CHAMBER ACTION

The Committee on Appropriations recommends the following:

Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to administrative procedures; amending s. 120.52, F.S.; revising the definition of “invalid exercise of delegated legislative authority"; amending s. 120.54, F.S.; revising language with respect to incorporation of rules by reference and with respect to uniform rules; providing requirements with respect to the application of alleged facts to specific rules or statutes; amending s. 120.56, F.S.; providing that hearings on rule challenges shall be de novo in nature; providing for burden and standard of proof; changing the timeframe for publishing proposed rules where agency statements are challenged to moot such challenge; providing that challenges to agency statements may be abated pending rulemaking; providing that a determination that such rule is an invalid exercise of delegated legislative authority shall prohibit the agency from enforcing its statement or certain similar statements; amending s. 120.569, F.S.; revising language with respect to decisions which affect substantial

interests; providing for initial scheduling orders by the administrative law judge; providing for a discovery period; amending s. 120.57, F.S.; revising language with respect to additional procedures applicable to hearings involving disputed issues of material fact; providing that an order relinquishing jurisdiction shall be rendered under certain circumstances; providing circumstances which excuse an agency from ruling on an exception to a recommended order; limiting the authority of agencies to reject or modify conclusions of law and interpretations of administrative rules in recommended orders; amending s. 120.595, F.S.; redefining the term “improper purpose” and conforming a cross reference; providing for the award of reasonable attorney’s fees and costs under certain circumstances; providing for nonexclusivity; amending s. 120.60, F.S.; revising language with respect to licensing; providing that licenses considered approved as a condition of time may still be subject to satisfactory completion of an examination; requiring written notice of intent to rely on a default license; amending s. 120.68, F.S.; revising language with respect to judicial review; providing additional grounds for certain petitions challenging an agency rule as an invalid exercise of delegated legislative authority; amending s. 57.105, F.S.; providing administrative law judges authority to award attorney's fees and damages in certain administrative proceedings; providing for appeal; amending s. 57.111, F.S.; increasing the cap on attorney’s fees in civil actions and

administrative proceedings initiated by state agencies; providing an effective date.

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

Section 1. Paragraphs (e), (f), and (g) of subsection (8) of section 120.52, Florida Statutes, are amended to read:

120.52 Definitions.--As used in this act:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

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

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

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

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.

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

120.54 Rulemaking.--

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

(i)1. A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes.

2. Notwithstanding any contrary provision in this section, when an adopted rule of the Department of Environmental Protection or a water management district is incorporated by reference in the other agency’s rule to implement a provision of chapter 373, subsequent amendments to the rule are not effective as to the incorporating rule unless the agency incorporating by reference notifies the committee and the Department of State of its intent to adopt the subsequent amendment, publishes notice

of such intent in the Florida Administrative Weekly, and files with the Department of State a copy of the amended rule incorporated by reference. Changes in the rule incorporated by reference are effective 20 days after the date of the published notice and filing with the Department of State. The Department of State shall amend the history note of the incorporating rule to show the effective date of such change. Any substantially affected person may, within 14 days after the date of publication of the notice of intent in the Florida Administrative Weekly, file an objection to rulemaking with the agency. The objection shall specify the portions of the rule incorporated by reference to which the person objects and the reasons for the objection. The agency shall not have the authority under this subparagraph to adopt those portions of the rule specified in such objection. Objections which are frivolous or which duplicate those previously filed during the initial adoption of the rule incorporated by reference shall not be considered sufficient to prohibit the agency from adopting rules under this subparagraph. The agency shall publish notice of the objection, and its action in response, in the next available issue.

3. A rule may not be amended by reference only. Amendments must set out the amended rule in full in the same manner as required by the State Constitution for laws. The Department of State may prescribe by rule requirements for incorporating materials by reference pursuant to this paragraph.

(5) UNIFORM RULES.--

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

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

2. Uniform rules for use by each state agency that provide procedures for conducting public meetings, hearings, and workshops, and for taking evidence, testimony, and argument at such public meetings, hearings, and workshops, in person and by means of communications media technology. The rules shall provide that all evidence, testimony, and argument presented shall be afforded equal consideration, regardless of the method of communication. If a public meeting, hearing, or workshop is to be conducted by means of communications media technology, or if attendance may be provided by such means, the notice shall so state. The notice for public meetings, hearings, and workshops utilizing communications media technology shall state how persons interested in attending may do so and shall name locations, if any, where communications media technology facilities will be available. Nothing in this paragraph shall be construed to diminish the right to inspect public records under chapter 119. Limiting points of access to public meetings, hearings, and workshops subject to the provisions of s. 286.011 to places not normally open to the public shall be presumed to violate the right of access of the public, and any official action taken under such circumstances is void and of no effect. Other laws relating to public meetings, hearings, and workshops, including penal and remedial provisions, shall apply to public

meetings, hearings, and workshops conducted by means of communications media technology, and shall be liberally construed in their application to such public meetings, hearings, and workshops. As used in this subparagraph, "communications media technology" means the electronic transmission of printed matter, audio, full-motion video, freeze-frame video, compressed video, and digital video by any method available.

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

4. Uniform rules of procedure for the filing of petitions for administrative hearings pursuant to s. 120.569 or s. 120.57. Such rules shall require the petition to include:

a. The identification of the petitioner.

b. A statement of when and how the petitioner received notice of the agency's action or proposed action.

c. An explanation of how the petitioner's substantial interests are or will be affected by the action or proposed action.

d. A statement of all material facts disputed by the petitioner or a statement that there are no disputed facts.

e. A statement of the ultimate facts alleged, including a statement of the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action.

f. A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action and an explanation of how the alleged facts relate to the specific rules or statutes.

g. A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the proposed action.

5. Uniform rules of procedure for the filing and prompt disposition of petitions for declaratory statements.

6. Provision of a method by which each agency head shall provide a description of the agency's organization and general course of its operations.

7. Uniform rules establishing procedures for granting or denying petitions for variances and waivers pursuant to s. 120.542.

Section 3. Paragraph (e) of subsection (1), paragraph (a) of subsection (3), and paragraph (e) of subsection (4) of section 120.56, Florida Statutes, are amended to read:

120.56 Challenges to rules.--

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

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

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

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

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

(e)1. If, prior to a final hearing to determine whether all or part of any agency statement violates s. 120.54(1)(a), an agency publishes, pursuant to s. 120.54(3)(a), proposed rules that address the statement, then, for purposes of this section, a presumption is created that the agency is acting expeditiously and in good faith to adopt rules that address the statement, and the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e).

2. If, prior to the final hearing to determine whether all or part of an agency statement violates s. 120.54(1)(a), an agency publishes a notice of rule development that addresses the statement, pursuant to s. 120.54(2), or certifies that such a notice has been transmitted to the Florida Administrative Weekly for publication, then such publication shall constitute good cause for the granting of a stay of the proceedings and a continuance of the final hearing for 30 days. If the agency publishes proposed rules within this 30-day period or any extension of that period granted by an administrative law judge

upon showing of good cause, then the administrative law judge shall place the case in abeyance pending the outcome of rulemaking and any proceedings involving challenges to proposed rules pursuant to subsection (2).

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

4. If an agency fails to adopt rules that ~~which~~ address the statement within 180 days after publishing proposed rules, for purposes of this subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to subsection (2), the 180-day period for adoption of rules is tolled until a final order is entered in that proceeding.

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

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

120.569 Decisions which affect substantial interests.--

(2)

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

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

120.57 Additional procedures for particular cases.--

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

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

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

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

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

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

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

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

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

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

3. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (l), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.

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

(k) The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. All proceedings conducted pursuant to this subsection shall be de novo. The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. An agency need not rule on an exception that does not clearly identify the

disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

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

120.595 Attorney's fees.--

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

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection ~~and s. 120.569(2)(e)~~. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause

unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

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

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

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

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

120.60 Licensing.--

(1) Upon receipt of an application for a license, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or

omissions and request any additional information the agency is permitted by law to require. An agency shall not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. An application shall be considered complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired. Every application for a license shall be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period shall be tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any ~~An~~ application for a license that is not ~~must be~~ approved or denied within the 90-day or shorter time period, within 15 days after ~~the~~ conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action or timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license. Subject to the satisfactory completion of an examination if required as a prerequisite to licensure, any license that is considered approved shall be issued and may include such reasonable conditions as are authorized by law. Any applicant for licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection, and shall not take any action

based upon the default license until after receipt of such notice by the agency clerk ~~later. The agency must approve any application for a license or for an examination required for licensure if the agency has not approved or denied the application within the time periods prescribed by this subsection~~.

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

120.68 Judicial review.--

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

Section 9. Subsections (5) and (6) of section 57.105, Florida Statutes, are renumbered as subsections (6) and (7), respectively, and a new subsection (5) is added to said section to read:

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

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to the prevailing party to be paid to the prevailing

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

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

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

(4)

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

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

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

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