HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	HB 7089	**FINAL HOUSE FLOOR ACTION:**	
SPONSOR(S):	Rulemaking Oversight & Repeal Subcommittee; Ray	115 **Y's**	1 **N's**
COMPANION BILLS:	SB 1674	**GOVERNOR'S ACTION:**	Pending

SUMMARY ANALYSIS

HB 7089 passed the House on April 11, 2014, and subsequently passed the Senate on May 2, 2014. The bill ratifies Rules 62-772.300 and 62-772.400, F.A.C., authorizing the rules to go into effect.

In 2013, SB 1502, the act implementing that year's General Appropriations Act, required all contracts for petroleum contamination site rehabilitation to be competitively procured by the Florida Department of Environmental Protection (FDEP), if entered into on or after July 1, 2013. Prior to that date, FDEP initiated rulemaking to develop procedures for competitive procurement of site rehabilitation services. The rules were filed for adoption in December 2013.

As required by s. 120.541, F.S., FDEP prepared a Statement of Estimated Regulatory Costs (SERC). The following rules promulgated under the 2013 legislation are estimated to have an economic impact in excess of $1 million over 5 years:

- Rule 62-772.300, F.A.C., establishing the minimum qualifications for contractors performing petroleum contamination rehabilitation activities under the PRP.
- Rule 62-772.400, F.A.C., establishing the procedures FDEP will use for the competitive procurement of contractors.

If an agency rule meets that economic impact threshold, current law requires legislative ratification of the rule before it can take effect. HB 7089 enacts that ratification.

The bill has no significant fiscal impact.

Subject to the Governor's veto powers, the bill is effective upon becoming law.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

Petroleum Restoration Program

The Petroleum Restoration Program (PRP) was created in 1986 by enactment of the State Underground Petroleum Environmental Response Act. It was designed to restore sites polluted by petroleum storage in Florida. After many decades of petroleum storage in Florida, hundreds of sites had been so contaminated that the cost of restoration required by more recently enacted environmental laws, particularly the Water Quality Assurance Act of 1983[1] and the Federal Clean Water Act of 1972,[2] exceeded the owners' and creditors' interests in the property. Economic reality would have led to the private abandonment and state takeover of most of the more polluted sites, with the State of Florida succeeding to legal burden to restore the sites. The PRP provides public funding for the cleanup of these mostly private sites.

The PRP is funded by a dedicated excise tax on all petroleum products produced in or imported into Florida, contributing approximately $200 million annually[3] to the Inland Protection Trust Fund.[4] For fiscal year 2013-14, the Legislature appropriated $125 million for the PRP.[5]

In 1986, the fiscal analysis accompanying that year's legislation predicted that there were 2,000 contaminated sites in Florida. Since that time, over 25,000 contaminated sites have been identified, of which over 17,000 are eligible for funding under the PRP.[6] As of February 2014, approximately 7,300 sites have been rehabilitated, approximately 3,100 sites are currently undergoing some phase of rehabilitation, and approximately 6,900 sites await rehabilitation.

Prior to 1996, site owners had the option of performing their own cleanup and sending the bill to the state for reimbursement, or waiting for the Florida Department of Environmental Protection (FDEP) to rehabilitate their site in priority order. The program was revised in 1996 to remove the option of site owner reimbursement. That legislation left the funding of sites on a priority basis, authorized use of contractors selected by site owners that met certain minimum qualifications, added cost-share programs allowing an owner to clean up a site out of priority order when contributing a share of private funds, and required the application of risk-based principles to corrective actions. In 1999, the Legislature enacted further revisions, providing funding for certain activities, including free product recovery activities at sites in advance of priority order. Until July 1, 2013, most rehabilitation funds have been paid to contractors selected by site owners. FDEP approved the activities of those contractors based on initial site evaluations and rehabilitation plans reviewed and approved by FDEP staff prior to the initiation of rehabilitation activities.

A site's priority for rehabilitation services is scored on relative risk factors including: fire/explosion hazard, threat to uncontaminated drinking water (based on proximity of the site to applicable water

[1] Sections 376.30-376.317, F.S.
[2] PL 92-500, 86 Stat. 816.
[3] FDEP: "Petroleum Restoration Program Improvements-Presentation to the Legislative Budget Commission," p.1 (Sept. 4, 2013).
[4] Section 376.3071, F.S.
[5] For information on FDEP's plan to improve the efficiency of the PRP, see FDEP: "Petroleum Restoration Program Improvements-Presentation to the Legislative Budget Commission," available at http://www.leg.state.fl.us/Data/Committees/Joint/JLBC/Meetings/Packets/Petroleum%20Restoration%20Program%20Improvements.pdf.
[6] FDEP: "January 2012 Program Briefing," p.1 (latest program briefing found at FDEP website, viewed at: http://www.dep.state.fl.us/waste/quick_topics/publications/pss/pcp/geninfo/2012Program_Briefing_11Jan12.pdf).

sources), migration potential, and other related environmental and geological factors.[7] Site specific data about the level of contamination is not considered in initial scoring of sites.[8]

For over 20 years, FDEP has had authority to establish procurement processes for the PRP by rule.[9] Prior to 2013, it does not appear that FDEP had used that rulemaking authority.

In 2013, the Legislature amended s. 376.30711, F.S., to require: (1) all contracts for providers under the PRP to be procured through competitive bidding; (2) a statement under oath from all owners, responsible parties, and cleanup contractors and subcontractors, that no compensation, remuneration, or gift of any kind, directly or indirectly, has been solicited, offered, accepted, paid or received in exchange for designation or employment in connection with the cleanup of an eligible site, except for the compensation paid by FDEP to the contractor for the cleanup; (3) a statement under oath from all cleanup contractors and subcontractors receiving compensation for cleanup of eligible sites that they have never paid, offered, or provided any compensation in exchange for being designated or hired to do cleanup work, except for the compensation for the cleanup work; and (4) any owner, responsible party or cleanup contractor or subcontractor who falsely executes either of those statements to be prohibited from participating in the PRP.[10]

In addition, SB 1502,[11] which implemented the 2013-2014 General Appropriations Act, was enacted, requiring all contracts for site rehabilitation to be competitively procured if entered into on or after July 1, 2013.

Effective and efficient implementation of the 2013 changes in law necessitated rulemaking, including a new procurement rule. The Department has also undertaken some competitive procurement activities under general procurement laws[12] and applicable existing rules.

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[13] Rulemaking authority is delegated by the Legislature[14] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[15] a rule. Agencies do not have discretion as to whether to engage in rulemaking.[16] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[17] The grant of rulemaking authority itself need not be detailed.[18] The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[19]

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[7] Rule 62-771.300(1), F.A.C. The priority scoring is based primarily upon site location with little consideration of the actual contamination of the site. (From a meeting between House staff and FDEP staff, June 28, 2013, in which background questions about site scoring and priorities were addressed informally.)
[8] Rule 62-771.300(5), F.A.C.
[9] Section 287.0595, F.S.
[10] Section 376.30711(2)(d)-(e), F.S. These provisions expire on June 30, 2014.
[11] Chapter 2013-52, L.O.F.
[12] Chapter 287, F.S.
[13] Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).
[14] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).
[15] Section 120.52(17), F.S.
[16] Section 120.54(1)(a), F.S.
[17] Sections 120.52(8) & 120.536(1), F.S.
[18] *Save the Manatee Club, Inc.*, supra at 599.
[19] *Sloban v. Florida Board of Pharmacy*,982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

An agency begins the formal rulemaking process by filing a notice of the proposed rule.[20] The notice is published by the Department of State in the Florida Administrative Register[21] and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.[22]

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period after the rule goes into effect. First discussed in the analysis is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.[23] Next is the likely adverse impact on business competitiveness,[24] productivity, or innovation.[25] Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.[26] If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed $1 million in the aggregate for the 5-year period, the rule cannot go into effect until ratified by the Legislature.[27]

Current law distinguishes between a rule being "adopted" and becoming enforceable or "effective."[28] A rule must be filed for adoption before it may go into effect[29] and cannot be filed for adoption until completion of the rulemaking process.[30] As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Adoption of Rules

In June 2013, FDEP initiated rulemaking on site priorities and procurement procedures to implement the 2013 reforms. Effective January 16, 2014, FDEP amended its rules governing site priority ranking, Rules 62-771.100 and 62-771.300, F.A.C., to authorize rescoring of sites to better reflect the current law. These rules were estimated to not have an impact significant enough to require the preparation of a SERC.

On December 27, 2014, FDEP filed for adoption competitive procurement rules for the PRP. Two of those rules, Rules 62-772.300 and 62-772.400, F.A.C., require legislative ratification based on SERCs[31] estimating an impact in excess of $1 million over 5 years.

Impact of Rules

Rule 62-772.300, F.A.C., establishes the minimum qualifications for contractors performing petroleum contamination rehabilitation activities under the PRP. The rule is estimated to have a recurring cost in excess of $15 million, based on the estimated cost to contractors of maintaining the minimum

[20] Section 120.54(3)(a)1, F.S.
[21] Section 120.55(1)(b)2, F.S.
[22] Section 120.541(2)(a), F.S.
[23] Section 120.541(2)(a)1., F.S.
[24] This factor includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.
[25] Section 120.541(2)(a) 2., F.S.
[26] Section 120.541(2)(a) 3., F.S.
[27] Section 120.541(3), F.S.
[28] Section 120.54(3)(e)6, F.S. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.
[29] Section 120.54(3)(e)6, F.S.
[30] Section 120.54(3)(e), F.S.
[31] Copies of the SERCs prepared on the two rules ratified by the bill are in possession of the staff of the Regulatory Oversight & Repeal Subcommittee.

qualifications established by the rule. This estimate may be high as the law[32] already mandates some of the qualifications in the rule.

Rule 62-772.400, F.A.C., establishes the procedures FDEP will use for the competitive procurement of contractors. The rule is estimated to have a recurring cost of approximately $41.2 million, including the cost of responding to competitive solicitations and the transaction fees associated with the use of MyFloridaMarketPlace under the procurement rules. It is difficult to determine which of these costs result from the statutory requirement for competitive procurement and which derive from the implementing rules.

Effect of Proposed Changes

The sole effect of the bill is to ratify Rules 62-771.300 and 62-771.400, F.A.C., allowing each rule to take effect. The bill directs that it will not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

The bill expressly states that it serves no purpose other than ratification of the two rules. Furthermore, the bill specifies that it does not:

- Alter rulemaking authority delegated by prior law,
- Constitute legislative preemption of or exception to any provision of law governing adoption or enforcement of the rules cited, or
- Cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited.

Lastly, the bill specifies that it is intended to preserve the status of any cited rule as a rule under chapter 120, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill itself creates no additional source of state revenues. Application of the rule will generate fees to MyFloridaMarketPlace.
2. Expenditures: The bill itself requires no state expenditures. Costs of implementing the rules ratified are evaluated in the SERC for each rule.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill has no impact on local government revenues.
2. Expenditures: The bill does not impose additional expenditures on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill itself does not directly impact the private sector. Any resulting economic impacts are due to the substantive policy of the rule as addressed in the SERC for that rule.

D. FISCAL COMMENTS:

None.

[32] Section 376.30711(2)(b)-(c), F.S.