

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/SB 2188

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Joyner

SUBJECT: Administrative Procedures

DATE: March 18, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson	GO	Fav/CS
2.			CA	
3.			EP	
4.			CM	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill makes minor adjustments to the Administrative Procedure Act, by amending the definition of “agency” to codify existing case law, requiring agencies give notice of meetings, hearings, and workshops on the agency’s website, requiring agencies to post meeting agendas and materials on the agency’s website, requiring agencies to consider certain submitted information in rulemaking, requiring agencies to specify the effective date of a rule in the notice of rulemaking, and requiring agencies to post their statements of agency organization on their websites.

The bill also deletes an unnecessary agency rule exception.

This bill amends sections 120.52, 120.525, 120.54, and 120.80 of the Florida Statutes.

II. Present Situation:

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

Because administrative agencies have been granted extensive investigative, rulemaking, and adjudicating powers, statutes such as the Florida Administrative Procedure Act (APA) have been adopted to provide parties in administrative proceedings with procedural protection and due process.¹ The APA allows individuals who feel that their interests are being or will be affected by the preliminary decisions of agencies to challenge those decisions.² The central purpose of the APA is to provide the basic fairness that should surround all governmental activity, such as:

- The opportunity for adequate and full notice of agency activities;
- The right to present viewpoints and to challenge the views of others;
- The right to develop a record which is capable of court review;
- The right to locate precedent and have it applied; and,
- The right to know the factual bases and policy reasons for agency action.³

The operative provisions of the APA concern only “agencies” as defined in 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.⁴
- 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 unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to the 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.⁵

¹ 2 FLA. JUR 2D *Administrative Law* s. 1 (2007).

² Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, 75 FLA. B.J. 14, 14 (2001); *see also* 2 FLA. JUR 2D *Administrative Law* s. 5 (2007).

³ 2 FLA. JUR 2D *Administrative Law* s. 5 (2007) (*quoting Singer Island Civic Ass’n, Inc. v. State Dep’t of Environmental Regulation*, 636 So. 2d 723, 725 (Fla. 4th DCA 1994)).

⁴ Section 20.04, F.S., specifies the structure of the executive branch of state government.

⁵ The definition of agency expressly excludes certain legal entities or organizations found in chs. 361 and 348, F.S., and ss. 339.175 and 163.01(7), F.S.

Since the APA was enacted in 1974, the definition of “agency” has been amended numerous times, and it sometimes difficult to determine with certainty whether a particular entity is or is not an agency subject to the Act. Florida courts generally apply a territorial or jurisdictional test in making this determination; if an entity operates in more than one county, it is subject to the APA. If an entity operates entirely within one county and has no authority outside that county, it is not subject to the provisions of the APA unless it has expressly been made subject to the Act by general or special law or existing judicial decisions.⁶

Notice of Agency Meetings

Section 120.525, F.S., requires each agency to give notice of public meetings, hearings, and workshops by publication in the Florida Administrative Weekly not less than 7 days before the event. The statute also requires the agency to ensure that a copy of the agenda be received at least 7 days before the event by any person who requests a copy and pays the reasonable cost of the copy.

Rule Adoption Procedures

Section 120.54(3)(b)2.a., F.S., requires agencies to consider the impact of a rule on small businesses as defined by s. 288.703. Section 288.703(1), F.S., used to define “small business” in part as a business that employs 100 or fewer employees. However, in 2000 this portion of the definition was amended to refer to 200 or fewer employees.⁷ Currently, the APA still provides that an agency may define “small business” to include businesses employing more than 100 persons.

Section 120.54(3)(d)1., F.S., provides that any change to a proposed rule, other than a technical change, must be supported by the record of public hearings held on the rule, must be in response to written material received on or before the date of the final public hearing, or must be in response to a proposed objection by the committee.

Sections 120.54(3)(e)6. and (6)(b), F.S., provide that, in certain circumstances, the effective date of a rule must be specified or designated in the rule, meaning in the text of the rule itself. Confusion could arise from having the effective dates of various portions of a rule printed in the text, however, and so the Department of State now removes these effective date provisions from the rule text and places them in the history note.

Section 120.54(5)(b)7., F.S., requires the uniform rules of procedure to include provision of a method by which each agency head shall provide a description of the agency’s organization and general course of its operations. Rule 28-101.001, F.A.C., requires the agency head to maintain a current statement of agency organization and operation and provide a copy to any person upon request.

⁶ *Orlando-Orange County Expressway Authority v. Hubbard Construction Co.*, 682 So. 2d 566 (Fla. 5th DCA 1996); *Booker Creek Preservation, Inc. v. Pinellas Planning Council*, 433 So. 2d DCA 1306 (Fla. 2d DCA 1986). See also *In re: Lower Florida Keys Hospital District*, 1977 Op. Att’y Gen. Fla. 077-142.

⁷ Chapter 2000-286, L.O.F.

Exceptions and Special Requirements

Section 120.80(16), F.S., provides an exception from certain rulemaking requirements for the Department of Environmental Protection in implementing s. 403.08725, F.S., which was repealed by Section 26 of Chapter 2008-150, Laws of Florida. The Division of Statutory Revision and the department have recommended that s. 120.80(16), F.S., be deleted.

III. Effect of Proposed Changes:

Section 1 amends s. 120.52(1), F.S., the definition of “agency” for the purposes of the APA. The new definition is intended to codify existing case law and simplify the current definition. It is not intended to make any substantive change to the entities or units of government currently subject to the APA. The definition excludes any municipality or legal entity created solely by a municipality.

Section 2 amends s. 120.525, F.S., by requiring that agencies give notice of meetings, hearings, and workshops on the agency’s website, in addition to publication in the Florida Administrative Weekly, and requiring the agency to also publish the agenda and any electronic meeting materials on the agency’s website. These changes are intended to enhance public access to information, and are consistent with other provisions of the APA that require electronic publication of materials.

Section 3 amends s. 120.54(3)(b)2., F.S., by specifying that an agency may, for purposes of a statement of estimated regulatory costs, define a small business to include businesses employing more than 200 people, a change from 100 people. This change makes the definition of small business in the APA consistent with the definition in s. 288.703, F.S.

The bill amends s. 120.54(3)(c)1., F.S., to require that when a public hearing is held on a rule, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the rule and respond to questions. Adding the language in the section dealing with rulemaking hearings will provide better public notice of this existing requirement in s. 120.54(2)(c), F.S., relating to rulemaking workshops.

The bill amends sections 120.54(3)(c) and (d), F.S., to clarify that material submitted to an agency within 21 days after publication of the notice of proposed rulemaking, or on or before the date of the final public hearing on the rule, must be considered by the agency, and may serve as the basis for a notice of change.

Sections 120.54(3)(e)6. and (6)(b), F.S., are amended to require that the effective date of a rule be specified in the notice of rulemaking, which should provide more efficient notice to the public, and simplify procedures.

The bill amends s. 120.54(5)(b)7., to require an agency to publish its required statement of agency organization on the agency’s website, which should make the agency statement more accessible to the public.

Section 4 repeals s. 120.80(16), F.S., which provides an exception from certain rulemaking requirements for the Department of Environmental Protection in implementing the now-repealed s. 403.08725, F.S.

Section 5 specifies an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Governmental Oversight and Accountability on March 18, 2009:

The CS modifies the definition of “agency” to exclude any municipality or legal entity created solely by a municipality. The CS also modifies the meeting material posting

requirement to require that only materials available electronically must be posted on the agency website.

B. Amendments:

None.

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