SENATE 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/CS/SB 262
INTRODUCER:	Judiciary Committee, Governmental Oversight and Productivity Committee, and Senator Bennett
SUBJECT:	Administrative Procedures
DATE:	February 10, 2006 REVISED:

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

I. Summary:

This bill amends statutory provisions relating to Internet publication of the *Florida Administrative Weekly*, and revises and creates various duties of the Joint Administrative Procedures Committee (JAPC). The bill revises some duties of the Department of State and the Administration Commission, and revises duties with respect to rulemaking for agencies. The bill revises provisions relating to the timing and substance of petitions for administrative review of agency actions.

The bill also:

- Expands eligibility under the Florida Equal Access to Justice Act, through which small business parties may receive attorney's fees and costs when they prevail in certain adjudicatory or administrative proceedings, to include certain individuals whose net worth did not exceed $2 million at the time of the state agency action;
- Clarifies an agency's duty to report on changes made to proposed rules after a final public hearing;
- Requires the Division of Administrative Hearings and agencies to recommend types of cases or disputes suitable for a statutory summary hearing process; and
- Requires an agency's final order in certain cases involving disputed issues of material fact to explicitly rule on the exceptions that parties raise to the recommended order.

This bill substantially amends the following sections of the Florida Statutes: 11.60, 57.111, 120.54, 120.55, 120.551, 120.56, 120.569, 120.57, 120.65, and 120.74.

II. Present Situation:

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

The Administrative Procedure Act (APA) allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions.[1] For purposes of 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.[2]
- 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 chapters 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 this 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. The definition expressly includes a regional water supply authority.

The definition of agency expressly excludes any legal entity or agency created in whole or in part pursuant to ch. 361, F.S., part II (Joint Electric Power Supply Projects); any metropolitan planning organization created under s. 339.175, F.S., or any separate legal or administrative agency of which a metropolitan planning organization is a member; an expressway authority pursuant to ch. 348, F.S.; any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), F.S., unless any party to such agreement is otherwise an agency as defined in the section; or any multicounty special district with a majority of its governing board comprised of elected persons.

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.[3] [4]

[1] Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation,* The Florida Bar Journal, Jan. 2001, at 14.
[2] Section 20.04, F.S., sets the structure of the executive branch of state government.
[3] Proceedings by DOAH are conducted like nonjury trials and are governed by ch. 120, F.S.
[4] Although DOAH is administratively assigned to the Department of Management Services (DMS) (*see* s. 20.22, F.S.), DMS does not have statutory authority over DOAH; it is responsible directly to the Governor and Cabinet. The director is

Challenges to Proposed or Existing Rules

Section 120.56(1)(a), F.S., provides that a person who is substantially affected by a rule or proposed rule may file a petition seeking an administrative determination of the invalidity of a rule or proposed rule, on the ground that the rule is an "invalid exercise of delegated legislative authority." This term is defined in s. 120.52(8), F.S., to mean that the rule "goes beyond the powers, functions, and duties delegated by the Legislature." Subsection (8) further provides that a proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1., F.S.;
(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1., F.S.;
(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
(e) The rule is arbitrary or capricious; or
(f) The rule imposes 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 objectives.

Finally, subsection (8) requires that the rule be authorized by a grant of rulemaking authority and that it implement the specific powers and duties provided by the enabling legislation. In *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*,[5] the court held that "the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*."

Challenges to Agency Determinations of a Party's Substantial Interests

Section 120.569, F.S., provides that a party who wishes to challenge an agency determination of his or her substantial interests must file a petition for a hearing with the agency, and it states that an agency request for an administrative law judge (ALJ) must be made to DOAH within 15 days after receiving the petition.[6] [7] In general, agencies request ALJs for cases in which there is a disputed issue of material fact.

---

appointed by a majority vote of the Administration Commission (the Governor and the Cabinet), and the appointment must be confirmed by the Senate. (Section 120.65, F.S.) The DOAH is a separate budget entity. It is funded, however, entirely from trust funds rather than from general revenue. Thus, the funding is directly correlated to the work the division does for executive agencies. Judge William C. Sherrill, Jr., *The Florida Division of Administrative Hearings*, The Florida Bar Journal, Jan. 2001, at 23.

[5] 773 So. 2d 594, 599 (Fla. 1st DCA 2000) (emphasis in original).

[6] Section 120.569(2)(a), F.S.

[7] Section 120.569, F.S., applies except when mediation is elected by all parties pursuant to s. 120.573, F.S., or when a summary hearing is elected by all parties pursuant to s. 120.574, F.S.

Section 120.569, F.S., also specifies notice and pleading requirements, and the time parameters within which a final order must be completed. All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for a frivolous purpose or needless increase in the cost of litigation.[8] If the presiding officer finds a violation of these requirements, the officer is required to impose an appropriate sanction, which may include an order to pay the other party's expenses, including attorney's fees, incurred because of the improper filing.[9]

Additional Procedures for Administrative Cases

Section 120.57(1), F.S., applies to hearings in which there is a disputed issue of material fact. In the majority of cases, these hearings are conducted by an ALJ.[10] The subsection sets forth evidentiary procedures, specifies the permissible contents of the record, and provides that, in the event a dispute of material fact no longer exists, any party may move the ALJ to relinquish jurisdiction to the agency.[11] The ALJ may grant or deny the motion to relinquish in his or her discretion.[12]

Further, the subsection provides that a presiding officer is to issue a recommended order that contains findings of fact, conclusions of law, and a recommended disposition or penalty.[13] The agency must allow each party 15 days in which to submit written exceptions to the recommended order.[14] The agency may adopt the recommended order as its final order, or in its final order the agency: (a) may reject or modify the order's conclusions of law and interpretations of rules over which the agency has jurisdiction, if it states its reasons for doing so with particularity and finds that its substituted conclusion is as reasonable as that which it rejected or modified; or (b) may reject or modify findings of fact if, after a review of the entire record, it states with particularity that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.[15] The agency may reduce or increase a recommended penalty only when it states its reason for the change with particularity.[16]

Section 120.57(2), F.S., applies to hearings that do not involve a disputed issue of material fact. Generally, these hearings are conducted by the agency, and the subsection requires that the agency: (a) provide reasonable notice to affected persons of its action; (b) provide the parties an

[8] Section 120.569(2)(e), F.S.
[9] *Id.*
[10] *See* s. 120.57(1)(a), F.S. (providing that an ALJ or an agency head or member thereof may conduct the hearing); and ss. 120.80 and 120.81, F.S. (specifying exceptions when an agency must conduct its own hearing).
[11] Section 120.57(1)(i), F.S.
[12] *Id.*, F.S.
[13] Section 120.57(1)(k), F.S.
[14] *Id.*
[15] Section 120.57(1)(l), F.S.
[16] *Id.*

opportunity to present evidence in opposition to the agency action; and (c) provide a written explanation to the parties if it overrules the parties' objections.[17]

Petition Requirements

Pursuant to s. 120.54(5), F.S., the Administration Commission[18] must adopt Uniform Rules of Procedure with which agencies must comply. The Uniform Rules[19] are the rules of procedure for each agency subject to this chapter. Section 120.54(5), F.S., contains a list of requirements that a petition for administrative hearing shall include. By operation of s. 120.569(2)(c), F.S., and Rule 28-106.201, F.A.C., the petition must be dismissed if it is not in substantial compliance with the requirements provision or is untimely filed.[20] Dismissal of the petition shall, at least once, be without prejudice to timely filing an amended petition curing the defect.

Some recent cases have suggested some potential adjustments to the requirements for both the timeliness and the contents of the petition. In *Cann v. Department of Children and Family Services*, 813 So. 2d 237 (Fla. 2d DCA 2002), the appellate panel held that the change caused to s. 120.569(2)(c), F.S., by enactment of ch. 98-200, L.O.F., overruled previous cases that held that an untimely administrative appeal could proceed if the delay was a result of excusable neglect.[21] In dicta, the court stated that "[i]n administrative matters affecting substantial interests, adopting an excusable neglect standard … would promote legitimate public policies."[22] In a concurring opinion, Chief Judge Blue specifically asked that the Legislature consider providing for the doctrine of excusable neglect in administrative proceedings.[23]

Brookwood Extended Care Center v. Agency for Healthcare Administration, 870 So. 2d 834 (Fla. 3d DCA 2003), addressed the denial of a nursing home's petition for an administrative hearing, after the agency imposed an immediate moratorium on new admissions to the nursing home and filed an administrative complaint. The agency initially denied the petition for administrative hearing for failure to comply with Rule 28-106.201(2), F.A.C., by not including a statement of all issues of material fact. The court held that the nursing home should be given a chance to comply with the Uniform Rules, and a concurring opinion pointed out that, when an agency initiates an administrative complaint, the agency has already identified the material facts at issue, and that no useful purpose is served by requiring a petitioner to do so again.[24]

Judicial Review of Agency Action

Section 120.68(1), F.S., provides that a party who is adversely affected by final agency action is entitled to judicial review. Subsection (9) states that no petition challenging an agency rule as an invalid exercise of delegated legislative authority may be instituted pursuant to this section,

[17] Section 120.57(2), F.S.
[18] Section 14.202, F.S, created the Administration Commission as part of the Executive Office of the Governor, composed of the Governor and Cabinet.
[19] Chapter 28-106, Florida Administrative Code.
[20] The paragraph in s. 120.569(2), F.S., requiring that petitions that are untimely filed or not in substantial compliance with the petition requirements *shall* be dismissed was added by ch. 98-200, L.O.F.
[21] *Cann*, 813 So. 2d at 239.
[22] *Id*.
[23] *Id* at 240 (Blue, J., concurring).
[24] *Brookwood*, 870 So. 2d at 841-843.

except to review an order entered in a rule-challenge proceeding, unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact. Thus, courts generally hold that they may not determine whether a rule is an invalid exercise of delegated legislative authority unless the rule has first been challenged in a rule-challenge proceeding pursuant to the APA.[25]

Florida Administrative Weekly

Under current law, the Department of State (DOS or the department) is required to publish notices and various other materials filed by the state's administrative agencies in the *Florida Administrative Weekly* (FAW).[26] [27] The FAW must contain:

- Notice of adoption of, and an index to, all rules filed during the preceding week;
- 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.[28]

In addition, numerous other laws require certain materials to be published in the FAW. For example, s. 403.527(1)(e), F.S., requires the Department of Environmental Protection to publish various notices in the FAW concerning applications filed under the Transmission Line Siting Act (ss. 403.52-403.5365, F.S.).

Responsibility for the grammatical editing of the FAW is statutorily assigned to DOS. Additionally, DOS is required to adopt rules that prescribe the style and form required for rules submitted for filing and that establish the form for rule certification.[29]

The department contracts with LexisNexis Matthew Bender for publication of the FAW in a printed format.[30] The FAW is published on Fridays and distributed for free to administrative agencies, courts, libraries, law schools, and legislative offices.[31] According to DOS, the FAW

[25] *See, e.g., Cross v. Department of Health & Rehabilitative Services*, 658 So.2d 1139 (Fla. 1st DCA 1995).
[26] Section 120.55(1)(b), F.S.
[27] According to the DOS, approximately 300 entities in the state publish notices in the *Florida Administrative Weekly*. These entities include state agencies, other units of state and local governments, and nongovernmental entities.
[28] Section 120.55(1)(b), F.S.
[29] Section 120.55(1)(c) and (d), F.S.
[30] Florida Joint Administrative Procedures Committee, *Report on Internet Noticing of the Florida Administrative Weekly*, October 2003, pp. 2-3.
[31] Section 120.55(1)(e) and (4), F.S.

has approximately 700 paid subscribers, who pay an annual subscription fee of $249 per year.[32] In addition to producing the paper version of the FAW, the Department of State posts copies of the FAW in Adobe® Acrobat® Portable Document Format (PDF) on its Internet website, which may be accessed by the public for free.[33]

The department is also required to publish the Florida Administrative Code (FAC), which contains all rules adopted by agencies, together with references to rulemaking authority and history notes.[34] The FAC must be supplemented at least monthly.[35] The department also contracts with LexisNexis Matthew Bender for the printing of the FAC.

Section 120.55(5), F.S., creates DOS's Records Management Trust Fund, and specifies that all fees and moneys collected by DOS under the Administrative Procedure Act (APA)[36] must be deposited in the fund for the purpose of paying for the publication of the FAC and FAW, and for associated costs incurred by the department in administering the APA's requirements. Unencumbered balances at the beginning of each fiscal year which exceed $300,000 are to be transferred to the General Revenue Fund.[37]

Regarding the FAW, current law authorizes DOS to: (a) make subscriptions of the FAW available for a price computed as a pro rata share of 50 percent of the costs related to the publication of FAW; and (b) charge agencies using the FAW a space rate, a.k.a. line charge, computed to cover a pro rata share of 50 percent of the costs related to publication of the FAW. Current law does not specifically address how costs related to the FAC should be computed.

The following fees and moneys were collected by DOS under the APA in FY 02-03:

- $500,266 was collected by DOS for the space rate, i.e., line charge. The current charge is $0.99 per line.
- $13,380 was collected by DOS for royalties from the sale of the FAC. Currently, copies of the FAC are sold by LexisNexis Matthew Bender. The majority of revenues from the sale of the FAC are retained by the company as compensation for printing the code. The department receives a small amount in royalties.

Subscription fees charged to FAW subscribers are retained by the publisher as compensation for printing the FAW. The department does not receive royalties from FAW subscriptions.

In sum, the current practice at DOS is: (1) publication costs of the FAC are paid for with purchases of the FAC; and (2) publication costs of the FAW are paid through subscriptions to the FAW. Line charges and FAC royalties are used by DOS to pay for costs associated with: (1) preproduction duties for the FAC and FAW, e.g., typesetting, proofing, formatting, and

[32] *Report on Internet Noticing of the Florida Administrative Weekly*, *supra* note 30, at 3.
[33] *See Florida Administrative Weekly*, *at* http://faw.dos.state.fl.us.
[34] Section 120.55(1)(a), F.S.
[35] Section 120.55(1)(a)1., F.S.
[36] Chapter 120, F.S.
[37] Section 120.55(5)(b), F.S.

editing; (2) tracking rules from notice to adoption; and (3) production of the Laws of Florida, Executive Orders, county ordinances, and other legal documents.[38]

Internet Publication Pilot Project

In 2001, the Legislature authorized the Department of Environmental Protection (DEP) and the State Technology Office (STO) to establish an Internet publication pilot project for the purpose of determining the cost-effectiveness of publishing administrative notices on the Internet, rather than in the FAW.[39] Scheduled to begin on or before December 31, 2001, and terminate on July 1, 2003, the pilot project required DEP, STO, and DOS to:

- Publish notices on the Internet on the same days that the FAW is published;
- Establish a permanent, searchable archive of all notices published on the Internet;
- Publish notices in the FAW directing readers to the Internet website address where DEP's notices were published; and
- Submit a report no later than January 31, 2003, to the Governor and the Legislature containing findings on the cost-effectiveness of Internet publication in lieu of publication in the FAW and recommendations on legislative or rule changes necessary to effectuate publication of notices on the Internet.[40]

2003 and 2004 Legislation

During the 2003 Regular Legislative Session, Senate Bill 1374 and House Bill 1157 were introduced for the purpose of implementing the recommendations contained in the DEP pilot project report. These bills would have authorized agencies to publish administrative notices on their own websites, rather than in the FAW. This concept, however, posed concerns:

- If numerous agencies had opted for Internet publication, FAW line charge revenues might have been reduced such that continuance of the printed FAW would have been fiscally infeasible, and agencies that had not opted for Internet publication would then have had no means for publication.
- The requirement that DOS review all notices submitted for publication would have no longer been effective for agencies opting for Internet publication, and thus the potential for a loss of quality control existed.
- Multiple websites would have been confusing and difficult to browse.[41]

Subsequently, both the Senate and House bills were amended in committee to require DOS to replace the printed FAW with a fully searchable, electronic version on a single Internet website. These bills also struck the authority in s. 120.55, F.S., for the Publication Revolving Trust Fund, but did not specify how costs incurred by DOS for Internet publication of the FAW nor for publication of the FAC would be funded. Ultimately, due to the lack of data on fiscal impact, the bills were amended to delete the provisions substituting Internet publication for the printed

[38] Fiscal data provided by DOS on March 9, 2004.
[39] Chapter 2001-278, L.O.F.; s. 120.551, F.S.
[40] Section 120.551, F.S.
[41] *Report on Internet Noticing of the Florida Administrative Weekly*, *supra* note 30, at 5.

version of the FAW and to extend the DEP's authority in s. 120.551, F.S., for Internet publication until July 1, 2004.[42] Section 41, ch. 2004-269, L.O.F., extended the effective repeal date of s. 120.551, F.S., to July 1, 2005; s. 31, ch. 2005-71, L.O.F., extended the repeal date to July 1, 2006.

2003 Interim Study on FAW Internet Noticing

During the 2003 Legislative Interim, the Joint Administrative Procedures Committee studied the feasibility of Internet noticing for all state agencies and other entities that advertise in the FAW. This study included conducting surveys and consulting with DOS, DEP, STO, and an independent technology expert to determine specific technology requirements and estimates of potential costs. The study's results were published in October 2003 in a report titled *Report on Internet Noticing of the Florida Administrative Weekly*.

The report's findings included the following:

- A telephone survey of current FAW subscribers indicated that 59 percent favored replacing the printed FAW with a free electronic version, while only 21 percent were opposed to the concept.
- A telephone survey of 21 states indicated that the majority published both an electronic and printed version of administrative notices. Three states published only a printed version, and six states either published solely on the Internet or were in the process of phasing out their printed publications. Reasons for printing both electronic and printed versions included concerns about Internet access, consumer preferences for the printed version, and statutory requirements for a printed version.
- The recommendation of DEP in its January 2003 report that agencies be permitted to publish administrative notices on individual websites may not be feasible as some agencies lack the information technology resources and expertise necessary to establish and maintain such websites. Further, it appeared that start-up costs for individual websites could be as much as $8 million.
- Publication of administrative notices on a centralized Internet website appears to have the greatest potential to reduce costs to agencies and the public. The STO indicated that no upfront costs for hardware would be necessary if the website were hosted by the Shared Resource Center. Non-recurring first-year expenses were estimated to be $70,000 for software. Recurring annual costs were estimated to be $36,000 for software maintenance and $26,300 for STO hosting, hardware maintenance, and backup and recovery services. In addition to lower costs, publication on a centralized Internet website would also permit maintenance of quality control through continued DOS review of notices to be published, e-mail notification of selected notices, and more advanced searching capabilities. Further, it was suggested that future enhancements to a centralized website could include providing the public with the opportunity to make comments online.[43]

The report concluded by recommending that the FAW be published on a centralized website managed by DOS in collaboration with the STO. Further, it was recommended that the space rate

[42] *Id.* at 5-6.
[43] *Id.* at 6-11.

charge continue to be collected by DOS to fund its functions related to publication of the FAW and FAC.

The Joint Administrative Procedures Committee

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, with three members from each house. The committee is assigned the duty of maintaining a continuous review of administrative rules and the statutory authority on which they are based.

Section 120.54(11)(a), F.S., requires an agency to furnish the following documents to JAPC at least 21 days prior to rule adoption: (1) a copy of the proposed rule; (2) a detailed written statement of the facts and circumstances justifying the proposed rule; (3) a copy of the economic impact statement, if required; (4) a statement of the extent to which the proposed rule establishes standards more restrictive than federal rules, or that a federal rule on the same subject does not exist; and (6) a copy of the notice of intent to adopt, amend, or repeal a rule.

The committee conducts a review of all proposed rules to determine whether: (a) the rule is an invalid exercise of delegated legislative authority; (b) the statutory authority for the rule has been repealed; (c) the rule reiterates or paraphrases statutory material; (d) the rule is in proper form; (e) the notice given prior to adoption was sufficient to give adequate notice of the purpose and effect of the rule; (f) an economic impact statement (EIS) was prepared, if required; (g) the rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements; (h) 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; (i) the rule could be made less complex or more easily comprehensible to the general public; (j) the rule reflects the approach to the regulatory objective involving the lowest net cost to society to the degree consistent with the provisions of law which the rule implements; (k) the rule will require additional appropriations; and (l) if the rule is an emergency rule, there exists an emergency justifying the rule, whether the agency has exceeded the scope of its statutory authority, and whether the emergency rule was promulgated in the manner required.[44]

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

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. 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.

[44] Section 120.545(1)(a)-(l), F.S.

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.

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. The department must publish this notice in the FAW and in the Florida Administrative Code (FAC). The committee may not require the agency to meet its objection. The 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

Section 120.55(1), F.S., requires the Department of State to publish in a permanent compilation 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.

Florida Equal Access to Justice Act

Under the Florida Equal Access to Justice Act, s. 57.111, F.S., an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding under the APA initiated by a state agency – unless the agency's actions were substantially justified or special circumstances would make the award unjust. Currently, the statute defines a small business party as:

- A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million, including both personal and business investments; or

- A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than $2 million; or

- Either small business party as defined above, without regard to the number of its employees or its net worth, in any action under s. 72.011, F.S., or in any administrative proceeding under that section to contest the legality of any assessment of tax imposed for the sale or use of services as provided in ch. 212, F.S., or interest thereon, or penalty therefor.

The Florida Supreme Court last year held that a woman who was the sole owner of a subchapter-S corporation was not a small business party within the meaning of the Florida Equal Access to Justice Act.[46] In *Daniels v. Fla. Dep't of Health*, the sole owner of an incorporated maternity center petitioned for attorney's fees under the act, after the department voluntarily dismissed its complaint relating to her midwifery license.[47] Noting that the department's complaint was brought against Ms. Daniels individually, rather than against her corporation, the Supreme Court concluded that she did not fall within the existing definition of small business party and thus was not entitled to recover attorney's fees and costs.[48]

III. Effect of Proposed Changes:

Section 1. Amends s. 11.60, F.S., to clarify the duties of the Joint Administrative Procedures Committee (JAPC or the committee). By deleting unnecessary language, the bill makes clear that JAPC shall maintain a continuous review of statutes that authorize agencies to adopt rules. The bill also deletes language requiring the committee to include in its annual report to the Legislature a schedule for its systematic review of existing statutes and a summary of the status of this review, since the review JAPC undertakes is done in the course of the continuous rule review process.

Section 2. Amends s. 57.111, F.S., relating to the Florida Equal Access to Justice Act, under which small business parties may receive attorney's fees and costs when they prevail in certain adjudicatory or administrative proceedings under the Administrative Procedure Act. The bill expands the definition of "small business party," and thereby eligibility under the act, to include an individual whose net worth did not exceed $2 million at the time the action is initiated by a state agency when the action is brought against the individual's license to engage in the practice or operation of a business, profession, or trade. This provision appears designed to addresses circumstances such as those in *Daniels v. Fla. Dep't of Health*,, in which the Florida Supreme Court held that a woman who was the sole owner of a subchapter-S corporation was not a small business party within the meaning of the Florida Equal Access to Justice Act, where the department's complaint had been made against her individual license.[49]

Section 3. Amends paragraphs (d) and (e) of subsection (3) and paragraph (b) of subsection (5) of s. 120.54, F.S.

The bill clarifies an agency's duty to report on changes made to proposed rules after the final public hearing. The bill clarifies that an agency must file, with the Joint Administrative Procedures Committee (JAPC), a notice of non-technical changes made to the proposed rule. In addition, the agency must publish the notice of change in the *Florida Administrative Weekly* (FAW). This revision clarifies that it is notice of substantive changes, rather than notice that no substantive changes have been made to the rule, which the agency must publish in the FAW.

[46] *Daniels v. Dep't of Health*, 898 So. 2d 61 (Fla. 2005).
[47] *Id*. at 63-64.
[48] *Id*. at 69.
[49] *Id*. See "**Florida Equal Access to Justice Act**" under the Present Situation section of this staff analysis.

The timelines currently found in s. 120.56(2)(b), F.S., are moved to s. 120.54(3)(e)2., F.S., which is amended to provide that a rule may not be filed by an agency for adoption with the Department of State, depending upon the applicable situation:

- less than 28 days or more than 90 after the notice of proposed rulemaking;
- until 21 days after the notice of change to the rule;
- until 14 days after the final public hearing on the rule;
- until 21 days after the preparation of the statement of estimated regulatory costs required by s. 120.541, F.S.; or
- until the administrative law judge has rendered a decision under s. 120.56(2), F.S.[50]

There is no substantive change in the above timelines. The bill does make a conforming revision to one of the 21-day timeframes – to make clear that it is linked to the notice of change that must be filed with JAPC.

The bill further provides that the filing of a petition under s. 120.56(2), F.S., tolls the applicable period during which a rule must be filed for adoption until 60 days after the filing of the final order by the administrative law judge, or until 60 days after judicial review of the final order is complete. The bill clarifies that – for purposes of the procedures and requirements related to filing rules for adoption – the term "administrative determination" does not include subsequent judicial review.

The bill amends s. 120.54(5)(b)3., F.S., to provide that, among the uniform rules the Administration Commission may adopt for the filing of protests and formal written protests, the commission may prescribe the form and substantive provisions of a required bond.[51]

Section 120.54(5)(b)4., F.S., currently delineates specific requirements that must be included in petitions for administrative hearings filed pursuant to s. 120.569, F.S.,[52] or s. 120.57, F.S.[53] The bill adds a new subparagraph 5., which establishes the requirements for the filing of a request for administrative hearing by a respondent in agency enforcement and disciplinary actions. The request must include:

- Identifying information for the party making the request and the party's representative upon whom service of pleadings shall be made;
- A statement that respondent is requesting an administrative hearing, identifying those material facts that are in dispute, or that respondent does not dispute the material facts alleged;

[50] Section 120.56(2), F.S., provides the procedures by which a substantially affected person may seek administrative determination of the invalidity of a proposed rule.
[51] Pursuant to s. 287.042(2)(c), F.S., any action protesting a decision or intended decision pertaining to contracts administered by the DMS, a water management district, or an agency must include a protest bond in amount equal to 1 percent of the estimated contract amount.
[52] Proceedings in which the substantial interests of a party are determined.
[53] Additional procedures for particular cases: those applicable to hearings involving disputed issues of material fact, those applicable to hearings not involving disputed issues of material act, and those applicable to protests of contract solicitation or award.

- A reference to the file number for the agency administrative complaint, and the date on which the agency pleading was received.

An agency may provide an election-of-rights form for use in requesting a hearing, as long as the form calls for the information above and does not impose any additional requirements in order to request a hearing, unless those requirements are authorized by law.

Subparagraphs subsequent to new subparagraph 5. are renumbered.

Section 120.54(5)(b)5., F.S., is redesignated as subparagraph 6. and is amended to require the uniform rules on petitions for declaratory statements to be published in the FAW, and to include time limits for filing petitions to intervene or for administrative hearing by persons whose interests may be affected.

Section 4. Amends s. 120.55, F.S., pertaining to publication of the Florida Administrative Code (FAC) and forms. The bill requires that each form created by an agency which is incorporated by reference in a rule must clearly display the number, title, and effective date of the form and the number of the rule in which the form is incorporated. This applies to forms incorporated into rules noticed after December 31, 2007.

The bill also amends s. 120.55(1)(b), F.S., effective December 31, 2007, to require that the Department of State publish on an Internet website the weekly publication titled the *Florida Administrative Weekly* (FAW). The bill provides that the website will be the official Internet website for the FAW, and amends the required content of the FAW. The bill deletes an outdated requirement that the FAW publish a reference in the FAW where the text of proposed rules is published, since the FAW will publish the actual notices showing that text. The bill adds a requirement that the FAW publish a cumulative list of all rules that have been proposed but not filed for adoption.

The bill adds a requirement that the Department of State review notices for compliance with format and numbering requirements before publishing them on the FAW website and a requirement that the Department of State maintain a permanent record of all notices published in the FAW.

The bill provides that the Department of State shall publish a printed version of the FAW and make copies available on an annual subscription basis, and may contract with a publishing firm for the printed version of the FAW. It deletes the current requirement that the annual subscription basis cover 50 percent of the costs to publish the printed version. The bill also requires the Department of State to charge agencies using the FAW a space rate to cover the costs related to the FAW and the Florida Administrative Code. The bill deletes a legislative intent paragraph that the FAW be supported entirely by subscription funds.

Section 120.55(2), F.S., is amended to provide for specific requirements of the FAW website, which must include:

- specific search functionality for notices published on the website for at least five years,
- subscription for e-mail notification of selected notices,

- the ability to view agency forms incorporated by reference in proposed rules, and
- the ability to comment on proposed rules.

The website functionality provisions of subsection (2) are derived from the current FAW website functionality provisions contained in current s. 120.551, F.S., which is repealed effective December 31, 2007, under Section 5 of this bill.

A subsection is added to s. 120.55, F.S., that permits publication on an agency's website or by other means, even if it is published on the FAW website, of the information required by s. 120.55(1)(b)., F.S.[54]

A subsection is amended to require that an agency provide copies of its rules upon request, with citations to the grant of rulemaking authority and the specific law implemented for each rule. A subsection is added requiring that access to the FAW website, including the e-mail notification functionality, must be free to the public.

The bill renumbers current s. 120.55(4)(a) as s. 120.55(7)(a), F.S., and retains the specific distribution requirements of the printed version of the FAW.

The bill amends language in s. 120.55(8), F.S., the current subsection (5)(a), to require that all fees collected by the Department of State pursuant to this chapter be deposited in the Records Management Trust Fund for the purpose of paying for costs incurred by the Department of State in carrying out this chapter. The bill deletes references to paying for the publication and distribution of the FAW and Florida Administrative Code.

Section 5. Amends s. 120.551(3), F.S., to change the repeal date of the existing Internet publication provisions from July 1, 2006, to December 31, 2007. The provisions of this section are transferred by Section 4 of this bill to s. 120.55, F.S.

Section 6. Amends s. 120.56(2)(b), F.S., to provide that in an administrative challenge to a proposed rule, when an administrative law judge (ALJ) declares a proposed rule wholly or partly invalid, the proposed rule or provision declared invalid shall not be adopted, unless the decision of the ALJ is reversed on appeal. In the current paragraph, the rule declared invalid by the ALJ must be withdrawn by the agency and may not be adopted, with no statutory provision for moving forward with the proposed rule if the ALJ is reversed on appeal. The bill also deletes the rule filing deadline provisions, which are added to s. 120.54(3)(e)2., F.S., by Section 3 of this bill.

Section 7. Amends s. 120.569(2)(c), F.S., to provide that the time for filing a petition or request for hearing by a person whose substantial interests are determined by an agency shall be extended for an appropriate time if the petitioner demonstrates that he or she has been misled or

[54] That information includes notices of adoption and an index to rules filed; notices of proposed rulemaking; notices of public meetings held pursuant to s. 120.525, F.S.; notices of request for authorization to amend, repeal, or adopt new uniform rules; notices of petitions for declaratory statements or administrative determinations; a summary of objections to rules; a cumulative list of proposed rules not yet filed; and any other material required or authorized by law.

lulled into inaction by the agency, or has in some extraordinary way been prevented from asserting his or her rights by the agency.

In effect, Section 7 codifies some principles from the common law doctrine of equitable tolling. The terms "appropriate time" and "extraordinary way" are undefined by the bill. Without a statutory definition, they may be defined in administrative and judicial decisions.

Section 8. Amends s. 120.57(1), F.S., to require that when a hearing involves disputed issues of material fact, the agency's final order shall include an explicit ruling on each exception submitted by a party to the recommended order. The bill, however, retains the caveat that an agency does not have to rule on an exception that does not clearly identify the disputed portion of the recommended order, that does not identify the legal basis for the exception, or that does not include appropriate citations to the record.

The bill also amends s. 120.57(3)(a), F.S., to provide that, in the notice of decision or intended decision concerning a solicitation, contract award, or exceptional purchase, the statement must include that failure to post a bond or other security required by law within the time allowed shall constitute a waiver of proceedings under ch. 120, F.S. Substantively, bid protest bonds are required by s. 287.042(c)(2), F.S., and the administrative rules concerning bid protests, found in Rule 28-110.005, F.A.C.

Sections 9 and **10.** Amend ss. 120.65 and 120.74, F.S., to require the Division of Administrative Hearings (DOAH) and agencies to issue recommendations on the types of cases or disputes that should be conducted under the summary hearing process described in s. 120.574, F.S.

Section 9 requires the DOAH to yearly submit to JAPC and the Administration Commission a report on agency compliance with the requirement that agencies provide copies of final orders and exceptions to the DOAH within 15 days after order is filed with the agency clerk.

Section 10 further amends s. 120.74, F.S., to require that the report required every two years by agency heads, as to the status of the review of the agency's rules, must also be filed with the Joint Administrative Procedures Committee. Currently, the report must be filed with the President of the Senate, the Speaker of the House, and each appropriate standing committee of the Legislature.

Section 11. Requires that the Department of State, before December 31, 2007, make training courses available to agencies in order to assist with agency transition to publishing on the FAW website required by Section 4 of this bill. The training must be made available to those agencies required to publish materials in the FAW on July 1, 2006, and the training may be provided in the form of workshops or self-training software packages.

Section 12. Provides an effective date of July 1, 2006, except for the provisions of Section 4 of the bill (relating to publication of the Florida Administrative Code and the *Florida Administrative Weekly*), which are effective December 31, 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 will provide the public with greater access to the *Florida Administrative Weekly* (FAW) and with advanced search capabilities, resulting in potential cost savings to users of the FAW.

Under the bill, additional individuals will qualify as a small business party and thereby be eligible to avail themselves of the Florida Equal Access to Justice Act, under which small business parties may receive attorney's fees and costs when they prevail in certain adjudicatory or administrative proceedings under the Administrative Procedure Act. The bill expands the definition of "small business party" to include certain individuals whose net worth did not exceed $2 million at the time of the state agency action.

C. Government Sector Impact:

It is estimated by the Department of State that the FAW Internet website will require $450,000 over three years to comply with the proposed implementation timeline, to be funded from existing authority.

According to the Department of State, local governments advertising in the online FAW would pay the current space rate charge of $.99 until implementation of the new services was completed. Local governments could save the cost of the private subscription service to the printed FAW if they choose to use the website. The Department of State receives no revenue from the private subscription services.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill contains modified versions of three provisions objected to in the Governor's veto message on CS for CS for CS for SB 1010, enacted during the Regular Session of 2005. The modified versions address the stated concerns that agencies will be adversely affected by the following three bill provisions:

- The expanded definition of "small business party" in Section 2 of the bill;
- The codification of equitable tolling in Section 7 of the bill;
- The lessened petition content requirements applicable to certain licensee appeals in Section 3 of the bill.

VIII. Summary of Amendments:

None.