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.)

BILL: CS/SB 206

SPONSOR: Governmental Oversight and Productivity Committee and Senator Laurent

SUBJECT: Administrative Procedure Act

DATE: March 11, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable/CS
2.			FP	
3.				
4.				
5.				

I. Summary:

This committee substitute reorganizes the definition of "agency" found in s. 120.52(1), F.S., for clarity. The committee substitute also clarifies that regional water supply authorities are agencies for purposes of the Administrative Procedure Act. Further, entities described in ch. 298, F.S., relating to water control districts, are removed from the definition of agency. Local school boards are added to paragraph (c) of section 120.52(1) of the definition of agency. Entities within this paragraph are included within the definition of agency ". . . to the extent they are expressly made subject to this act by general or special law or existing judicial decisions."Additionally, the committee substitute modifies the rulemaking standard adopted in the 1996 revision of the Administrative Procedure Act. It provides that an agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling act. Further, the standard is modified to provide that an agency does not have authority to adopt a rule only because it is with the agency's class of powers and duties. Statutory language granting rulemaking authority is to be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

The committee substitute requires agencies to identify rules that do not meet the standard and to provide the Joint Administrative Procedures Committee with a list of those rules. Rules that are on the list are to be submitted to the Legislature to determine if specific legislation for the rules should be enacted. Agencies are required to repeal those rules by January 1, 2001 that exceed the rulemaking standard. Rules adopted on or after October 1, 1996, and before October 1, 1999, and included on the list may not be challenged before July 1, 2001.

The committee substitute provides that an agency may not adopt retroactive rules, including those intended to clarify existing law, unless expressly authorized by statute. The committee substitute also provides that in a challenge to a proposed rule, the petitioner has the burden of going forward, but the agency has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority. The committee substitute also limits the ability of an agency to modify conclusions of law in a recommended

order by providing that only those clearly erroneous conclusions of law over which the agency has substantive jurisdiction may be modified by the agency. The committee substitute further provides that an appellate court shall not defer to an agency's construction of a statute or rule or otherwise afford any special weight to the agency's interpretation of a statute or rule.

This committee substitute amends the following sections of the Florida Statutes: 120.52; 120.536; 120.54; 120.56; 120.57; and 120.68.

II. Present Situation:

The Administrative Procedure Act (APA), which is contained in ch. 120, F.S., primarily sets forth requirements for two governmental processes. First, it contains general standards and procedures that all agencies must follow when adopting administrative rules. Second, the APA creates an administrative hearing process in the executive branch for the resolution of disputes.

The APA does not apply to the Legislature or to the courts[1] but to agencies. The term "agency" is defined by the act[2] to mean:

> (a) The Governor in the exercise of all executive powers other than those derived from the constitution.
> (b) Each state officer and state department, departmental unit described in s. 20.04, commission, regional planning agency, board, multicounty special district with a majority of its governing board comprised of non-elected persons, and authority, including, but not limited to, the Commission on Ethics and the Game and Fresh Water Fish Commission when acting pursuant to statutory authority derived from the Legislature, educational units, and those entities described in chapters 163, 298, 373, 380, and 582 and s. 186.504, except any legal entity or agency created in whole or in part pursuant to chapter 361, part II, an expressway authority pursuant to chapter 348, or any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection.
> (c) Each other unit 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.

Rulemaking Standard

Executive agencies do not have inherent rulemaking authority.[3] Shaping public policy through lawmaking is the exclusive power of the Legislature.[4] The Legislature, however, may delegate to

[1]Section 120.50, F.S.

[2]Section 120.52(1)(a), F.S.

[3]*Grove Isle, Ltd. v. State Dept. of Envtl. Reg.*, 454 So.2d 571, 573 (Fla. 1st DCA 1984).

[4]*Jones v. Department of Rev.*, 523 So.2d 1211, 1214 (Fla. 1st DCA 1988).

agencies the authority to adopt rules that implement, enforce, and interpret a statute.[5] An enabling statute that delegates rulemaking authority to an agency cannot provide unbridled authority to an agency to decide what the law is,[6] but must be complete,[7] must declare the legislative policy or standard,[8] and must operate to limit the delegated power.[9]

A rule is defined by s. 120.52(15), F.S., to mean

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. . . .[10]

Agencies are not authorized to determine whether or not they want to adopt rules.[11] They are required by law to adopt as a rule each agency statement that meets the definition of a rule as soon as feasible and practicable. Rulemaking is presumed to be feasible [12] and practicable[13] unless the agency proves certain statutory standards. Whenever an act of the Legislature requires implementation by rule, an agency has 180 days after the effective date of the act to do so, unless the act provides otherwise.[14]

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[5]*State v. Atlantic C.L.R. Co.*, 47 So. 969 (1909).

[6]*State ex rel. Davis v. Fowler*, 114 So. 435, 437 (Fla. 1927).

[7]*Spencer v. Hunt*, 147 So. 282, 286 (Fla. 1933); accord *Florida Beverage Corp. V. Wynne*, 306 So. 2d 200, 202 (Fla. 1st DCA 1975).

[8]*Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 268 (Fla. 1991).

[9]*Palm Beach Jockey Club, Inc. v. Florida State Racing Comm'n.*, 28 So. 2d 330 (Fla. 1946).

[10]The term "rule" does not include: (a) internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum; (b) legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action; (c) the preparation or modification of: (1) agency budgets; (2) statements, memoranda, or instructions to state agencies issued by the Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Comptroller; (3) contractual provisions reached as a result of collective bargaining; or (4) memoranda issued by the Executive Office of the Governor relating to information resources management.

[11]Section 120.54(1)(a), F.S.

[12]Rulemaking is presumed feasible unless the agency proves that: (a) the agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; (b) related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; (c) the agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

[13]Rulemaking is presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that: (a) Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or (b) The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interest of a party based on individual circumstances.

[14]Section 120.54(1)(b), F.S.

While agencies are required to adopt as a rule each agency statement that implements, interprets, or prescribes law or policy, there are limitations on the content and scope of these rules. When the Legislature adopted changes to the APA in 1996, it overturned case law that had permitted broader bases for rulemaking, and significantly narrowed the standard for rulemaking.[15] Sections 120.52(8) and 120.536(1), F.S., now state:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the *particular powers and duties* granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute [*emphasis added*].

The standard limiting agency rulemaking power has been reviewed by the courts in at least three cases. In two of the three cases, the courts overturned proposed rules of agencies, but in the third case the court upheld the proposed rules.

In the first case, *St. Johns River Water Management District v. Consolidated-Tomoka Land Co., et al*[16], the First District Court of Appeal upheld proposed agency rules. In *Tomoka*, land owners challenged proposed rules of the water management district that would have added two hydrologic basins to five others within the district and would have imposed four new development standards within these basins. The administrative law judge in *Tomoka* found the proposed rules to be supported by competent substantial evidence, but concluded that the statutory authority on which they were based was ". . . merely a general, nonspecific description of the agency's duties." The administrative law judge determined that the enabling statute must "detail" the powers and duties that are the subject of the rules and, since it did not, the rules were not within the "particular powers and duties" granted by the enabling statute.[17] As a result, the administrative law judge invalidated the proposed rules. The water management district appealed the decision invalidating the proposed rules to the First District Court of Appeal.

The First District Court of Appeal (DCA) overturned the administrative law judge's final order and upheld the proposed rules. The court stated that the phrase "particular powers and duties" in the statute was unclear and noted that the word "particular" had more than one meaning.

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[15]Before the 1996 revision to the APA, the courts had held that rule is a valid exercise of delegated legislative authority if it is "reasonably related" to the enabling statute and not arbitrary and capricious. See, *General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n*, 446 So.2d 1063 (Fla. 1984); *Department of Labor and Employment Sec., Div. of Workers' Compensation v. Bradley*, 636 So.2d 802 (Fla. 1st DCA 1994); *Florida Waterworks Ass'n v. Florida Pub. Serv. Comm'n*, 473 So.2d 237 (Fla. 1st DCA 1985); *Department of Prof'l Regulation, Bd. of Med. Exam'rs v. Durrani*, 455 So.2d 515 (Fla. 1st DCA 1984); *Agrico Chem. Co. v. State, Dept. of Envtl. Regulation*, 365 So.2d 759 (Fla. 1st DCA 1978); *Florida Beverage Corp., Inc. v. Wynne*, 306 So.2d 200 (Fla. 1st DCA 1975).

[16]717 So.2d 72 (Fla. 1st DCA 1998)

[17]Sections 373.413(1) and 373.416(1), F.S.

> In the present case, the language of section 120.52(8) could refer to one of two different kinds of restrictions on an agency's rulemaking power. The statute could mean that the powers and duties delegated by the enabling statute must be particular in the sense that they are identified (and therefore limited to those identified) or in the sense that they are described in detail.[18]

While the administrative law judge relied on a definition of "particular" that meant "detailed" to disallow the proposed rules, the district court determined that "particular" meant "directly within a class of powers," which the court found to be a broader standard than "detailed." The court stated:

> We consider it unlikely that the Legislature intended to establish a rulemaking standard based on the level of detail in the enabling statute, because such a standard would be unworkable. The courts are bound to interpret ambiguous statutes in the most logical and sensible way. If possible, the court must avoid an interpretation that produces an unreasonable consequence. A standard based on the precision and detail of an enabling statute would produce endless litigation regarding the sufficiency of the delegated power. Section 120.52(8) provides that a rule can implement, interpret, or *make specific*, the powers and duties granted by the enabling statute. (Emphasis added.) It follows from this statement that the enabling statute can be, and most likely will be, more general than the rule. Just how general the statute can be is not explained.[19]

The court identified two problems that would result if the stricter definition of the term "particular" were applied. The court stated

> [w]hat is specific enough in one circumstance may be too general in another. An argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the Legislature tried to be in describing the power delegated to the agency. Consequently, it is more likely that the Legislature used the term "particular" to mean that the powers and duties must be identifiable as powers and duties falling within a class.

Second, the court stated that the stricter standard is less consistent with other provisions of APA. The court noted that rulemaking is not restricted to those situations in which the enabling statute details the precise subject of a proposed rule:

> Section 120.54(1)(a), Florida Statutes (Supp. 1996), states that "[r]ulemaking is not a matter of agency discretion." This statute places an affirmative duty on the part of all state agencies to codify their policies in rules adopted in the formal rulemaking process. The term "rule" is defined broadly in section 120.52(15) to include an "agency statement of general applicability." These sections suggest that rulemaking authority is not restricted to those situations in which the enabling statute details the precise subject of a proposed rule. The legislative command directing the agency to adopt rules carries with it an implication that the

[18]717 So.2d 72 at 79.

[19]717 So.2d 72 at 80.

> agencies have authority to adopt rules, at least within the *class of powers* conferred by the applicable enabling statute [*emphasis added*].

For these reasons, the court determined that the proper test to determine whether a rule is a valid exercise of delegated authority is whether the rule is:

> based on the nature of the power or duty at issue and not the level of detail in the language of the applicable statute. The question is whether the rule falls within the *range of powers* the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter *directly within the class of powers and duties identified in the statute* to be implemented. This approach meets the legislative goal of restricting the agencies' authority to promulgate rules, and, at the same time, ensures that the agencies will have the authority to perform the essential functions assigned to them by the Legislature [*emphasis added*].

Another recent case interpreting the new rulemaking standard is *Department of Business and Professional Regulation v. Calder Race Course, Inc., et al.*[20] In that case, corporations holding permits and licenses to operate pari-mutuel facilities and to conduct parti-mutuel wagering, filed a joint petition contesting numerous proposed rules that authorized the department to conduct warrantless searches of persons and places within a permitted pari-mutuel wagering facility. The administrative law judge observed in her order that

> before the enactment of the 1996 amendments to chapter 120, Florida Statutes, an agency's rulemaking authority was implied to the extent necessary to properly implement the agency's statutory duties and responsibilities. Thus, if the enabling statute simply stated that an agency "may make such rules and regulations as may be necessary to carry out the provisions of this Act," the regulations were deemed valid so long as they were not arbitrary and capricious. . . .[21]

This administrative law judge, however, concluded that this principle had been repealed by the 1996 amendments to the APA and that the agency now had the burden of proving that a proposed rule is not an invalid exercise of delegated legislative authority. Additionally, the administrative law judge found that the "reasonably related" standard was no longer sufficient to support a rule and that an agency must now show a grant of specific legislative authority for the rule. Based on these statutory changes and the lack of specific legislative authority, a final order invalidating the rule was issued.

The department appealed the final order to the First District Court of Appeal, but the final order was affirmed by the court. The court stated

> Although the result we reach in the instant case -- approval of the ALJ's order invalidating a rule -- is not the same as that decided in St. Johns, we adopt the reasoning employed therein. We reiterate that the term "particular powers and duties granted by the enabling state," as

[20]23 Fla. L. Weekly D1795 (Fla. 1st DCA July 29, 1998).

[21]Department of Business and Professional Regulation v. Calder Race Course, Inc.

> used in amended sections 120.52(8) and 120.536(1), requires a determination of whether the rule falls within the *range of powers* the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction.

In applying this range of powers test to the proposed rule, the court found that the cited general and specific statutory authority for the rule failed to convey the requisite power to the agency to conduct searches of persons and places within a permitted pari-mutuel wagering facility. The court stated

> Subsection 550.0251(3) merely empowers the Division to "adopt reasonable rules for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state." This general grant of rulemaking authority, while necessary, is not sufficient to validate rule 61D-2.002 under the 1996 amendment to section 120.52(8). A specific law to be implemented was also required, and nothing in this subsection identifies the power that the rule attempts to implement, i.e., to search.

The court stated that if the rule was to pass the range of powers test, it must do so through the powers delegated generally to the department under s. 550.0251, F.S., which enumerate the division's powers. The court singled out one of those powers, the power to conduct investigations, and discussed how investigations may or may not involve a search. The court found that the distinction between an investigation that does not involve a search and one that does is highly significant. The court noted that where "government is to be given the right to conduct a warrantless search of a closely regulated business, the Fourth Amendment demands that the language of the statute delegating such power do so in clear and unambiguous terms." Additionally, the court noted that ". . . highly regulatory laws are subject to strict construction and may not be extended by interpretation." The court concluded that there was nothing in the class of powers and duties identified in s. 550.0251, F.S., that delegated to the Division the right to search persons or places within pari-mutuel wagering facilities, or any provision in the statute deeming a licensee to have waived the protections of the Fourth Amendment by consenting to such searches. The court upheld the final order invalidating the proposed rules.

Finally, in the case *St. Petersburg Kennel Club v. Department of Business and Professional Regulation*, a kennel club owner appealed two orders of the department. The first final order of the department denied the Kennel Club's petition for a determination that the definition of the game "poker" was an invalid exercise of delegated legislative authority. The second order challenged a final order of the department which denied the Kennel Club's application for approval of three particular card games.

The court noted that the Cardroom Act[22] did not define "poker" but defined the term "authorized games" by reference to another statute, s. 849.085(2)(a), F.S. The statute referred to, however, did not define "poker" either. Thus, neither the Cardroom Act nor the statute to which it referred

[22]Section 849.086, F.S.

provided a statutory definition of "poker." Furthermore, the general powers of the division did not specifically authorize it to ". . . make rules which set forth the definition of poker."[23] The court reversed both orders because the enabling statutes did not provide specifically that the department was authorized to adopt rules to define the game of poker. As the department was not authorized to define the game of poker it could not, therefore, deny approval of these games because the denial was based upon application of an invalid rule.

Challenges to Proposed Rules

Under the APA, any substantially affected person may seek an administrative determination of the invalidity of any proposed rule by filing a petition with DOAH within certain time frames. Since the 1996 amendments, a petition challenging a proposed rule is required to state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The agency has the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

This process was adopted in the 1996 revision to the APA. Prior to that time, the courts had held that a rule was presumed to be valid, and that the party challenging a rule had the burden of establishing that it was invalid.[24] These principles still apply in challenges to existing rules and challenges to agency statements alleged to meet the definition of a rule, but not to challenges to proposed rules. Section 120.56(2)(c), F.S., provides that a proposed rule is not presumed to be valid or invalid. Section 120.56(2)(a), F.S., requires an agency to establish the validity of a proposed rule once it has been challenged.

In *Tomoka*, the administrative law judge interpreted the requirement to mean that the agency has the ultimate burden of establishing that a proposed rule is valid, but that the challenger still has the burden of going forward with the evidence supporting the objections. The First District Court of Appeals agreed stating

> Section 120.56(2)(a) requires the agency to justify a proposed rule, but that does not relieve the challenger of the duty to present the evidence necessary to provide a preliminary factual basis for the objections. . . . Nothing in section 120.56(2) requires the agency to carry the burden of presenting evidence to disprove an objection alleged in a petition challenging a proposed rule. Moreover, it would be impractical to impose such a requirement. As the administrative law judge explained, a petition challenging a proposed rule might include numerous objections, not all of which remain in controversy by the time of the hearing. If the agency had the burden of going forward with the evidence, it would be forced to rebut every objection made in the petition, if for no other reason than to avoid the possibility of an award of attorneys' fees for its failure to justify the proposed rule. Therefore, we prefer the more practical approach taken by the administrative law judge here. A party challenging a proposed rule has the burden of establishing a factual basis for the objections to a rule, and then the

[23]St. Petersburg Kennel Club v. Department of Business and Professional Regulation

[24]*Agrico Chem. Co. v. State, Dept. of Env. Reg.*, 365 So. 2d 759 (Fla. 1st DCA 1978); *Dravo Basic Materials Co., Inc. v. Dept. of Transportation*, 602 So.2d 632 (Fla. 2d DCA 1992).

agency has the ultimate burden of persuasion to show that the proposed rule is a valid exercise of delegated legislative authority.[25]

Additionally, in *Board of Clinical Laboratory Personnel v. Florida Ass'n of Blood Banks,*[26] the court reversed the ALJ's final order on the issue of what evidentiary standard should be employed to prove the validity of a challenged rule. The ALJ held that the agency had to establish proof by a preponderance of the evidence. In reversing on this issue, the court noted that the APA did not require this level of proof when challenging a proposed rule but did not state what the standard should be.[27]

Finally, in *Department of Children and Families v. Patricia Morman d/b/a/ Patti Cake Nursery*,[28] relating to issuance of final orders, the court found that an agency may reject or modify only interpretations of administrative rules over which it has substantive jurisdiction, but that it may reject or modify any conclusion of law found in a recommended final order. In this case, the court reversed the ALJ's dismissal of the complaint against the respondent because the petitioner agency did not provide enought specificity in the complaint against which the respondent could defend. The court found that the respondent failed to object to the lack of specificity in the complaint and that the transcript showed that the respondent was clear as to the rules violated and those in her employ who violated the rules.

Retroactive Application of Rules

Generally, administrative rules of an agency are prospective in application. In *Environmental Trust v. Dept. of Environmental Protection*,[29] the district court of appeal applied an exception, drawn from federal administrative law cases, that a rule that merely clarifies another existing rule and does not establish new requirements may be applied retroactively.

III. Effect of Proposed Changes:

The committee substitute makes definitional changes to the APA, as well as addresses several cases interpreting the 1996 amendments to the APA.

Definitional changes. The committee substitute reorganizes the definition of "agency" to clarify it. It also adds regional water supply authorities to the definition to clarify that they are agencies for purposes of the APA. The committee substitute also includes local school boards in paragraph (c) of subsection 120.52 (1), F.S. Entities in that paragraph are included within the definition of agency to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

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[25]*Tomoka, supra*, at 76 and 77.

[26]23 Fla.L.Weekly D1851 (Fla. 1st DCA August 3, 1998).

[27] *Id* at 1852.

[28]23 Fla. L. Weekly 1900 (Fla. 1st DCA August 7, 1998).

[29]714 So.2d 493 (Fla. 1st DCA 1998).

The committee substitute removes entities described in ch. 298, F.S., from the definition of agency found in s. 120.52(1), F.S. The entities that are described in ch. 298, F.S., are water control districts. These districts are limited-purpose local governmental units administratively separate from state and other local governments. These units are created to provide financing or to construct or maintain infrastructure or provide services. The chapter was significantly revised in 1997 to create a circuit court process for adjudicating disputes resulting from ad valorem assessments, among other things. The revision also repealed the authority of water control districts to adopt rules.

Rulemaking standard. The committee substitute also modifies the legislative standard for rulemaking adopted in 1996 that subsequently was interpreted by the judicial branch in the cases reviewed *supra*. Sections 120.52(8) and 120.536(1), F.S., currently state that an agency may adopt only rules that implement, interpret, or make specific the *particular* powers and duties granted by the enabling statute and that statutory language granting rulemaking authority or generally describing the powers and functions of an agency are to be construed to extend no further than the *particular* powers and duties conferred by the same statute. The committee substitute strikes the word "particular" which the First District Court of Appeals in *Tomoka* described as being unclear. The provision is amended to permit agencies to adopt only rules that "implement or interpret the specific powers and duties granted by the enabling statute." Further, agencies are not permited to adopt a rule only because it is within the agency's class of powers and duties. Agency powers and functions are to be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

Rules Authorization Process. The committee substitute provides for a period of agency and legislative review of rules, as well as a savings clause for a period of time for rules that are identified by agencies as being outside the rulemaking standard and reported to the Joint Administrative Procedures Committee. Rules that exceed the standard will be reviewed by the Legislature to determine if specific legislation authorizing them should be adopted. If specific legislation is not adopted, agencies must initiate repeal by January 1, 2001. Challenges to rules on the grounds that it exceeds the rulemaking authority or law implemented may begin on July 1, 2001.

Retroactive Rules. The committee substitute prohibits agencies from adopting retroactive rules, including retroactive rules that are intended to clarify existing law, unless that power is expressly authorized by statute.

Rule challenge proceedings. The committee substitute amends s. 120.56(2)(a), F.S., by providing that, after a petition challenging the validity of a proposed rule has been filed, the petitioner has the burden of going forward in the case, but the agency whose proposed rule is being challenged has the burden of proving by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

Final orders in cases involving disputed issues of material fact. In cases where there are disputed issues of material fact and where the administrative law judge issues only a recommended order, an agency in its final order currently may reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. The committee substitute narrows this provision by tightening the standard on modification. Under the

committee substitute, the agency only may reject or modify the "clearly erroneous" conclusions of law "over which it has substantive jurisdiction . . ."

Judicial Review. Section 120.68(7)(d), F.S., is amended to state that the courts may not defer to an agency's construction of a statute or rule or otherwise afford any special weight to the agency's interpretation of a statute or rule.

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:

Indeterminable.

C. Government Sector Impact:

Indeterminable. State entities meeting the definition of "agency" under s. 120.52, F.S., will be required to review their rules to determine if they are within the standard enunciated in the committee substitute. If they do not meet this standard, agencies will have to initiate rulemaking to initiate the repeal of these rules. As the number of rules that will not meet the standard of the committee substitute is unknown, the total cost for repealing these rules is unknown.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The First District Court of Appeals in *Tomoka*[30] found that the phrase "particular powers and duties" in the statute was unclear and noted that the legislatively-undefined word "particular" had more than one meaning. The court found that "particular" could mean that the powers and duties are identified (and therefore limited to those identified) or in the sense that they are described in detail. The administrative law judge relied on the definition of "particular" that required powers and duties to be described in detail, but was overruled by the district court. The First District Court of Appeal used the definition of "particular" that meant "directly within the class of powers and duties," which is a broader standard. The committee substitute removes the word "particular" from the standard and instead relies upon the word "specific." As in the case of the word "particular" in the 1996 APA amendments, the word "specific" is not defined by the bill. As a result, in any administrative appeal, the court will use principles of statutory construction to determine legislative intent for the word "specific."

The committee substitute provides that an agency may reject or modify the conclusions of law over which it has substantive jurisdiction only if those conclusions of law are clearly erroneous. This standard makes it more difficult for an agency to reject or modify the conclusions of law in a recommended order and shifts the standard that favors the agency interpretation of the law it executes away from the agency toward the administrative law judge. Additionally, the committee substitute provides that the courts may not defer to an agency's construction of a statute or rule or otherwise afford any special weight to the agency's interpretation of a statute or rule.

The committee substitute modifies the definition of "agency" by including regional water supply authorities within the definition, thereby making them subject to the act, but it eliminates water control districts from the definition. Traditionally, the APA applied to all governmental entities with statewide or multi-county, regional jurisdictions.

The committee substitute includes local school boards within paragraph (c) of the definition, which includes governmental entities within the definition of "agency" only if they are expressly made subject to this act by general or special law or existing judicial decisions. The impact of the provision appears to remove local school boards from the applicable requirements of the act.

VIII. Amendments:

None.

[30]717 So.2d 72 at 79 (Fla. 1st DCA 1998).