe is latest and applicable, is
26 considered approved unless the recommended order recommends
27 that the agency deny the license. Subject to the satisfactory
28 completion of an examination if required as a prerequisite to
29 licensure, any license that is considered approved shall be
30 issued and may include such reasonable conditions as are
31 authorized by law. Any applicant for licensure seeking to

1 claim licensure by default under this subsection shall notify
2 the agency clerk of the licensing agency, in writing, of the
3 intent to rely upon the default license provision of this
4 subsection, and shall not take any action based upon the
5 default license until after receipt of such notice by the
6 agency clerk later. ~~The agency must approve any application~~
7 ~~for a license or for an examination required for licensure if~~
8 ~~the agency has not approved or denied the application within~~
9 ~~the time periods prescribed by this subsection.~~

10 Section 8. Subsection (9) of section 120.68, Florida
11 Statutes, is amended to read:

12 120.68 Judicial review.--

13 (9) No petition challenging an agency rule as an
14 invalid exercise of delegated legislative authority shall be
15 instituted pursuant to this section, except to review an order
16 entered pursuant to a proceeding under s. 120.56 or an
17 agency's findings of immediate danger, necessity, and
18 procedural fairness prerequisite to the adoption of an
19 emergency rule pursuant to s. 120.54(4), unless the sole issue
20 presented by the petition is the constitutionality of a rule
21 and there are no disputed issues of fact.

22 Section 9. Present subsections (5) and (6) of section
23 57.105, Florida Statutes, as amended by chapter 2002-77, Laws
24 of Florida, are renumbered as subsections (6) and (7),
25 respectively, and a new subsection (5) is added to that
26 section, to read:

27 57.105 Attorney's fee; sanctions for raising
28 unsupported claims or defenses; service of motions; damages
29 for delay of litigation.--

30 (5) In administrative proceedings under chapter 120,
31 an administrative law judge shall award a reasonable

1 attorney's fee and damages to be paid to the prevailing party
2 in equal amounts by the losing party and a losing party's
3 attorney or qualified representative in the same manner and
4 upon the same basis as provided in subsections (1)-(4). Such
5 award shall be a final order subject to judicial review
6 pursuant to s. 120.68. If the losing party is an agency as
7 defined in s. 120.52(1), the award to the prevailing party
8 shall be against and paid by the agency. A voluntary dismissal
9 by a nonprevailing party does not divest the administrative
10 law judge of jurisdiction to make the award described in this
11 subsection.

12 Section 10. Paragraph (d) of subsection (4) of section
13 57.111, Florida Statutes, is amended to read:

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

16 (4)

17 (d) The court, or the administrative law judge in the
18 case of a proceeding under chapter 120, shall promptly conduct
19 an evidentiary hearing on the application for an award of
20 attorney's fees and shall issue a judgment, or a final order
21 in the case of an administrative law judge. The final order
22 of an administrative law judge is reviewable in accordance
23 with the provisions of s. 120.68. If the court affirms the
24 award of attorney's fees and costs in whole or in part, it
25 may, in its discretion, award additional attorney's fees and
26 costs for the appeal.

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

29 2. No award of attorney's fees and costs for an action
30 initiated by a state agency shall exceed \$50,000~~\$15,000~~.

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1 Section 11. This act shall take effect upon becoming a
2 law.
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