

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 2556

SPONSOR: Judiciary Committee and Senator King

SUBJECT: Administrative Procedure

DATE: April 7, 2000 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Forgas</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>GO</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill modifies various provisions of the Administrative Procedure Act, Ch. 120, F.S., relating to mediation, expedited hearings, and attorney’s fees. It also clarifies the expedited hearing processes for certain environmental permit applications under Chapters 373 and 403, F.S. Among other modifications, the bill:

- Modifies the Equal Access to Justice Act to increase the net worth amounts for small business parties and increases the amount of attorney’s fees that may be awarded under s. 57.111, F.S., from \$15,000 to \$75,000.
- Agency actions under parts II and IV of ch. 373, F.S., and part VIII of ch. 403, F.S., are added to the mediation provisions in s. 120.573, F.S., to allow only the party affected by the agency action and the agency to decide whether to mediate a case.
- Redesignates “summary hearing” in s. 120.574, F.S., as “expedited hearing” and revises the conditions under which such hearings may be held. Gives an administrative law judge recommended order authority instead of final authority for all expedited hearings under s. 120.574, F.S. Provides that parties may file exceptions to recommended orders, as well as responses to the exceptions.
- Allows for expedited hearings under the expedited comprehensive plan permit process of s. 403.973, F.S., without consent of the affected agency or a determination of the appropriateness of an expedited hearing by an administrative law judge. However, the hearing schedule may be extended by written agreement of all parties.
- Modifies the variance and waivers provisions in s. 120.542, F.S., so that they are applicable only to persons substantially affected by an agency rule.

- Allows an award of attorney's fees and costs under 120.595, F.S., to the petitioner when the agency statement is challenged as not having been properly adopted as a rule and the agency has proceeded to rulemaking.
- Removes authority from the Land and Water Adjudicatory Commission to review orders resulting pursuant to ss. 120.57 and 120.69, F.S., evidentiary hearings.
- Creates a notice and waiver of the administrative rights mechanism for permits for stormwater management systems, dams, impoundments or other work under part IV of Ch. 373, F.S., and provides for a hearing within 90 days of a petition for hearing under that section.
- Modifies s. 403.412(5), F.S., to provide that a resident who is not substantially affected by the permitted activity may not initiate, institute, petition or request a proceeding pursuant to ss. 120.569 or 120.57, F.S.
- Clarifies the definition of agency in s. 120.52, F.S.

The bill shall be effective on becoming law.

This bill substantially amends the following sections of the Florida Statutes: 57.111, 120.52, 120.542, 120.573, 120.574, 120.595, 373.114, 373.1501, 373.4141, 403.088, 403.412, 403.973, and 408.7056.

II. Present Situation:

Equal Access to Justice Act

Section 57.111, F.S., provides for the award of attorney's fees and costs to prevailing small business parties in actions initiated by state agencies. A small business party is currently defined in relevant part 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 principle 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. *See* s. 57.111(3)(d), F.S.

The Act limits the award of attorney's fees for a prevailing party in an action initiated by a state agency to \$15,000. s. 57.111(4)(d)2., F.S.

Mediation under Chapter 120, F.S.

Section 120.573, F.S., provides for the mediation of administrative disputes. This section allows the agency and all parties to the litigation to agree to mediation and, in such cases, tolls the time limits provided by ss. 120.569 and 120.57, F.S., to allow for the mediation. The mediation must be conducted within 60 days of the parties' agreement to mediate. The mediation agreement must include provisions for mediator selection, the allocation of costs and fees associated with mediation, and the mediating parties' understanding regarding the confidentiality of discussions and documents introduced during mediation. If the mediation results in settlement of the administrative dispute, the agency enters a final order incorporating the agreement of the parties. If the mediation terminates without settlement of the dispute, the agency shall notify the parties in writing that the administrative hearing processes under ss. 120.569 and 120.547, F.S., are resumed.

Summary Hearing under Chapter 120, F.S.

Section 120.574, F.S., provides for a summary hearing process for administrative actions. The Division of Administrative Hearings must provide the original parties with an initial order within 5 days of the filing of the petition for hearing. That order shall contain a statement advising the addressees that a summary hearing is available. Within 15 days after service of the initial order, any party may file with the division a motion for summary hearing in accordance with s. 120.574(2), F.S. If all original parties agree, in writing, to the summary proceeding, it shall be conducted within 30 days of the agreement. Intervenors are subject to the decision of the original parties as to whether the case will proceed under the summary hearing provisions and shall not have standing to challenge the decision. If a motion for summary hearing is not filed within 15 days after service of the initial order, the case shall proceed in accordance with the formal hearing provisions of ss. 120.569 and 120.57, F.S.

The summary hearing limits the types of motions and the scope of the record of the hearing. Within 30 days of the conclusion of the summary hearing, the administrative law judge shall enter a final order in the matter, which is final agency action for purposes of Chapter 120, F.S., and is appealable to a district court of appeal as provided in s. 120.68, F.S.

Expedited Permitting Process

Section 403.973, F.S., provides for an expedited permit process for certain economic development projects. Section 403.973(15), F.S., provides that challenges of state agency action under the expedited permit process are subject to the summary hearing provisions of s. 120.574, F.S., except that the decision of the administrative law judge shall be in the form of a recommended order and not a final order subject to appeal under s. 120.68, F.S., unless the affected agencies agree at the preliminary hearing conference to allow the judge's decision to constitute final agency action. In cases where a single agency is affected, the agency shall render its final order in the matter within 10 working days of the receipt of the recommended order. In those proceedings where the actions of more than one agency are challenged, the Governor shall issue the final order within 10 working days of receipt of the recommended order.

Variations and Waivers of Agency Rules

Section 120.542, F.S., provides that strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. In appropriate cases, variances or waivers to a rule may be granted by an agency to provide relief to persons subject to regulation. This section does not apply to public employees and does not authorize variances or waivers to statutes or rules required by the federal government for the agency's implementation or retention of any federally approved or delegated program.

Land and Water Adjudicatory Commission

Under s. 373.114, F.S., the Governor and the Cabinet sit as the Land and Water Adjudicatory Commission. With certain exceptions, the Commission has the exclusive authority to review any order or rule of a water management district to ensure consistency with the provisions and purposes of ch. 373, F.S., which pertains to water resources.

Challenges to Agency Action Pursuant to s. 120.56(4), F.S.

Section 120.56(4), F.S., provides for challenges of agency statements. A substantially affected person must show that the statement constitutes a rule that the agency has not adopted as required by the general rulemaking provisions of s. 120.54(1), F.S. In such cases, and upon the entry of a final order that all or part of the agency statement violates s. 120.54(1), F.S., the petitioner is entitled to an award of reasonable attorney's fees and costs unless the agency demonstrates that the statement is required by the federal government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds. *See* s. 120.595(4), F.S.

Permit Processing under Chapter 373, F.S.

Section 373.4141, F.S., regulates the permitting process for stormwater management systems, dams, impoundments, or other works under Part IV of Chapter 373, F.S. Under that section, within 30 days after receipt of an application for a permit, the Department of Environmental Protection or the water management district shall review the application and shall request submission of all additional information the department or the water management district is permitted by law to require. If the applicant believes any request for additional information is not authorized by law or rule, the applicant may request a hearing pursuant to s. 120.57, F.S. Within 30 days after receipt of such additional information, the department or water management district shall review it and may request only that information needed to clarify such additional information or to answer new questions raised by or directly related to such additional information. If the applicant believes the request of the department or water management district for such additional information is not authorized by law or rule, the department or water management district, at the applicant's request, shall proceed to process the permit application. This section also requires that a permit must be approved or denied within 90 days after receipt of the original application, the last item of timely requested additional material, or the applicant's written request to begin processing the permit application.

Environmental Protection Act

The Environmental Protection Act of 1971 is contained in s. 403.412, F.S. Basically, the act provides that the Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against the appropriate governmental authority to compel enforcement of the laws, rules and regulations for the protection of the air, water, and other natural resources of the state. The act also allows maintenance of an action against any person, corporation, or governmental agency or authority to enjoin such persons, agencies or authorities from violating laws, rules and regulations which protect the air, water and other natural resources.

Additionally, in any administrative, licensing, or other proceeding authorized by law for the protection of the air, water, or other natural resources of the state, a resident of Florida has standing, pursuant to s. 403.412(5), F.S., to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resource of the state.

III. Effect of Proposed Changes:

Equal Access to Justice Act

The bill amends s. 57.111, F.S., to change the net worth definition of a “small business party” that may be entitled to an award of attorney’s fees from \$2 million to \$5 million and to increase the award of attorney’s fees under that section from \$15,000 to \$75,000.

Definition of State Agency under Chapter 120

The bill clarifies the definition of state agency in s. 120.52(1), F.S., to provide that only state authorities, state boards and state commissions are subject to ch. 120, F.S. Section 120.52(1)(c), F.S., is amended to provide that units of local government having jurisdiction only in one county, or part thereof, are subject to ch. 120, F.S., only if expressly provided for by general law, special law or judicial decisions.

Mediation under Chapter 120, F.S.

The bill amends s. 120.573, F.S., by adding a new subsection (2) to provide that agency actions under parts II and IV of chapter 373, F.S., and part VIII of chapter 403, F.S., which affect substantial interests may be mediated if the agency and the party subject to the agency action agree to mediate. The time limitations imposed by ss. 120.569 and 120.57, F.S., shall be tolled when mediation occurs. The mediation must be concluded within 60 days of the agreement to mediate, unless otherwise agreed to by the parties. If mediation results in settlement of the administrative dispute, the agency shall enter a final order incorporating the agreement of the parties. If there is no settlement, the agency shall notify the parties in writing that the administrative hearing processes under ss. 120.569 and 120.57, F.S., are resumed.

Summary Hearings under Chapter 120, F.S.

The bill reclassifies the summary hearing under s. 120.574, F.S., as an “expedited” hearing. It requires the initial order to advise the original parties to the litigation that an expedited hearing is available, provided that the affected agency agrees, and defines the accelerated nature of the expedited procedure. The bill additionally provides that any party may file a motion for expedited hearing. Under the bill, if a non-agency party files such a motion, and the affected agency does not file a written objection within 7 days after service of such a motion, or if the affected agency files such a motion, and the party who is the subject of the agency action does not file a written objection within 7 days after service of the motion, the motion shall be granted. An order must be entered setting a hearing date within 30 days of the date the response period to the motion expires. If an affected agency files such a motion, and the party who is the subject of the agency action files a response within 7 days after service of the motion objecting to the expedited hearing, the administrative law judge shall, within 5 days from the filing of that response, enter an order granting the motion for the expedited hearing. The motion must be granted unless the administrative law judge determines that any of the original parties will be unduly prejudiced. The hearing shall be held within 30 days from the date the order granting the expedited hearing is entered.

The bill also requires that intervenors to the litigation be governed by the decision of the administrative law judge, instead of the decision of the original parties, with respect to whether the case will proceed on an expedited basis.

Within 10 days of the conclusion of the final hearing or the filing of the transcript thereof, whichever is later, the administrative law judge must render a recommended order. The parties may file exceptions to the recommended order within 10 days after its issuance and responses to the exceptions may be filed within 5 days thereafter. The agency must issue the final order within 30 days after the issuance of the administrative law judge’s recommended order.

Expedited Hearing Process for Water Pollution Operation Permit

The bill provides that the expedited hearing process under s. 120.574, F.S., shall apply to challenges of state agency action in the expedited permitting process for projects pertaining to water pollution operations processed under s. 403.088, F.S. It also provides that, notwithstanding the provisions of s. 120.574, F.S., the use of the expedited hearing does *not* require consent of the affected agency or a determination by the administrative law judge as to its propriety. However, the hearing schedule may be extended by written agreement of all parties.

Variances and Waivers

The bill amends s. 120.542, F.S., to provide that only persons who are substantially affected by an agency rule are allowed to seek a variance or waiver to the agency rule. A public employee is not a person who is substantially affected by agency rule for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee.

Challenges to Agency Action Pursuant to s. 120.56(4), F.S.

The bill requires an administrative law judge to award the petitioner reasonable attorney's fees and costs under s. 120.595(4), F.S., if an agency publishes a proposed rule as described in s. 120.56(4)(e), F.S., more than 15 days after the date on which the petition is filed and a final order has not been entered because the agency has proceeded to rulemaking, or a final order has been entered in favor of the agency because the agency has proceeded to rulemaking and has effectively relied upon s. 120.56(4)(e), F.S. Attorney's fees and costs shall not be awarded if the agency prevails that the agency statement does not violate s. 120.54(1)(a), F.S.

Land and Water Adjudicatory Commission

The bill removes authority from the Governor and Cabinet, sitting as the Land and Water Adjudicatory Commission, to review orders or rules of water management districts resulting from ss. 120.57 or 120.69, F.S., evidentiary hearings.

Permit Processing under Chapter 373, F.S.

The bill substantially revises the provisions pertaining to the processing of permits by water management districts under s. 373.4141, F.S., in the following manner:

- After the application for the permit is deemed complete or the applicant declines to provide additional information, the applicant may publish notice of the application and request the department or water management district to mail a notice to every person who has requested such notice, and may be subject to the final agency action, and all property owners within 500 feet of the proposed project.
- The department or district shall maintain a permanent list of persons requesting notices. The department and respective district shall publish once each year, in a newspaper of general circulation in each county, a notice indicating that persons may be placed on the list for receiving notice of permit applications. The notice mailed to persons on the list must include certain prescribed information.
- Creates a presumption that a petitioner is not a substantially affected party and has waived its right to an administrative hearing if the petitioner has not submitted written comments, recommendations, or objections prior to the decision to finalize agency action.
- The party who objects to the agency action bears the burden of going forward with the evidence and the burden of persuasion.
- The Division of Administrative Hearings shall conduct a final hearing on a permit application challenged pursuant to ss. 120.569 and 120.57, F.S., within 90 days of receipt of the request for a final hearing. However, the hearing schedule may be extended if agreed to in writing by the parties. During the pendency of the administrative proceeding, the department or the water management district, as applicable, may authorize construction activities that are not subject to the allegations contained in the petition or request for hearing initiating the administrative challenge.

Environmental Protection Act

The bill amends s. 403.412(5), F.S., to provide that residents who are not substantially affected by the activity impairing, polluting, or otherwise injuring the air, water, or other natural resource may not institute, initiate, petition, or request a proceeding pursuant to ss. 120.569 or 120.57, F.S. Residents will still be able to intervene in such proceedings and they also may file injunctive actions in circuit court.

Conforming Amendments

The bill amends ss. 373.1501, 403.088, 403.973, and 408.7056, F.S., to conform the use of the term “expedited” with respect to hearings under s. 120.574, F.S.

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:

Opponents of the bill contend that the changes to s. 403.412(5), F.S., will essentially prohibit regular citizens and environmental groups from challenging projects that may be harmful to the environment as, most often, they will not qualify under the bill’s standing requirement of being “substantially affected” by the project. However, proponents of the bill claim that these citizens and environmental groups may still intervene in the proceedings pursuant to s. 403.412(5), F.S., as well as file actions in circuit court to enjoin the projects.

C. Government Sector Impact:

The bill will speed up the administrative hearing process in expedited permitting cases under Chapter 403, F.S., without the consent of the affected agency. This may place an

administrative burden on the agencies in question, who may not be prepared to litigate a case on an expedited basis. However, the impact is indeterminate.

The bill also requires the Division of Administrative Hearings to accelerate certain hearings under s. 120.574, F.S., and Chapter 373, F.S. By requiring a hearing within 30 or 90 days of the request for hearing, the bill may have an effect on the docket schedule at DOAH. However, as of this date, the Division has not indicated whether this requirement will have an adverse effect.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
