HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 713 Administrative Procedures and Permitting Process Review
SPONSOR(S): State Affairs Committee, Agriculture, Conservation & Resiliency Subcommittee, Constitutional Rights, Rule of Law & Government Operations Subcommittee, McFarland
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 742

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Constitutional Rights, Rule of Law & Government Operations Subcommittee	11 Y, 2 N, As CS	Wagoner	Miller
2) Agriculture, Conservation & Resiliency Subcommittee	17 Y, 0 N, As CS	Gawin	Moore
3) State Affairs Committee	11 Y, 6 N, As CS	Wagoner	Williamson

SUMMARY ANALYSIS

The Administrative Procedure Act (APA) sets forth a uniform set of procedures agencies must follow when exercising delegated rulemaking authority. 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. Executive branch agencies do not have inherent rulemaking authority.

The bill amends the APA to increase transparency in rulemaking, provides a process for agencies to reduce unnecessary rules, requires certain agencies to review coastal permitting and other permitting processes, and ensures that regulatory cost impacts are considered for every rule. Specifically, the bill:

- Requires each agency to review its rules for consistency with the powers and duties granted by the agency's enabling statutes. If, after reviewing a rule, the agency determines substantive changes to update a rule are not required, the agency must repromulgate the rule.
- Authorizes agencies to hold workshops to gather information to aid in the preparation of the SERC.
- Requires an agency, in all notices of rulemaking that include material incorporated by reference, to submit the incorporated material in the prescribed electronic format to the Department of State with the full text available for free public access through an electronic hyperlink.
- Requires the agency annual regulatory plan to identify and describe each rule by rule number or proposed rule number that the agency expects to develop, adopt, or repeal for the 12-month period beginning October 1 and ending September 30, and to include a declaration by the agency head and general counsel.
- Allows submitting a lower cost regulatory alternative after publication of a notice of change.
- Defines the term "technical change" and requires documenting technical changes in a rule's history.
- Requires at least seven days between the publications of a notice of rule development and of a notice of proposed rule.
- Requires the Department of Environmental Protection and each water management district to review and report on their permitting processes.

The bill may have a negative fiscal impact on state government. *See* Fiscal Comments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Rulemaking

Present Situation

The Legislature, as the sole branch of government with the inherent power to create laws,[1] may delegate to executive branch agencies and certain political subdivisions the quasi-legislative authority to create rules.[2] The Administrative Procedure Act (APA)[3] sets forth a uniform set of procedures agencies[4] must follow when exercising delegated rulemaking authority. 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.[5] Rulemaking authority is delegated by the Legislature through statute and authorizes agencies to "adopt, develop, establish, or otherwise create"[6] rules. The Legislature delegates rulemaking authority where the given agency has "expertise in a particular area for which they are charged with oversight."[7] Agencies do not have the discretion in and of themselves to engage in rulemaking.[8] To adopt a rule, an agency must have authority both to make rules and implement a specific law.[9] The grant of rulemaking authority itself need not be detailed. 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.[10]

Whether creating or amending a rule, an agency begins the formal rulemaking process[11] by publishing a notice of rule development in the Florida Administrative Register (FAR) indicating the subject area to be addressed and including a short, plain explanation of the purpose and effect of the rule.[12] The notice may include the preliminary text of the proposed rule, but it is not necessary. An agency may hold public workshops for rule development but must hold such workshops, including in various regions of the state, if so requested in writing by any affected person.[13]

After publishing the notice of rule development, and upon approval by the agency head, an agency must publish a notice of proposed rule.[14] A rule cannot be amended by reference only.[15] The notice is

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[1] Art. III, s. 1, FLA. CONST.; *see also* art. II, s. 3, FLA. CONST.
[2] *See Whiley v. Scott*, 79 So. 3d 702, 710 (Fla. 2011), stating "[r]ulemaking is a derivative of lawmaking."
[3] Ch. 120, F.S.
[4] "Agency" includes the Governor; each state officer and state department, and each departmental unit described in s. 20.04; the Board of Governors of the State University System; the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multicounty special district, but only if a majority of its governing board is comprised of nonelected persons; educational units; and each entity described in chs. 163, 373, 380, and 582, F.S., and s. 186.504, F.S., each officer and governmental entity in the state having statewide jurisdiction or jurisdiction in more than one county, and each officer and governmental entity with jurisdiction within only one county but made subject to the APA by general or special law or judicial decision. The definition excludes municipalities and other specifically identified governmental entities. S. 120.52(1), F.S.
[5] S. 120.52(16), F.S.
[6] S. 120.52(17), F.S.
[7] *Whiley v. Scott*, 79 So. 3d 702, 711 (Fla. 2011).
[8] S. 120.54(1)(a), F.S.
[9] Ss. 120.52(8) and 120.536(1), F.S.
[10] *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).
[11] Alternatively, a person regulated by an agency or having substantial interest in an agency rule may petition the agency to adopt, amend, or repeal a rule. Section 120.54(7), F.S.
[12] S. 120.54(2), F.S.
[13] S. 120.54(2)(c), F.S.
[14] S. 120.54(3)(a)1., F.S.
[15] S. 120.54(1)(i)4., F.S.

published by the Department of State (DOS) in the FAR[16] and must contain both the full text of the proposed rule or amendment and a summary.[17]

After publishing a notice of proposed rule, an agency must hold a hearing if requested within 21 days from the date of publication.[18] After the hearing is held or the time for requesting a hearing has expired, if the agency does not change the rule, other than a technical change, the agency must file a notice stating no changes have been made to the rule with the Joint Administrative Procedures Committee (JAPC) at least seven days before filing the rule for adoption.[19] However, if a hearing is requested, the agency may, based upon the comments received at the hearing, publish a notice of change.[20]

As an alternative to the agency initiated rulemaking process delineated above, a person regulated by the agency or having a substantial interest in an agency rule may petition the agency to adopt, amend, or repeal a rule. The petitioner must specify the proposed rule and action requested. The agency may either initiate rulemaking or decline to do so; however, if the agency chooses the latter it must issue a written statement of the reasons for the denial.[21]

Once an agency has completed the steps of rulemaking, the agency may file the rule for adoption with DOS and the rule becomes effective 20 days later, on a later date specified in the notice, on a date specified in statute, or upon ratification by the Legislature.[22] Most adopted rules are published in the Florida Administrative Code (FAC).[23]

The validity of a rule or a proposed rule may be challenged at the Division of Administrative Hearings (DOAH)[24] as an invalid delegation of legislative authority.[25] An invalid delegation of legislative authority is an action that goes beyond the powers, functions, and duties delegated by the Legislature.[26] A rule or proposed rule is an invalid delegation of legislative authority if:

- The agency has materially failed to follow the rulemaking procedures in the APA;
- The agency has exceeded its grant of rulemaking authority;
- The rule enlarges, modifies, or contravenes the specific provisions of the law implemented;
- The rule is vague, fails to establish adequate standards for agency decisions, or vests the agency with unbridled discretion;
- The rule is arbitrary or capricious; or
- The rule imposes regulatory costs on the regulated person, county, or municipality that could have been reduced by adopting less costly alternatives that substantially accomplish the statutory objectives.[27]

An administrative law judge (ALJ) at DOAH hears the rule challenge in a de novo proceeding and, within 30 days of the hearing, renders a final order determining the rule's validity based upon a

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[16] S. 120.55(1)(b), F.S. Prior to 2012, the FAR was published weekly, resulting in a period of at least seven days between the publication of a notice of rule development and a notice of proposed rule. In 2012, the Legislature passed HB 541 (2012) that changed the FAR from a weekly publication to a publication that is continuously revised and, as a result, eliminated the seven day period between the two notices. *See* ch. 2012-63, Laws of Fla.

[17] S. 120.54(3)(a)1., F.S.

[18] S. 120.54(3)(c), F.S.

[19] S. 120.54(3)(d)1., F.S.

[20] *Id.*

[21] S. 120.54(7)(a), F.S.

[22] S. 120.54(3)(e)6., F.S.

[23] Rules general in form but applicable to only one school district, community college district, or county, or a part thereof, or a state university rules relating to internal personnel or business and finance are not published in the FAC. Forms are not published in the FAC. S. 120.55(1)(a), F.S. Emergency rules are also not published in the FAC.

[24] DOAH is an agency in the executive branch, administratively housed within the Department of Management Services but not subject to its control. DOAH employs administrative law judges who serve as neutral arbiters presiding over disputes arising under the APA. S. 120.65, F.S.

[25] S.120.56(1), F.S.

[26] S.120.52(8), F.S.

[27] S. 120.52(8)(a)-(f), F.S.

preponderance of the evidence standard.[28] The agency may not alter the ALJ's decision but may appeal the decision to the District Court of Appeal where the agency maintains its headquarters.[29]

Effect of the Bill

The bill requires a notice of proposed rule to be filed within 12 months of publishing a notice of rule development. The bill requires that a proposed rule be withdrawn if, after issuing a notice of proposed rule, the agency fails to adopt it within the APA prescribed timeframes. If an agency exceeds the time allowed to adopt the rule, the bill requires JAPC to notify the agency of the failure. If the agency does not withdraw the rule within 30 days following the notice, JAPC must notify DOS that the date for adoption of the rule has expired. DOS must then publish a notice of withdrawal of the proposed rule.

The bill requires an agency to file a copy of a petition to initiate rulemaking with JAPC. The bill also defines the term "technical change" to mean a change limited to correcting grammatical, typographical, and similar errors not affecting the substance of the rule.

Joint Administrative Procedures Committee

Present Situation

JAPC is a standing committee of the Legislature established by joint rule and created to maintain a continuous review of administrative rules, the statutory authority upon which those rules are based, and the administrative rulemaking process.[30]JAPC may examine existing rules and must examine each proposed rule to determine whether the:

- Rule is an invalid exercise of delegated legislative authority;
- Statutory authority for the rule has been repealed;
- Rule reiterates or paraphrases statutory material;
- Rule is in proper form;
- Notice given prior to adoption was sufficient;
- Rule is consistent with expressed legislative intent;
- Rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law that the rule implements;
- Rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule;
- Rule could be made less complex or more easily comprehensible to the general public;
- Rule's statement of estimated regulatory cost (SERC) complies with the requirements of the APA and whether the rule imposes regulatory costs on the regulated person, county, or municipality that could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives; or
- Rule will require additional appropriations.[31]

[28] S. 120.56(1)(e), F.S.
[29] S. 120.68(2)(a), F.S.
[30] Fla. Leg. J. Rule 4.6; *see also* s. 120.545, F.S.
[31] S. 120.545(1), F.S.

Effect of the Bill

The bill requires JAPC to examine existing rules to align with its mandate to examine proposed rules.

Agency Review of Rules

Present Situation

The APA requires each agency to review its rules annually.[32] Rules generally do not expire or sunset and many agencies have adopted rules that have not been updated in years.

Effect of the Bill

The bill creates a process called "repromulgation," whereby each agency is required to review its rules for consistency with the powers and duties granted by the agency's enabling statutes. If the agency determines that substantive changes are not required after reviewing the rule, the agency must repromulgate the rule to reflect the date of the review. The bill defines "repromulgation" to mean the publication and adoption of an existing rule following an agency's review of the rule for consistency with the power and duties granted by its enabling statutes. Each agency must review its rules according to the following schedule:

- If the rule was adopted on or after January 1, 2019, within five years after its effective date, and every five years thereafter.
- For any rule existing as of July 1, 2023, no later than December 31, 2028.

No later than September 1, 2023, and annually thereafter, the bill requires JAPC to provide each agency a list of existing rules and their effective dates for review in the next calendar year.

An agency, before repromulgation of a rule and upon approval of its agency head, must:

- Publish a notice of repromulgation in the FAR, which is not required to include the text of the rule; and
- File the rule with DOS. The rule may not be filed for repromulgation less than 28 days before or more than 90 days after the publication of the notice.

An agency must file a notice of repromulgation with JAPC at least 14 days before filing the rule with DOS. JAPC must certify at the time of filing whether the agency has responded to all of JAPC's material or written inquiries. Under the bill, the APA hearing requirements do not apply to repromulgation of a rule[33] and a repromulgated rule is not subject to challenge as a proposed rule.[34]

The bill requires each agency, upon approval of the agency head, to submit electronically a certified copy of the repromulgated rule it proposes to adopt with DOS and one certified copy of any material incorporated by reference in the rule. The repromulgated rule is adopted upon its filing with DOS and becomes effective 20 days later. DOS must then update the history of the rule in the FAC to reflect the new effective date. The bill requires DOS to adopt rules to implement the bill's repromulgation provision by December 31, 2023.

If an agency fails to adhere to deadlines imposed for repromulgation, any person regulated by the agency or substantially interested in the rule may petition the agency to review the rule. Upon receiving the petition to review, the agency has 30 days to comply with or deny the petition. Each agency must submit a list of rules not being re-promulgated to the President of the Senate and the Speaker of the House 30 days before each legislative session, and must identify whether the rulemaking authority for each such rule remains in effect. If no action is taken by the Legislature with regard to a listed rule, by July 1 following the legislative session, the agency must initiate rulemaking proceedings to repeal the rule.

[32] *See* s. 120.74, F.S.
[33] *See* s. 120.54(3)(c), F.S.
[34] *See* s. 120.56(2), F.S.

The bill exempts community development districts from the rule repromulgation requirements.[35]

Statement of Estimated Regulatory Costs

Present Situation

A SERC is an agency estimate of the potential costs to the public of complying with a rule as well as to the agency and other governmental entities to implement the rule.[36] Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.[37] However, a SERC is required if the proposed rule will have a negative impact on small businesses or increase regulatory costs by more than $200,000 in the aggregate within one year after implementation of the rule.[38] If the agency revises a rule before adoption and the revision increases the regulatory costs of the rule, the agency must revise the SERC to reflect that increase.[39]

A SERC must include:

- A good faith estimate of the number of people and entities affected by the proposed rule;
- A good faith estimate of the cost to the agency and other governmental entities to implement the proposed rule;
- A good faith estimate of transactional costs[40] likely to be incurred by people, entities, and governmental agencies for compliance; and
- An analysis of the proposed rule's impact on small businesses, counties, and municipalities.[41]

The SERC must also include an economic analysis on the likelihood that the proposed rule will have direct or indirect adverse impacts in excess of $1 million within the first five years of implementation on:

- Economic growth, private-sector job creation or employment, or private-sector investment;
- Business competitiveness, productivity, or innovation; or
- Regulatory costs, including any transactional costs.[42]

A rule having any such impact must be ratified by the Legislature in order to take effect.[43]

An agency's failure to prepare a SERC or respond to a lower cost regulatory alternative may be used in a challenge to invalidate the rule as an invalid exercise of delegated legislative authority only if raised in a petition filed within one year of the effective date of the rule by a person whose substantial interests are affected by the regulatory costs of the rule.[44]

Effect of the Bill

The bill requires an agency to prepare a SERC for a rule repeal if such repeal would impose a regulatory cost. In a challenge to a rule repeal that only reduces or eliminates regulations on those

[35] The Florida Land and Water Adjudicatory Commission is authorized to create community development districts of 2,500 or more acres by administrative rulemaking, and community development districts are authorized to adopt rules and orders pursuant to the APA. *See* ss. 190.005(1) and 190.011(5), F.S.
[36] S. 120.541(2), F.S.
[37] S. 120.54(3)(b)1., F.S.
[38] S. 120.54(3)(b)1., F.S.
[39] S. 120.541(1)(c), F.S.
[40] "Transactional costs" are readily ascertainable direct costs based on standard business practices, including matters such as filing fees, the cost to obtain a license, and costs of complying with the rule such as required equipment or revised operating procedures. S. 120.541(2)(d), F.S.
[41] S. 120.541(2)(b)-(e), F.S.
[42] S. 120.541(2)(a), F.S.
[43] S. 120.541(3), F.S.
[44] S. 120.541(1)(f), F.S.

regulated by the rule, the repeal must be considered presumptively correct in any proceedings before DOAH or a court.
If an agency revises a SERC, the bill requires the agency to provide notice of the revision and include the agency website address where the revision may be viewed for publication on the FAR website.

The bill replaces the term "transactional costs" with "compliance costs."

The bill allows agencies to survey individuals, businesses, business organizations, counties, and municipalities to collect data helpful to estimate the costs and impacts of the proposed rule. The bill authorizes agencies to hold workshops to gather information to aid in the preparation of the SERC. Additionally, if an agency holds a hearing on a proposed rule, the bill requires the agency to ensure that those responsible for preparing the SERC be made available to respond to questions or comments. If a SERC is not required, the bill requires the notice to state the information that the agency relied upon in reaching this conclusion.

Lower Cost Regulatory Alternative

Present Situation

Within 21 days after publication of a notice of rule adoption, amendment, or repeal, a person substantially affected by the proposed rule may submit a lower cost regulatory alternative (LCRA).[45] The LCRA must be a written proposal, made in good faith, that substantially accomplishes the objectives of the law being implemented.[46] A LCRA may recommend that a rule not be adopted at all, if it explains how the "lower costs and objectives of the law will be achieved by not adopting any rule."[47] If a LCRA is submitted to an agency, the agency must prepare a SERC if one has not been previously prepared, or revise its prior SERC, and either adopt the LCRA or provide a statement explaining the reasons for rejecting the LCRA.[48] Additionally, submitting a LCRA extends the 90-day period for filing a rule for an additional 21 days.[49] At least 21 days before filing a rule for adoption, an agency that is required to revise a SERC in response to a LCRA must provide the revised SERC to the person submitting the LCRA and to JAPC and must provide notice on the agency's website that it is available to the public.[50]

Just as in the case of an agency's failure to prepare a SERC, an agency's failure to respond to a LCRA may be raised in a proceeding at DOAH to invalidate a rule as an invalid delegation of legislative authority if filed in a petition within one year from the effective date of the rule and is raised by a person whose substantial interests are affected by the regulatory costs of the rule.[51]

Effect of the Bill

The bill specifies that a LCRA may be submitted either after a notice of proposed rule or a notice of change. If submitted after the agency publishes a notice of change, the LCRA is deemed to be made in good faith only if the person reasonably believes, and states such reasons in the proposal, that the proposed rule as changed increases the regulatory costs or creates an adverse impact on small business. If an agency receives a LCRA, the bill requires the agency to provide a copy to JAPC at least 21 days before filing the rule for adoption.

In addition to a rulemaking agency's choice to adopt or reject with explanation a LCRA, the bill authorizes an agency to modify the proposed rule to substantially reduce regulatory costs. If the rule is modified, the agency must revise the SERC. If the agency rejects the LCRA or modifies the proposed rule, the agency must state its reasons for rejecting the LCRA in favor of the proposed or modified rule.

[45] S. 120.541(1)(a), F.S.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] S. 120.541(1)(d), F.S.
[51] S. 120.541(1)(f), F.S.

When a SERC is revised because a change to a proposed rule increases the projected regulatory costs or the agency modified the rule in response to a LCRA, a summary of the revised SERC must be included in subsequent published rulemaking notices. Under the bill, the revised SERC must be provided to the rules ombudsman, the party submitting the LCRA, and JAPC, and must be published in the same manner as the original SERC.

Florida Administrative Code and Register

Present Situation

The FAC is the official electronic compilation of all rules adopted by each agency and maintained by DOS. DOS retains the copyright over the FAC.[52]

Each rule in the FAC must cite the grant of rulemaking authority and the specific law implemented, as well as a history note detailing the initial promulgation of the rule and any subsequent changes.[53] Rules applicable to only one school district, one community college district, or county or state university rules relating to internal personnel or business and finance, are not required to be included in the FAC.[54] DOS is required to publish the following information at the beginning of each section of the code concerning an agency:

- The address and telephone number of the executive offices of the agency;
- The manner by which the agency indexes its rules; and
- A listing of all rules of that agency excluded from publication in the FAC and a statement as to where those rules may be inspected.[55]

DOS must adopt rules allowing electronic filing of adopted rules and material incorporated by reference,[56] and must prescribe by rule the style and form required for rules, notices, and other materials submitted for filing in the FAC.[57] DOS requires rules that are being amended to be coded by underlining new text and by striking through deleted text.[58]

The FAR is the official publication of the APA published electronically on a free public website[59] managed by DOS as a continuous revision under the statute.[60] The FAR must contain all notices of rule development and adoption, showing the full text of all rules proposed for consideration; all notices of public meetings, hearings, and workshops under s. 120.525, F.S.; all notices of requests to adopt, amend, or repeal a rule; all notices of petitions for a declaratory statement or an administrative determination; summaries of objections to any rule filed by JAPC; a list of rules filed for adoption in the previous seven days; a list of all rules filed for adoption pending legislative ratification; and all other material required by law or deemed useful by DOS.[61] The FAR website must allow users to search for notices by specific criteria,[62] search for notices published in the FAR for at least the preceding five years, subscribe to automated e-mail notification of selected notices, view agency forms and other materials submitted electronically to DOS, and comment on proposed rules.[63]

Effect of the Bill

The bill requires the FAR be published once daily, by no later than 8 a.m., with the exception of state holidays and emergency closures. If a rule is corrected and replaced, the FAR must indicate the rule

[52] S. 120.55(1)a.1., F.S.
[53] *Id.*
[54] S. 120.55(1)(a)2., F.S.
[55] S. 120.55(1)(a)3., F.S.
[56] S. 120.55(1)(a)5., F.S.
[57] S. 120.55(1)(c), F.S.
[58] R. 1-1.010(5)(a), F.A.C., *referencing* r. 1-1.011(3)(c), F.A.C.
[59] S. 120.55(7), F.S.
[60] S. 120.55(1)(b), F.S.
[61] S. 120.55(1)(b)1.-7., F.S.
[62] By type, publication date, rule number, word, subject, and agency. S. 120.55(2)(a), F.S.
[63] S. 120.55(2), F.S.

has been republished and indicate DOS has corrected it. The bill also requires the history note appended to each rule include the date of any technical changes to the rule.

Emergency Rules

Present Situation

Agencies are authorized to respond to immediate dangers to the public health, safety, or welfare by adopting emergency rules.[64] Emergency rule adoption follows different procedures.[65] The notice of the emergency rule and its text is published in the first available issue of the FAR. There is no requirement that an emergency rule be published in the FAC.[66] The agency must publish prior to, or contemporaneous with, the rule's promulgation the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare.[67] Emergency rules are effective immediately, or on a date less than 20 days after filing if specified in the rule,[68] but are effective for no longer than 90 days.[69] An emergency rule is not renewable, except when the agency has initiated rulemaking to adopt rules relating to the subject of the emergency rule and either a challenge to the proposed rules has been filed and remains pending or the proposed rule is awaiting ratification by the Legislature.[70] The validity of an emergency rule may be challenged at DOAH subject to an expedited filing and hearing schedule.[71]

Effect of the Bill

The bill requires emergency rules to be published in the FAC instead of the FAR. The bill also allows an agency to make technical changes to the emergency rule within the first seven days after adoption and permits an agency to supersede an emergency rule currently in effect through the adoption of another emergency rule. The bill clarifies that an emergency rule is not subject to the legislative ratification process.[72]

Additionally, the bill:

- Requires that any notice of renewal of an emergency rule be published in the FAR before expiration of the emergency rule;
- Requires emergency rules with an effective period longer than 90 days and intended to replace existing rules to have a history note that specifically identifies the emergency rule and includes the date the emergency rule was filed with DOS; and
- Provides that an adopted emergency rule may be repealed at any time while the rule is in effect by publishing a notice in the FAR.

[64] S. 120.54(4), F.S.
[65] S. 120.54(4)(a)1., F.S.
[66] S. 120.54(4)(a)3., F.S.
[67] *Id.*
[68] S. 120.54(4)(d), F.S.
[69] S. 120.54(4)(c), F.S.
[70] *Id.*
[71] *Id.*
[72] In 2011, the Legislature passed two bills, CS/CS/HB 993 and CS/CS/CS/HB 849 that contained conflicting provisions concerning the exemption of emergency rules from the legislative ratification process. In CS/CS/HB 993, the provision exempting emergency rules from the legislative ratification process was expressly included in the bill. In CS/CS/CS/HB 849, the provision was deleted, leading to a statutory conflict. In 2013, the Legislature passed CS/CS/SB 1410, which amended s. 120.541(4), F.S., to correct a cross reference and in the process the bill continued the omission of the provision exempting emergency rules. This bill reinstates the provision exempting emergency rules from the legislative ratification process.

Small Business Impact in Rulemaking

Present Situation

Each agency, before the adoption, amendment, or repeal of a rule, must consider the impact of the rule on small businesses.[73] If the agency determines that the proposed action will affect small businesses, the agency must send written notice to the rules ombudsman in the Executive Office of the Governor at least 28 days before the intended action.[74] The agency must adopt the regulatory alternatives offered by the rules ombudsman if the alternatives are feasible, consistent with the stated objectives of the proposed rule, and would reduce the impact on small businesses.[75] If the agency does not adopt the alternatives offered, and before rule adoption or amendment, the agency must file a detailed written statement with JAPC explaining the reasons for not adopting such alternatives.[76]

Effect of the Bill

If the rules ombudsman provides a regulatory alternative to the agency to lessen the impact of the rule on small businesses, the bill requires the agency to provide the regulatory alternative to JAPC at least 21 days before filing the proposed rule for adoption.

Incorporation by Reference

Present Situation

The APA allows an agency to incorporate material external to the text of the rule by reference.[77] The material to be incorporated must exist on the date the rule is adopted.[78] If the agency seeks to alter the material incorporated by reference after the rule has been adopted, the rule itself must be amended for the change to be effective.[79] However, an agency rule incorporating another rule by reference automatically incorporates subsequent amendments to the referenced rule.[80]

An agency may not incorporate material by reference unless:

- The material is submitted in the prescribed electronic format to DOS and the full text of the material may be made available for free public access through an electronic hyperlink from the rule incorporating the material by reference in the FAC; or
- If the agency determined that posting the material publicly on the Internet would violate federal copyright law, a statement explaining such concern, along with the address of locations at DOS and the agency at which the material is available for public inspection and examination, must be included in the notice.[81]

DOS requires each agency incorporating material by reference in an administrative rule to certify the materials incorporated have been filed with DOS electronically or, if the agency claims the posting of the material would violate federal copyright law, the location where the public may view the material.[82]

Effect of the Bill

Beginning July 1, 2023, the bill requires an agency, in all notices of rulemaking, repromulgating rules, or rule modifications, that include material incorporated by reference, to submit the incorporated material in the prescribed electronic format to DOS with the full text available for free public access

[73] S. 120.54(3)(b)2., F.S.
[74] S. 120.54(3)(b)2.b.(I), F.S.
[75] S. 120.54(3)(b)2.b.(II), F.S.
[76] S. 120.54(3)(b)2.b.(III), F.S.
[77] S. 120.54(1)(i), F.S.; *see also* r. 1-1.013, F.A.C.
[78] S. 120.54(1)(i)1., F.S.
[79] *Id.*
[80] S. 120.54(1)(i)2., F.S.
[81] S. 120.54(1)(i)3., F.S.
[82] R. 1-1.013(5)(d), F.A.C.

through an electronic hyperlink and include a summary of substantive revisions to any material proposed to be incorporated by reference. Alternatively, if an agency determines that posting the incorporated material on the internet would violate federal copyright law, the agency must include in the notice a statement to that effect, along with the addresses of locations at DOS and the agency at which the material is available for public inspection and examination.

The bill requires DOS to prescribe by rule that material incorporated by reference included in a notice of proposed rule and a notice of change be formatted in such a way that additions to the text appear underlined and deletions appear as text stricken through.

Annual Regulatory Review

Present Situation

Annually, each agency must prepare a regulatory plan that includes a list of each law enacted during the previous 12 months that creates or modifies the duties or authority of the agency and state whether the agency must adopt rules to implement the newly adopted laws.[83] The plan must also include a list of each additional law not otherwise listed that the agency expects to implement by rulemaking before the following July 1, except emergency rules. The plan must include a certification by the agency head or, if the agency head is a collegial body, the presiding officer, and the individual acting as principal legal advisor to the agency verifying they reviewed the plan, that the agency regularly reviews all of its rules, and identifying the period during which all rules have most recently been reviewed to determine if the rules remain consistent with the agency's rulemaking authority and the laws implemented.[84] By October 1 of each year, the plan must be published on the agency's website or on another state website established for publication of administrative law records with a hyperlink to the plan. The agency must also deliver a copy of the certification to JAPC and publish a notice in the FAR identifying the date of publication of the agency's regulatory plan.[85]

Effect of the Bill

The bill replaces the requirement that the annual regulatory plan include a listing of each law the agency expects to implement through rulemaking with the requirement that the plan identify and describe each rule, by rule number or proposed rule number, that the agency expects to develop, adopt, or repeal for the 12-month period beginning October 1 and ending September 30. The annual regulatory plan must also identify any rules required to be repromulgated during that 12-month period.

The bill also requires that the annual regulatory plan contain a declaration that the agency head and the general counsel understand that regulatory accountability is necessary to ensure public confidence in the integrity of state government and, to that end, the agency is diligently working toward lowering the total number of rules adopted.

Infrastructure Permitting Process Review

Present Situation

Coastal Construction Permits

Coastal construction is regulated by the Department of Environmental Protection (DEP) in order to protect Florida's beaches and dunes from imprudent construction that may jeopardize the stability of Florida's natural resources.[86] The coastal construction control line (CCCL) defines the portion of the beach-dune system that is subject to severe fluctuations caused by a 100-year storm surge, storm

[83] S. 120.74(1), F.S.
[84] S. 120.74(1)(d), F.S.
[85] S. 120.74(2), F.S.
[86] S. 161.053(1)(a), F.S.

waves, or other forces such as wind, wave, or water level changes.[87] Seaward of the CCCL, new construction and improvements to existing structures generally require a CCCL permit from DEP.[88]

Permit applicants must show the proposed project will not result in a significant adverse impact.[89] DEP makes 30-year erosion projections of the location of the seasonal high-water line on a site-specific basis upon receipt of a CCCL permit application.[90] With certain exceptions, DEP and local governments may not issue CCCL permits for the construction of major structures that are seaward of the 30-year erosion projection.[91]

For joint coastal permits, the Legislature does not require a detailed review of a previously permitted project if there have been no substantial changes to the scope of the project and past performance shows the project performed to design expectations.[92]

Environmental Resource Permits

Part IV of chapter 373, F.S., regulates the construction, alteration, operation, maintenance, abandonment, and removal of stormwater management systems, dams, impoundments, reservoirs, works, and appurtenant works. DEP regulates activities in, on, or over surface waters, as well as any activity that alters surface water flows, through environmental resource permits (ERPs). ERPs are required for development or construction activities typically involving the dredging or filling of surface waters, construction of flood protection facilities, building dams or reservoirs, or any other activities that affect state waters.[93] A water management district (WMD) or DEP may require an ERP and impose reasonable conditions necessary to assure the construction or alteration of any water management system[94] complies with state law and applicable rules and will not be harmful to water resources.[95] Pursuant to specific statutory authority,[96] DEP adopted a comprehensive chapter of rules governing the permitting process.[97]

State Administered Federal Section 404 Dredge and Fill Permits

In 2018, Florida assumed responsibility under section 404 of the federal Clean Water Act[98] for dredge and fill permitting.[99] DEP adopted rules implementing the assumption of the section 404 program.[100] The State 404 Program is responsible for overseeing permitting for any project proposing dredge or fill activities within state assumed waters.[101]

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[87] S. 161.053, F.S.; r. 62B-33.005(1), F.A.C.; DEP, *The Homeowner's Guide to the Coastal Construction Control Line Program* (2017), at 3, (last visited March 3, 2023).
[88] S. 161.053, F.S.; DEP, *The Homeowner's Guide to the Coastal Construction Control Line Program* (2017), at 3, (last visited March 3, 2023).
[89] R. 62B-33.005, F.A.C.
[90] *Id.*
[91] S. 161.053(5), F.S.
[92] S. 161.041(8), F.S.
[93] *See* s. 373.413, F.S.
[94] S. 373.403(10), F.S.
[95] S. 373.413(1), F.S.
[96] S. 373.4131, F.S.
[97] Ch. 62-330, F.A.C.
[98] 33 U.S.C. s. 1251, et seq.
[99] S. 373.4146, F.S.
[100] *See* ch. 62-330, F.A.C.
[101] Fl. Dept. of Environmental Protection, *State 404 Program*, www.floridadep.gov/water/submerged-lands/content/state-404-program (last visited March 3, 2023).

Permitting Process

Upon receiving an ERP permit application, DEP or the WMD evaluates the material to determine if the application is complete.[102] If the application is incomplete, DEP or the WMD must request additional information within 30 days after receiving the application.[103] The rules of DEP allow an applicant 90 days to respond to such requests.[104] Within 30 days after receiving such additional information, DEP or the WMD must review the submittal.[105] Once the application is complete, DEP or the WMD must decide whether to issue or deny an ERP within 60 days after receiving the original application, the last item of timely requested additional material, or the applicant's written request to begin processing the permit application.[106] Any application that DEP or the WMD does not approve or deny within 60 days is considered approved by default.[107]

Effect of the Bill

The bill directs DEP and WMDs to conduct a holistic review of their current coastal permitting programs and other permit programs. The review requires DEP and WMDs to identify areas of improvement to increase efficiency. Factors required for review are:

- Requirements to obtain a permit;
- Areas for improved efficiency and decision-point consolidation within a single project's process;
- Areas of duplication across one or more permit programs;
- Methods of requesting permits;
- Any other factors that may increase the efficiency of permitting processes and may allow improved storm recovery; and
- Adequate staffing levels necessary for complete and efficient review.

DEP and WMDs must report their findings to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2023.

B. SECTION DIRECTORY:

Section 1 amends s. 120.52, F.S., relating to definitions applicable to the APA.

Section 2 amends s. 120.54, F.S., relating to rulemaking procedures.

Section 3 amends s. 120.541, F.S., relating to SERCs and rule ratification by the Legislature.

Section 4 creates s. 120.5435, F.S., relating to the repromulgation of rules.

Section 5 amends s. 120.545, F.S, relating to JAPC review of agency rules.

Section 6 amends s. 120.55, F.S., relating to publication requirements in the FAC and FAR.

Section 7 amends s. 120.74, F.S., relating to agency annual rulemaking and regulatory plans.

Section 8 amends s. 120.57, F.S., relating to exceptions and special requirements.

Section 9 amends s. 120.81, F.S., conforming cross-references.

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[102] DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 5.5.3, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: https://www.flrules.org/gateway/reference.asp?No=Ref-03174 (last visited January 4, 2018).
[103] S. 373.4141(1), F.S.
[104] DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 5.5.3.5, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: https://www.flrules.org/gateway/reference.asp?No=Ref-03174 (last visited Mar. 3, 2023).
[105] S. 373.4141(1), F.S.
[106] S. 373.4141(2), F.S. Most state licensure decisions must be made within 90 days. S. 120.60(1), F.S.
[107] S. 120.60(1), F.S.

Section 10 amends s. 420.9072, F.S., conforming cross-references.

Section 11 amends s. 420.9075, F.S., conforming cross-references.

Section 12 amends s. 443.091, F.S., conforming cross-references.

Section 13 creates an unnumbered section of Florida law relating to infrastructure permitting review.

Section 14 provides an effective date of July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill requires each agency to review and repromulgate its rules, which may require agencies to expend funds to institute this new process, including dedicating staff to review existing rules and engaging in rulemaking to repromulgate the rules. Although all agencies currently have the responsibility to regularly review their rules, the publication requirement for repromulgation may have an indeterminate negative fiscal impact.

DEP and each WMD may incur additional expenses to conduct the required review of all permitting processes within the agency and make the required report by December 31, 2023.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   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.

2. Other:

The inclusion of the infrastructure permit process review requirement in the bill may raise an issue under s. 6, art. III of the State Constitution, the single subject requirement. Section 13 of the bill requires the DEP and WMDs to review their internal processes for issuing the various permits under their respective authorities and make a single report by December 31, 2023. The remainder of the bill revises a number of requirements for developing, adopting, reviewing, and amending rules implementing statutory authority and are applicable to all state and local entities defined as agencies, with no termination date. The State Constitution requires every law to "embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title."[108] As applied by the Florida Supreme Court, the subject of the act is stated in the "relating to" clause.[109] However, the "relating to" clause cannot be so broad that it covers unrelated topics, providing insufficient guidance about the body of the act.[110] The "relating to" clause in the bill title states the bill pertains to administrative procedures "and permitting process review." That description may be too broad to provide sufficient guidance about the scope of the act since a number of state agencies and local governments issue a variety of permits for many different purposes other than environmental regulation[111] and "permitting process review" could refer to subjects outside of generally applicable administrative procedures. If the "relating to" clause is overly broad, the Court requires the remainder of the act "and history of the legislative process" be reviewed to determine if the act encompasses more than one subject.[112]

B. RULE-MAKING AUTHORITY:

The bill requires DOS to adopt rules to implement the provisions of the bill concerning repromulgation. The bill gives DOS until December 31, 2023, to adopt such rules. The bill's provisions regarding repromulgation provide DOS with sufficient direction to guide the department in the creation of the rules.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill states the requirement for publication of emergency rules in the FAC twice, at lines 734 and 748.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 9, 2023 the Constitutional Rights, Rule of Law & Government Operations Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments clarified that an agency must withdraw the notice of rule development if a notice of proposed rule is not published within 12 months and required the full text of all emergency rules that are currently active be published in the FAR.

On March 27, 2023, the Agriculture, Conservation & Resiliency Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment revised provisions related to the review of DEP and WMD permitting processes as follows:

- Specified the legislative intent related to the review;
- Excluded coastal high-hazard areas from the review;
- Specified that the review must include permits related to nature-based infrastructure;
- Specified that review of state-administered 404 permits must be consistent with the Endangered Species Act;
- Removed time periods for review and approval of permit applications from factors that must be considered during the review; and
- Required the review to consider adequate staffing levels necessary for complete and efficient review.

[108] Art. III, s. 6, Fla. Const.
[109] *Franklin v. State,* 887 So. 2d 1063, 1075 (Fla. 2004). In the opinion the Court refers to the "relating to" clause as the "short title."
[110] *Franklin, supra* at 1076.
[111] *See, e.g.*, ss. 125.022 and 166.033, F.S., local governments issuing land development permits; s. 552.091, F.S., State Fire Marshal issuing blasting permits; and s. 550.054, F.S., pari-mutuel wagering permits.
[112] *Franklin, supra* at 1076-1077.

On April 19, 2023, the State Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment removed provisions defining adverse impacts on small businesses, the requirement to prepare a SERC for every new rule, and exempted community development districts from the rule repromulgation requirements.

This analysis is drafted to the committee substitute as passed by the State Affairs Committee.