

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL: CS/SB 1594

INTRODUCER: Judiciary Committee and Senator Bennett

SUBJECT: Rules and Rulemaking

DATE: April 24, 2007 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson	GO	Fav/3 amendments
2.	Daniell	Maclure	JU	Fav/CS
3.			TA	
4.				
5.				
6.				

I. Summary:

This bill modifies provisions of the Administrative Procedure Act (APA), codified in chapter 120, F.S., relating to agency rulemaking, particularly provisions concerning the incorporation by reference of materials into agency rules. In addition to technical or administrative refinements to ch. 120, F.S., the bill makes the following significant changes:

- Provides definitions of the terms “law implemented” and “rulemaking authority”;
- Provides additional requirements for the use of material that is being incorporated by reference in rules;
- Requires electronic publication of the *Florida Administrative Code* (FAC);
- Provides for material incorporated by reference to be filed in electronic form, unless doing so would constitute a violation of federal copyright law;
- Provides that if an agency head is a board or other collegial body, then the agency head may not delegate the responsibility to conduct requested public hearings;
- Provides an award of attorney’s fees to the petitioner in an unadopted rule challenge if, prior to the final hearing, the agency initiates rulemaking and the agency knew or should have known that the agency statement was an unadopted rule; and
- Provides the granting of a stay in an unadopted rule challenge when certain conditions are met.

This bill amends the following sections of the Florida Statutes: 120.52, 120.536, 120.54, 120.545, 120.55, 120.569, 120.595, and 120.74.

II. Present Situation:

Overview of the Administrative Procedure Act (APA), Ch. 120, F.S.

Because administrative agencies have been granted extensive investigative, rulemaking, and adjudicating powers, statutes such as the Florida Administrative Procedure Act (APA) have been adopted to provide parties in administrative proceedings with procedural protection and due process.¹ The APA allows individuals who feel that their interests are being or will be affected by the preliminary decisions of agencies to challenge those decisions.² The central purpose of the APA is to provide the basic fairness that should surround all governmental activity, such as:

- The opportunity for adequate and full notice of agency activities;
- The right to present viewpoints and to challenge the views of others;
- The right to develop a record which is capable of court review;
- The right to locate precedent and have it applied; and
- The right to know the factual bases and policy reasons for agency action.³

The operative provisions of the APA concern only “agencies” as defined in the APA. The term “agency” is defined in s. 120.52(1), 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 non-elected persons.
- Educational unit.
- Entity described in chs. 163 (Intergovernmental Programs), 373 (Water Resources), 380 (Land and Water Management), and 582 (Soil and Water Conservation), F.S., and s. 186.504 (regional planning councils), F.S.
- Other units of government in the state, including counties and municipalities, to the extent they are expressly made subject to the act by general or special law or existing judicial decisions.

The definition also includes the Governor in the exercise of all executive powers other than those derived from the State Constitution.⁵

¹ 2 FLA. JUR 2D *Administrative Law* s. 1 (2007).

² Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, 75 FLA. B.J. 14, 14 (2001); *see also* 2 FLA. JUR 2D *Administrative Law* s. 5 (2007).

³ 2 FLA. JUR 2D *Administrative Law* s. 5 (2007) (*quoting Singer Island Civic Ass’n, Inc. v. State Dep’t of Environmental Regulation*, 636 So. 2d 723, 725 (Fla. 4th DCA 1994)).

⁴ Section 20.04, F.S., sets the structure of the executive branch of state government.

⁵ The definition of agency expressly excludes certain legal entities or organizations found in chs. 361 and 348, F.S., and ss. 339.175 and 163.01(7), F.S.

The Division of Administrative Hearings (DOAH), which consists of an independent group of administrative law judges (ALJs), conducts hearings under ch. 120, F.S., when certain agency decisions, e.g., rules and determinations of a party's substantial interest, are challenged by substantially affected persons.⁶ Proceedings by DOAH are conducted like nonjury trials and are governed by ch. 120, F.S.⁷

The Joint Administrative Procedures Committee and Agency Rulemaking

The APA also provides for legislative oversight of rules. The Joint Administrative Procedures Committee (JAPC or the committee) is created in s. 11.60, F.S., as a legislative check on legislatively created authority as interpreted by executive agencies. The JAPC is a joint standing legislative committee composed of six members, three from the Senate and three from the House of Representatives.⁸ The committee is assigned the duty of maintaining a continuous review of administrative rules and the statutory authority on which they are based.⁹

Pursuant to s. 120.52(15), F.S., a "rule" means "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule." Florida law states that statutory language which grants general rulemaking authority must not be construed to go beyond the implementation or interpretation of any specified powers and duties conferred by the same statute.¹⁰

Prior to the adoption, amendment, or repeal of any rule, an agency must publish notice of the intended action in the *Florida Administrative Weekly* (FAW) at least 28 days prior to the intended action.¹¹ The notice shall provide:

- A short, plain explanation of the purpose and effect of the proposed action;
- The full text of the proposed rule or amendment and a summary thereof;
- A reference to the specific rulemaking authority pursuant to which the rule is adopted;
- A reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific;
- A summary of the agency's statement of the estimated regulatory costs, if one is prepared;
- A statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs must do so in writing within 21 days after publication of the notice; and
- The procedure for requesting a public hearing on the proposed rule.

⁶ Rigot, *supra* note 2, at 14.

⁷ *Id.*

⁸ Section 11.60(1), F.S.

⁹ Section 11.60(2)(a), F.S.

¹⁰ Section 120.536(1), F.S.

¹¹ Section 120.54(3)(a)1. and 2., F.S.

Section 120.54(3)(a)4., F.S., requires an agency to furnish the following documents to the JAPC at least 21 days prior to rule adoption:

- A copy of the proposed rule;
- A detailed written statement of the facts and circumstances justifying the proposed rule;
- A copy of any statement of estimated regulatory costs that has been prepared pursuant to s. 120.541, F.S.;
- A statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and
- A copy of the notice of intent to adopt, amend, or repeal a rule, as required by s. 120.54(3)(a)1., F.S.

The JAPC will conduct a review of all proposed rules to determine whether:

- The rule is an invalid exercise of delegated legislative authority;
- The statutory authority for the rule has been repealed;
- The rule reiterates or paraphrases statutory material;
- The rule is in proper form;
- The notice given prior to adoption was sufficient to give adequate notice of the purpose and effect of the rule;
- The rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements;
- The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements;
- The rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule;
- The rule could be made less complex or more easily comprehensible to the general public;
- The rule does not impose 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 objections;
- The rule will require additional appropriations; and
- If the rule is an emergency rule, there exists an emergency justifying the promulgation of such rule, the agency has exceeded the scope of its statutory authority, and the rule was promulgated in compliance with the requirements and limitations of s. 120.54(4), F.S.¹²

If JAPC objects to a rule, it must certify the objection to the agency within five days of the objection.¹³ The committee also must notify the President of the Senate and the Speaker of the House of Representatives of any objection concurrent with certification to the agency.¹⁴

¹² Section 120.545(1), F.S.

¹³ Section 120.545(2), F.S.

¹⁴ *Id.*

Upon receipt of the objection, an agency must:

- (a) Modify the proposed rule to meet JAPC's objection;
- (b) Withdraw the proposed rule; or
- (c) Refuse to modify or withdraw the proposed rule.¹⁵

If the objection is to an existing rule, the agency must notify the committee that:

- (a) It has elected to amend the rule to meet the objection;
- (b) It has elected to repeal the rule; or
- (c) It refuses to amend or repeal the rule.¹⁶

Section 120.545(4), F.S., provides that if an agency elects to modify a proposed rule to meet the objection, after modification it must give notice in the first available issue of the FAW. If an agency elects to amend an existing rule to meet an objection, it must notify JAPC in writing and initiate the amendment procedure by giving notice in the next available issue of the FAW. The agency must complete the amendatory process to an existing rule under these circumstances within 90 days.¹⁷

If the agency refuses to modify, amend, withdraw, or repeal a rule to which JAPC has filed an objection, JAPC must file a detailed notice of its objection with the Department of State (department). The department must publish this notice in the FAW and in the *Florida Administrative Code* (FAC).¹⁸

The committee may not require the agency to meet its objection. JAPC, however, may seek an administrative or judicial determination that a rule to which it has filed an objection is an invalid exercise of delegated legislative authority.

Florida Administrative Code and Florida Administrative Weekly

Section 120.55(1), F.S., requires the Department of State (department) to publish all rules adopted by each agency. This compilation of rules is entitled the *Florida Administrative Code* (FAC). The publication is the official compilation of the administrative rules of the state. The FAC must cite the specific rulemaking authority pursuant to which each rule was adopted, all history notes, and complete indexes to all rules contained in the code. Supplementation is required to occur at least monthly.

Pursuant to s. 120.55(1)(b), F.S., the department is required to publish notices and various other materials filed by the state's administrative agencies in the *Florida Administrative Weekly* (FAW). The FAW must contain:

- Notice of adoption of, and an index to, all rules filed during the preceding week;

¹⁵ Section 120.545(3), F.S.

¹⁶ *Id.*

¹⁷ Section 120.545(6), F.S.

¹⁸ Section 120.545(9), F.S.

- All notices required by s. 120.54(3)(a), F.S., concerning agency rulemaking, showing the text of all rules proposed for consideration or a reference to the location in the FAW where the text of the proposed rules is published;
- All notices of public meetings, hearings, and workshops, including a statement of the manner in which a copy of the agenda may be obtained;
- A notice of each request for authorization to amend or repeal an existing uniform rule or for the adoption of new uniform rules;
- Notice of petitions for declaratory statements or administrative determinations;
- A summary of each objection to any rule filed by the Joint Administrative Procedures Committee during the preceding week; and
- Any other material required or authorized by law or deemed useful by the department.¹⁹

During the 2006 Regular Session, the Legislature passed CS/SB 262, enacted as ch. 2006-82, L.O.F., which requires the department to start publishing the FAW on its Internet website with certain search capabilities, effective December 31, 2007.²⁰ The law requires the department to continue to publish a printed version of the FAW.

III. Effect of Proposed Changes:

This bill modifies provisions of the Administrative Procedure Act (APA), codified in ch. 120, F.S., relating to agency rulemaking. In addition to technical or administrative refinements to ch. 120, F.S., the bill makes the following significant changes:

- Provides definitions of the terms “law implemented” and “rulemaking authority”;
- Provides additional requirements for the use of material that is being incorporated by reference in rules;
- Requires electronic publication of the *Florida Administrative Code* (FAC); and
- Provides for material incorporated by reference to be filed in electronic form unless, doing so would constitute a violation of federal copyright law.
- Provides that if an agency head is a board or other collegial body, then the agency head may not delegate the responsibility to conduct requested public hearings;
- Provides an award of attorney’s fees to the petitioner in an unadopted rule challenge if, prior to the final hearing, the agency initiates rulemaking and the agency knew or should have known that the agency statement was an unadopted rule; and
- Provides the granting of a stay in an unadopted rule challenge when certain conditions are met.

Section 1. Definitions

Present Situation

The terms “law implemented” and “rulemaking authority” are not defined for purposes of the APA.

¹⁹ Section 120.55(1)(b), F.S.

²⁰ The department’s website is located at <https://www.flrules.org/default.asp>.

Proposed Changes

The bill adds subsection (9) to s. 120.52, F.S.,²¹ which provides that “law implemented” means “the statutory language being carried out or interpreted by an agency through rulemaking.”

The term “rulemaking authority” is also added to s. 120.52, F.S., as subsection (17), and means “statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of ‘rule.’”

The bill also amends the definition of “invalid exercise of delegated legislative authority” to remove the phrase “. . . by the same statute,” which therefore removes the limitation that a statute granting rulemaking authority cannot be interpreted to extend beyond the implementation of any powers and duties that are conferred by the same statute.

Section 2. Rulemaking authority; repeal; challenge

Present Situation

Florida law states that statutory language which grants general rulemaking authority (i.e., authority to adopt rules on an issue) must not be construed to go beyond the implementation or interpretation of any specified powers and duties conferred by the same statute.

Proposed Changes

The bill amends s. 120.536(1), F.S., to clarify language relating to the source of statutory authority granting rulemaking authority by removing the phrase “. . . by the same statute” found at the end of subsection (1). Eliminating this phrase removes the limitation that a statute granting rulemaking authority cannot be interpreted to extend beyond the implementation of any powers and duties that are conferred by the same statute.

Section 3. Rulemaking

Present Situation

Section 120.54, F.S., authorizes agencies to adopt certain types of materials by incorporating them by reference in a rule, instead of reproducing all of the material in the rule. This helps ensure that rules will not be voluminous or full of technical jargon. It also ensures that the public is informed that the materials constitute part of the rules and helps the public find the material.

Proposed Changes

This bill amends s. 120.54(1)(i), F.S., by requiring that material incorporated by reference in a rule cannot incorporate other material by reference unless the rule refers to the additional material. For example, if a rule wishes to incorporate a reference to a Canadian health report, it

²¹ The bill renumbers subsequent subsections accordingly.

would violate the proposed bill language if the Canadian health report contained a statement incorporating a European health report, unless the rule specifically referenced the European health report.

This bill adds a provision to subsection (1) of s. 120.54, F.S., which clarifies that in all instances when an agency rule incorporates by reference another rule of that agency, all future revisions to the incorporated rule automatically apply to the host rule unless a contrary intent is clearly indicated. The bill also states that when changes to a rule that has been incorporated by reference in other rules are noticed, the notice must explain the effect of the changes on the referencing rule. For example, if an agency rule on travel authorization incorporates another rule of the same agency that deals with travel documentation, then any revisions to the travel documentation rule automatically apply to the travel authorization rule. Additionally, if changes to the travel documentation rule are noticed, such notification must explain the effect of the changes on the travel authorization rule.

For rules adopted after December 31, 2009, material may not be incorporated by reference unless it has been submitted in the appropriate electronic format to the Department of State (department) and is made available to the public for free of charge by providing a hyperlink from the reference in the rule (as published in the *Florida Administrative Code* (FAC)) to the incorporated materials on file at the department. However, the agency does not have to submit material incorporated by reference in electronic format if the agency determines that posting the material on the Internet for purposes of public examination and inspection would constitute a violation of federal copyright law. If the agency makes this determination, it must submit a statement to that effect, along with the address of locations at the department and the agency in which the material is available, in the notice required by s. 120.54(3)(a)1., F.S.

This bill provides that rulemaking responsibilities of an agency head under subparagraphs (3)(a)1.,²² (3)(e)1.,²³ or (3)(e)6.,²⁴ F.S., may not be delegated or transferred

The bill amends s. 120.54(3), F.S., to clarify language relating to grants of rulemaking authority, and to require that agencies, when filing a rule with the Joint Administrative Procedures Committee (JAPC or the committee), file copies of any materials incorporated by reference in the rule. If the rule is required to be published in the FAC, a certified copy of any material incorporated by reference in the rule must be filed with the department. The department must reject any rule presented for adoption if it does not comply with the department's rules.

The bill provides that if an agency head is a board or other collegial body created under ss. 20.165(4) or 20.43(3)(g), F.S., then the agency head may not delegate the responsibility to conduct requested public hearings, without the consent of the persons requesting the public hearing.

The bill amends s. 120.54(4), F.S., by requiring that in adopting an emergency rule, an agency must provide the JAPC with any material incorporated by reference in the rule.

²² Section 120.54(3)(a)1., F.S., provides for notice requirements in rule adopting procedures.

²³ Section 120.54(e), F.S., provides the procedures for filing for final adoption of a rule.

²⁴ *Id.*

The bill moves a provision allowing the department to provide rules governing the incorporation of materials by reference from the middle of subsection (1) of s. 120.54, F.S., to the end of the subsection.

Section 4. Committee review of agency rules

Present Situation

Florida law authorizes the Joint Administrative Procedures Committee (JAPC or the committee) to review proposed and existing agency rules. The law also requires that agencies provide the committee with any information it requests that may help it conduct such review.

Proposed Changes

This bill amends s. 120.545(2), F.S., by providing that JAPC may also request information necessary to examine an unadopted agency statement from an agency.

Sections 5, 6, and 7. Publication

Present Situation

Section 120.55(1), F.S., requires the Department of State (department) to publish all rules adopted by each agency in the *Florida Administrative Code* (FAC). The FAC must include:

- All rules adopted by agencies;
- Citations specifying the rulemaking authority for each rule;
- History notes for each rule; and
- Complete indexes to all rules in the FAC.

Any agency that publishes proposed rules in the FAC or other place must designate the supervisor or person who approved the rule.

Additionally, the department is required to publish notices and various other materials filed by the state's administrative agencies weekly in the *Florida Administrative Weekly* (FAW). The statute authorizes the department to promulgate rules specifying the style and form of rules, notices, and other items submitted for filing, as well as the form for certifying rules.²⁵

The department may contract with a publishing firm to print the FAC, but the law specifies that the department retains responsibility for it. In addition, the law provides that this publication is the official compilation of Florida's administrative rules.²⁶

Section 120.55, F.S., as amended by s. 4 of ch. 2006-82, L.O.F., effective December 31, 2007, requires that an FAW Internet website be developed and that this website allow users to:

²⁵ Section 120.55(1)(c), F.S.

²⁶ Section 120.55(1)(a)1., F.S.

- Search for notices by type, publication date, rule number, agency, and word/subject;
- Search a database that makes available all notices published on the website for a period of at least five years;
- Subscribe to an automated e-mail notification of selected notices;
- View agency forms incorporated by reference in proposed rules; and
- Comment on proposed rules.

Proposed Changes

This bill amends s. 120.55(1)(c), F.S., to authorize the department to promulgate rules specifying content requirements, as well as the style and form, of rules, notices, and other materials submitted for filing. The bill removes language authorizing the department to promulgate rules establishing the form for certifying such items. The bill makes identical changes to s. 120.55(1)(d), F.S., effective December 31, 2007, pursuant to ch. 2006-82, L.O.F.

The bill also requires, under s. 120.55(3), F.S., that the name of the agency head, not a delegate, be published with proposed rules. The bill makes an identical change to s. 120.55(5), F.S., effective December 31, 2007, pursuant to ch. 2006-82, L.O.F.

Section 120.55(2), F.S., is amended, effective December 31, 2007, to change the requirements associated with the FAC Internet website subscription system. The bill requires that the e-mail notification be sent out before, or at the same time, as such notice is published in hardcopy and electronically in the FAW. A requirement is added that the e-mail include a summary of the content of each notice. The bill also amends this subsection to add language requiring that a user on the system can view all other materials that are incorporated by reference in a proposed rule, not just proposed forms.

This bill amends s. 120.55(1), F.S., effective December 31, 2008, to require the department to publish an electronic version of the FAC, in which each rule must contain a cite to the specific law implemented. The on-line FAC must contain all required or useful information, display rules in browse mode, and allow for a full text search. The bill requires that the department continue to publish a printed version of the FAC, which must be supplemented at least monthly. The bill adds a new provision authorizing the department to prescribe rules governing the electronic filing of materials incorporated by reference. It provides that if materials incorporated by reference in a rule are filed electronically, the department must provide a hyperlink on its Internet website from the FAC text that incorporates the materials to the actual materials.

Section 8. Decisions which affect substantial interests

Present Situation

Section 120.569(1), F.S., provides that, unless waived by all parties, s. 120.57(1), F.S., applies to all proceedings involving a disputed issue of material fact and s. 120.57(2), F.S., applies in all other cases.

Section 120.569(2)(c), F.S., provides that unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.55(5)(b)4., F.S.

Proposed Changes

The bill provides that if a disputed issue of material fact arises during a proceeding under s. 120.57(2), F.S., the proceeding shall be terminated and a proceeding under s. 120.57(1), shall be initiated, unless waived by all parties.

The bill contains a technical change in s. 120.569, F.S., to a statutory cross-reference to the uniform rules adopted pursuant to s. 120.54(5)(b), F.S.

Section 9. Attorney's Fees

Present Situation

Under current law, an agency may avoid the imposition of costs by initiating the rulemaking process when a challenge is filed to an unadopted rule.

Current law provides for an award of attorney's fees to a party or agency depending upon who prevails in challenges to proposed or existing agency rules. Such judgments for attorney's fees are capped at \$15,000.²⁷ However, in challenges to unadopted rules, upon entry of a final order that all or part of an agency statement is an unadopted rule, the administrative law judge must award reasonable costs and attorney's fees to the petitioner, unless the agency demonstrates that the statement is required by the Federal Government.²⁸ Current law does not provide a cap on these attorney's fees.

Proposed Changes

This bill provides an award of attorney's fees, capped at \$50,000, to the petitioner in an unadopted rule challenge if, prior to the final hearing, the agency initiates rulemaking. These attorney's fees are only awarded upon a finding that the agency knew or should have known that the agency statement was an unadopted rule.

During an unadopted rule challenge, an agency may request a stay in order to initiate rulemaking. The administrative law judge (ALJ) must grant the stay upon consent of both parties. The ALJ may deny the stay if the petitioner objects and establishes that good cause exists to deny the stay. If a stay is granted, it remains in effect until either the statement has been adopted as a rule and has become effective or the proposed rule has been withdrawn.

Even if the agency initiates rulemaking during an unadopted rule challenge, the ALJ shall award costs and attorney's fees, accrued to the date the agency filed a request for a stay, to the

²⁷ Sections 120.595(2) and (3), F.S.

²⁸ Section 120.595(4), F.S.

petitioner upon a finding that the agency knew or should have known that the statement was an unadopted rule.

Section 10. Agency review

Present Situation

Section 120.74, F.S., provides that the head of every agency must submit a report every two years to specified legislative officers and committees which certifies that the agency has complied with the rule review activities specified by this statute.

Proposed Changes

This bill amends s. 120.74, F.S., to provide that the rule review report be submitted every year, instead of every two years.

Section 11. Effective Date

Except as otherwise expressly provided in this act, this act shall take effect July 1, 2007.

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:

The bill provides an award of attorney's fees, capped at \$50,000, to the petitioner in an unadopted rule challenge, if prior to the final hearing the agency initiates rulemaking. These attorney's fees are only awarded if the agency knew or should have known that the agency statement was an unadopted rule.

C. Government Sector Impact:

According to the Department of State, electronically accepting and publishing incorporated materials will entail \$345,000 in nonrecurring costs to upgrade existing systems, and \$39,614.91 in recurring costs for one FTE.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
