

**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 316

INTRODUCER: Senator Stewart

SUBJECT: Environmental Regulation Commission

DATE: November 3, 2017

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Mitchell</u>	<u>Rogers</u>	<u>EP</u>	<b>Favorable</b>
2.	_____	_____	<u>EE</u>	_____
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 316 requires the Governor to appoint a new member of the Environmental Regulation Commission (ERC) within 90 days after the occurrence of a vacancy on the commission. 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 minimum of 4 affirmative votes to approve or modify a proposed rule submitted to the ERC which pertains to air quality standards or water quality standards.

**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 appoints the chair of the ERC and the members of the ERC may elect a vice-chair. The ERC members serve 4-year terms.<sup>2</sup>

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

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

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 DEP rules that relate exclusively to the internal management of 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 possesses the powers to set standards for the following matters:

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

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<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.

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

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**

The Governor may fill a vacancy on the ERC for the unexpired term at any time.<sup>9</sup> 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>10</sup> For any office that requires Senate confirmation, the appointee may hold an interim term until the Senate takes up their confirmation.<sup>11</sup> When the Senate rejects an officer, they may hold over for no more than 30 days until the Governor appoints his or her successor, and the successor is qualified.<sup>12</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 the appointee.<sup>13</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 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>14</sup>

<sup>8</sup> Department of Environmental Protection (DEP), *Environmental Regulation Commission*, <https://floridadep.gov/ogc/ogc/content/erc-members> (last visited November 1, 2017).

<sup>9</sup> Section 20.255(6), F.S.

<sup>10</sup> Section 114.04, F.S.

<sup>11</sup> *Id.*

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

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

<sup>14</sup> Section 114.05(1)(f), F.S.

### **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. 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>

The month after the ERC approved the water quality criteria, the rule changes were challenged by several parties. An administrative judge dismissed the rule challenge petitions for not having been timely filed, but on October 18, 2017, that decision was reversed on appeal by the Florida Third District Court of Appeals. The court remanded the case to administrative court for further proceedings.<sup>18</sup>

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

SB 316 amends the statutory section that establishes the Department of Environmental Protection (DEP) and the Environmental Regulation Commission (ERC)<sup>19</sup> to require the Governor to appoint a new member, subject to confirmation by the Senate, within 90 days after the occurrence of a vacancy. 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 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 air quality standards or water quality standards, in which case a minimum of 4 affirmative votes is required for approval or modification.

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

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<sup>15</sup> DEP, *Surface Water Quality Standards*, <http://www.dep.state.fl.us/water/wqssp/> (last visited October 30, 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 October 30, 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> *The Seminole Tribe of Florida and City of Miami v. Department of Environmental Protection and Florida Environmental Regulation Commission*, Case Nos. 3D16-2440 & 3D16-2129 (Fla. 3rd DCA 2017), <http://www.3dca.flcourts.org/Opinions/3D16-2440.pdf> (last visited November 1, 2017).

<sup>19</sup> Section 20.255, F.S.

The bill takes effect July 1, 2018.

**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:**

None.

**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.

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

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