

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 12, 1998 Revised: _____

Subject: Department of Transportation Rules

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>McAuliffe</u>	<u>Johnson</u>	<u>TR</u>	<u>Favorable/CS</u>
2.	<u>_____</u>	<u>_____</u>	<u>GO</u>	<u>Withdrawn</u>
3.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
4.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
5.	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>

I. Summary:

In 1996, the Legislature enacted s. 120.536, F.S., which eliminates an agency’s ability to rely on broad statutory authority for its rules and requires specific statutory authority for the powers exercised in a rule.

Pursuant to s. 120.536, F.S., the Department of Transportation has identified the areas of current rule making authority where specific grants of power by the Legislature are necessary to continue implementation of the rules. This CS provides statutory authorization for existing Department of Transportation rules or portions thereof which the department deems necessary but which currently exceed the agencies’ rulemaking authority.

The CS provides specific legislative authority for the Department of Transportation to regulate storm water runoff on the state’s right-of-way as a result of man-made changes to adjacent properties; to, for good cause, deny or suspend a professional consultant from consideration for a professional services contract; and, for good cause, to deny or suspend the certification of a disadvantaged business enterprise. The CS provides definitions for “good cause.”

This bill substantially amends sections 334.044, 337.105, 337.18 and 339.0805 of the Florida Statutes.

II. Present Situation:

During the 1996 legislative session a comprehensive rewrite of the Florida Administrative Procedures Act (APA) was adopted as CS/SBs 2290 and 2288. Among many other changes, the revised APA modified the standards which authorize rulemaking and included provision for periodic review of rules by agencies with rulemaking authority.

In the past, a number of court decisions held that a rule did not exceed the legislative grant of rulemaking authority if it was reasonably related to the stated purpose of the enabling legislation. Additionally, it was accepted that a rule was valid when it implemented general legislative intent or policy. Agencies had wide discretion to adopt rules whether the statutory basis for a rule was clearly conferred or implied from the enabling statute.

Section 120.536, F.S., effectively overturned this line of cases and imposed a much stricter standard for rulemaking authority. Under the new APA, existing rules and proposed rules must **implement, interpret, or make specific** the particular powers and duties granted by the enabling statute. It is important to note that the revised APA is not intended to eliminate administrative rules or even to discourage rulemaking, but to ensure that administrative rules are no broader than the enabling statute. A grant of rulemaking authority by the Legislature is necessary but not enough by itself for an agency to adopt a rule. Likewise, agencies need more than a statement of general legislative intent for implementing a rule. Rules must be based on specific grants of powers and not address subjects on which the Legislature was silent.

In order to temporarily shield a rule or portion of a rule from challenge under the new provisions, agencies were to report rules which they believed did not meet the new criteria by October 1, 1997.

Section 120.536(2) also lays out the second step in the process, that of legislative review. The subsection provides:

The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist.

Thus, during the 1998 legislative session, each agency has the responsibility to bring forward legislative proposals, as appropriate, which will provide statutory authorization for existing rules or portions thereof which the agency deems necessary but which currently exceed the agencies' rulemaking authority. The Legislature is directed to consider whether such legislation authorizing the identified rules should be enacted.

The Department of Transportation has identified the areas of current rule making authority where specific grants of power by the Legislature are necessary to continue implementation of the rules.

The regulation of storm water runoff on to the state's right-of-way as a result of man-made changes to adjacent properties is currently regulated through a permitting process set forth in rule but not specifically authorized by statute.

The department's rules currently authorize the department to offer incentives or collect damages from contractors for the timely completion of a project that will provide substantial benefit to the

public or will limit the disruptive effect of construction on the community. This authority is granted in the department's rules but not specifically authorized by statute.

Criteria for the denying or suspending a professional consultant from consideration for a professional services contract and denying or suspending the certification of a disadvantaged business enterprise is currently regulated through a certification process set forth in rule. While the consultant certification process and the disadvantaged business enterprise certification process are authorized by law there is no specific statutory authority to revoke either certification. The definition of "good cause" for the purpose of disqualifying a consultant or denying or suspending the certification of a disadvantaged business enterprise as set forth in the agency's rules is not specifically authorized by statute.

III. Effect of Proposed Changes:

Section 334.044, F.S., is amended to give specific legislative authority for the Department of Transportation to regulate storm water runoff on the state's right-of-way as a result of man-made changes to adjacent properties. The section clarifies that the issuance of a permit by the department does not exempt a property owner from otherwise applicable federal, state, local or regional regulations governing pollution control, water quality, surface water management or land use. Permittees must reimburse the department for any expenses incurred by the department as a result of the permittee's unpermitted discharge to the right-of-way. The section further provides that the department may suspend or revoke a permit for failure to construct, operate, or maintain the facilities as authorized by the permit; for failure to reimburse the department for unpermitted discharge; or for submission of false or misleading information regarding the permitting, construction, operation or maintenance of the facilities.

Section 337.105, F.S., is amended to give specific legislative authority for the Department of Transportation to, for good cause, deny or suspend a professional consultant from consideration for a professional services contract. The CS provides a definition of "good cause" for this purpose which includes inadequate insurance coverage, fraudulent or misleading behavior, bankruptcy, and unsatisfactory performance.

Section 337.18, F.S., is amended to authorize rules which allows the department to provide incentives for contractors for early completion of projects, and collect damages for work not completed in time, on projects which provide substantial benefits to the public.

Section 339.0805, F.S., is amended to give specific legislative authority for the Department of Transportation to, for good cause, deny or suspend the certification of a disadvantaged business enterprise. The bill provides a definition of "good cause" for this purpose which includes fraudulent or misleading behavior, unsatisfactory performance, not meeting certification standards, insolvency or bankruptcy, and failing to schedule on-site reviews.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.