

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Committee on Environmental Preservation and Conservation

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BILL: SB 198

INTRODUCER: Senators Stewart and Rodriguez

SUBJECT: Environmental Regulation Commission

DATE: March 21, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Mitchell</u>	<u>Rogers</u>	<u>EP</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>EE</u>	_____
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 198 adds requirements for appointing new members of the Environmental Regulation Commission (ERC) when vacancies on the ERC occur. The bill requires the Governor to appoint a new member within 90 days after the occurrence of a vacancy. When the appointment by the Governor occurs:

- If the Legislature is in regular session, the appointee may not become a member until confirmed by the Senate.
- If the Legislature is not in regular session, the appointee serves on the ERC provisionally until confirmed by the Senate during the next legislative session. If the Senate refuses or fails to confirm the appointment during the next regular legislative session, the provisional member's service is immediately terminated and the Governor must make a new appointment subject to the same conditions.

The bill removes language that authorizes the Governor to fill a vacancy at any time for the unexpired term of a commissioner.

The bill also requires a supermajority of 5 votes to approve or modify a proposed rule submitted to the ERC which pertains to one of the following:

- Air pollution;
- Water quality standards;
- Regulation of consumptive usage of water;
- Hazardous substance release notification;
- Ambient air quality standards;
- Emission standards for stationary sources;
- Surface water quality standards;
- Ground water classes, standards, and exemptions; and
- Drinking water classes, standards, and exemptions.

## II. Present Situation:

### Environmental Regulation Commission

The Environmental Regulation Commission (ERC) exists within the Department of Environmental Protection (DEP). Seven members appointed by the Governor and approved by the Senate serve on the ERC. When making appointments, the Governor must provide reasonable representation from all sections of the state. Membership of the ERC must be representative of agriculture; the development industry; local government; the environmental community; lay citizens; and members of the scientific and technical community who have substantial expertise in the areas of the fate and transport of water pollutants, toxicology, epidemiology, geology, biology, environmental sciences, or engineering.<sup>1</sup> The Governor must appoint a chair of the ERC. The members of the ERC may then elect a vice-chair. The ERC members serve for 4 years.<sup>2</sup>

The secretary of DEP must submit any proposed rule containing a standard to the ERC for approval, modification, or disapproval.<sup>3</sup> A “standard” is any DEP rule relating to air and water quality, noise, solid-waste management, and electric and magnetic fields associated with electrical transmission and distribution lines and substation facilities. The term “standard” does not include rules of the DEP that relate exclusively to the internal management of the DEP, the procedural processing of applications, the administration of rulemaking or adjudicatory proceedings, the publication of notices, the conduct of hearings, or other procedural matters.<sup>4</sup> The ERC possess the powers to set standards for the following topics:

- Environmental control, including air quality standards; water quality and water quantity standards; waste regulation and cleanup, including hazardous waste regulation; power plant and transmission line siting; water supply; water treatment plants; and natural gas transmission lines;
- Consumptive use of water permitting;
- Certain aspects of water well construction;
- Criteria for wetlands that receive and treat domestic wastewater;
- Water quality for wetlands;
- Regulation of the construction, operation, alteration, maintenance, abandonment, and removal of stormwater management systems;
- Delineating the extent of wetlands;
- Phosphorus criteria in the Everglades Protection Area and water quality standards applicable to the Everglades Agricultural Area canals; and
- Water quality standards for the Everglades Protection Area.<sup>5</sup>

The ERC does not possess the power to set standards related to total maximum daily load calculations and allocations.<sup>6</sup> Further, the ERC may not establish DEP policies, priorities, plans,

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<sup>1</sup> Section 20.255(6), F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Section 403.805(1), F.S.

<sup>4</sup> Section 403.803(13), F.S.

<sup>5</sup> Section 403.804(1), F.S.

<sup>6</sup> Section 403.805(1), F.S.

or directives. The ERC may adopt procedural rules governing the conduct of its meetings and hearings.<sup>7</sup>

The following individuals currently serve on the ERC:<sup>8</sup>

Name	Term	From	Represents
Frank Gummey	12/16/16 to 07/01/17	Daytona Beach Shores	Local Governments
Joe Joyce	10/02/15 to 07/01/19	Gainesville	Agriculture
Adam R. Gelber	10/02/15 to 07/01/19	Miami	Science & Technical
Cari Roth	03/31/10 to 07/01/17	Tallahassee	Development
Sarah S. Walton	03/07/14 to 07/01/17	Pensacola	Lay Citizens
Craig D. Varn	05/10/16 to 03/01/19	Tallahassee	Lay Citizens
Jim McCarthy	12/16/16 to 07/01/19	Jacksonville	Environmental Community

### Office Vacancies Filled by the Governor

Unless otherwise provided by the Florida Constitution, the Governor must fill by appointment any vacancy in a state, district, or county office for the remainder of the term of an appointed officer.<sup>9</sup> For any office that requires Senate confirmation, the appointee may hold an interim term until the Senate takes up their confirmation.<sup>10</sup> When the Senate rejects an officer, they may hold over for no more than 30 days until the Governor appoints their successor, and the successor is qualified.<sup>11</sup>

If the Senate votes to take no action on a confirmation or otherwise fails to consider an appointee, the seat becomes vacant and the appointee may hold over for no more than 45 days. The Governor may reappoint this appointee.<sup>12</sup> If the Senate votes to take no action or for any other reason fails to consider the reappointment of the same person to the same office during the regular session immediately following the effective date of the reappointment, the reappointment of such person to such office shall be deemed to have been rejected. The office shall become vacant upon the adjournment sine die of the regular session immediately following the effective

<sup>7</sup> Section 403.804(1), F.S.

<sup>8</sup> Department of Environmental Protection, *Environmental Regulation Commission*, <http://www.dep.state.fl.us/legal/ERC/members.htm> (last visited March 18, 2017).

<sup>9</sup> Section 114.04, F.S.

<sup>10</sup> *Id.*

<sup>11</sup> Section 114.05(1)(d), F.S.

<sup>12</sup> Section 114.05(1)(e), F.S.

date of the reappointment and the appointee shall not hold over in that office or be eligible for reappointment in that office for 1 year thereafter.<sup>13</sup>

The Governor may fill a vacancy on the ERC for the unexpired term at any time.<sup>14</sup>

### **Human Health Criteria Rule Changes**

During the summer of 2016, the ERC took up a rule proposal to change certain human health based water quality criteria, including the establishment of a new classification of waters. The DEP used a new methodology to update these standards. Some standards became more protective, while others became less protective.<sup>15</sup>

At the time the ERC considered the proposed rule changes, two vacancies existed on the ERC. The vacant seats were those seats on the ERC designated for the representation of local governments and the environmental community. These constituencies were not specifically represented on the ERC when it voted 3-2 to approve the new human health based water quality criteria. Some groups were concerned that the ERC took up the new standards before the Governor filled the two vacancies.<sup>16</sup> The revised rules became effective on November 17, 2016.<sup>17</sup>

### **III. Effect of Proposed Changes:**

SB 198 amends the statutory section that establishes the Department of Environmental Protection (DEP) and the Environmental Regulation Commission (ERC),<sup>18</sup> to add requirements for appointing a new member when a vacancy on the ERC occurs. The bill requires the Governor to appoint a new member, subject to confirmation by the Senate, within 90 days after the occurrence of a vacancy. The appointee's service on the ERC is governed by the following:

- If the Legislature is in regular session when the appointment occurs, the appointee may not become a member until confirmed by the Senate.
- If the Legislature is not in regular session when the appointment occurs, the appointee serves on the ERC provisionally until presented for confirmation by the Senate during the next legislative session. If the Senate refuses or fails to confirm the appointment during the next regular legislative session, the provisional member's service must be immediately terminated and the Governor must make a new appointment subject to the same conditions.

The bill removes language that authorizes the Governor to fill a vacancy at any time for the unexpired term of a commissioner.

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<sup>13</sup> Section 114.05(1)(f), F.S.

<sup>14</sup> Section 20.255(6), F.S.

<sup>15</sup> DEP, *Surface Water Quality Standards*, <http://www.dep.state.fl.us/water/wqssp/> (last visited March 18, 2017); Jeff Burlew, *ERC signs off on controversial water standards*, Tallahassee Democrat (July 26, 2016), <http://www.tallahassee.com/story/news/2016/07/26/erc-signs-off-controversial-water-standards/87585308/> (last visited March 18, 2017).

<sup>16</sup> *Id.*

<sup>17</sup> Fla. Admin. Code R. 62-302.400 and Fla. Admin. Code R. 62-302.530.

<sup>18</sup> Section 20.255, F.S.

The bill also requires a proposed rule containing standards submitted to the ERC for approval, modification, or disapproval to receive a simple majority vote for approval or modification, unless the rule pertains to one of the following, in which case a supermajority of 5 votes is required for approval or modification:

- Air pollution;
- Water quality standards;
- Regulation of consumptive usage of water;
- Hazardous substance release notification;
- Ambient air quality standards;
- Emission standards for stationary sources;
- Surface water quality standards;
- Ground water classes, standards, and exemptions; and
- Drinking water classes, standards, and exemptions.

The bill provides that proposed rules that fail to receive the votes required for approval or modification are deemed disapproved.

The bill takes effect July 1, 2017.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

C. **Government Sector Impact:**

The bill does not provide rulemaking authority or require executive branch rulemaking and is unlikely to result in significant rulemaking by DEP.

**VI. Technical Deficiencies:**

The bill requires the Governor, upon the failure of an ERC appointment confirmation, to make a new appointment subject to the same conditions. This language appears at the end of a subparagraph and it is unclear whether the word “conditions” refers to the provisions in that subparagraph or the provisions of the entire paragraph of which it is a part. To provide clarity regarding a new appointment following a confirmation failure, line 44 of the bill could be amended to read, “new appointment subject to the requirements of this paragraph” or “subparagraph,” depending on the intent of this language.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends sections 20.255 and 403.805 of the Florida Statutes.

**IX. Additional Information:**

A. **Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.