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 Committee on Governmental Oversight and Accountability

BILL: SB 742

INTRODUCER: Senators Grall and Hooper

SUBJECT: Administrative Procedures

DATE: March 14, 2023 REVISED: ________ ________ ________ ________

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McVaney	GO	**Pre-meeting**
2.			EN	
3.			FP	

I. Summary:

SB 742 amends the Administrative Procedures Act (APA). The APA contains a uniform set of procedures that agencies must follow when exercising rulemaking authority delegated by the Legislature. This bill amends the APA rulemaking process and provides a new mechanism for an agency to review, revise, and repeal its rules. The bill:

- Requires each agency to review its rules for consistency with the powers and duties granted by the agency's enabling statutes. If, after reviewing a rule, the agency determines that substantive changes to update a rule are not required, the agency must repromulgate the rule.
- Specifies the economic impacts and compliance costs an agency must consider in creating a statement of estimated regulatory costs (SERC). Each agency is required to have a website where each of its SERCs may be viewed in its entirety.
- Authorizes an agency to hold workshops and to survey the public to gather information pertinent to the creation of a SERC.
- Requires an agency, in all notices of rulemaking which include material incorporated by reference, to submit the incorporated material in the prescribed electronic format to the Department of State with the full text available on the Internet for free public access.
- Requires changes to material incorporated by reference to be in a strike-through and underline format.
- Requires annual regulatory plans to identify and describe each rule, by rule number or proposed rule number that the agency expects to develop, adopt, or repeal for the 12-month period beginning October 1 and ending September 30. The bill also requires the annual regulatory plan to contain a declaration that the agency head and the general counsel understand that regulatory accountability is necessary to ensure public confidence in the integrity of state government and are working to lower the total number of rules adopted.
- Specifies that an adverse impact on small business exists if certain specific criteria are met.
- Specifies that a lower cost regulatory alternative may be submitted after a notice of proposed rule *or* a notice of change.

- Defines the term “technical change” and requires technical changes to be documented in the history of the rule.
- Requires a notice of rule development and a notice of proposed rule to include the proposed rule number.
- Requires at least 7 days to pass between the publication of a notice of rule development and a notice of proposed rule.
- Requires the Joint Administrative Procedures Committee to review all existing rules.
- Requires the Department of Environmental Protection and Water Management Districts to review and report on their permitting processes.

The bill may have a negative fiscal impact on state government. However, the impact is indeterminate and not expected to impact agencies until a later date. See Section V. Fiscal Impact Statement.

The bill will take effect July 1, 2023.

II. Present Situation:

The Administrative Procedures Act - Overview

The Administrative Procedure Act, which is commonly referred to as the “APA,” is contained in ch. 120, F.S. The first version of the APA was adopted in 1961 in an attempt to produce a comprehensive and uniform administrative process to govern executive branch agency actions. The “modern version” of the APA was adopted in 1974 and is amended almost every year. In addition to creating a standardized process for agencies to enact rules and issue orders, the APA also provides citizens the opportunity to be involved and challenge agency decisions.[1]

The Florida Constitution vests in the Legislature the sole authority to create laws.[2] However, the Legislature may delegate to agencies in the executive branch the quasi-legislative authority to create rules and not be in violation of the separation of powers doctrine. Almost 100 years ago, in 1930, the Florida Supreme Court noted:

> The Legislature is in session only during limited periods, and statutes cannot always anticipate and provide for complicated and contingent conditions in governmental affairs; therefore functions that are quasi legislative in their nature are with appropriate limitations conferred by statute upon administrative officers to effectuate the statutory purpose.[3]

The Legislature establishes the regulatory program to be implemented and the agencies supply the details. Even though rules are created by executive agencies, it is the legislative branch that maintains ownership over the product that is eventually adopted and promulgated.[4] When the

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[1] Joint Administrative Procedures Committee, *A Pocket Guide to Florida’s Administrative Procedure Act*, 1 (2020), https://www.japc.state.fl.us/Documents/Publications/PocketGuideFloridaAPA.pdf (last visited Mar. 14, 2023).
[2] FLA. CONST. art. III, s. 1.
[3] *Florida Motor Lines, Inc., v. Railroad Commissioners*, 129 So. 876, 881 (Fla. 1930), and note 1, *supra*.
[4] Joint Administrative Procedures Committee, The Florida Legislature, *An Overview of Chapter 120 Rulemaking*, (Jan. 28, 2021) (on file with the Senate Committee on Governmental Oversight).

Legislature enacts statutes granting power to the executive branch, the statutes "must clearly announce adequate standards to guide…in the execution of the powers delegated."[5]

The First District Court of Appeal noted in *Gopman v. Department of Education*[6] that the APA "presumptively governs the exercise of all authority statutorily vested in the executive branch of state government." Accordingly, the APA is the "mechanism used by state agencies to adopt rules."[7]

A discussion of the present situation for each section of the bill is included in the "Effect of Proposed Changes" section of this bill analysis.

III. Effect of Proposed Changes:

Rulemaking Procedures

Present Situation

Delegation of Authority

The Legislature, as the sole branch of government having the inherent power to create laws,[8] may delegate to agencies in the executive branch the quasi-legislative ability, or authority, to create rules.[9] As the Florida Supreme Court has noted:

> Rulemaking is a derivative of lawmaking. An agency is empowered to adopt rules if two requirements are satisfied. First, there must be a statutory grant of rulemaking authority, and second, there must be a specific law to be implemented.[10]

The Administrative Procedure Act (APA)[11] sets forth the uniform set of procedures agencies must follow when exercising delegated rulemaking authority.

Rules

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[12]

Rulemaking Authority

Rulemaking authority is delegated by the Legislature through statute and authorizes agencies to "adopt, develop, establish, or otherwise create"[13] rules. Usually, the Legislature delegates rulemaking authority to a given agency because an agency has "expertise in a particular area for

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[5] *Bush v. Schiavo,* 885 So. 2d 321, 332 (Fla. 2004) quoting *Lewis v. Bank of Pasco County*, 346 So. 2d 53, 55-56 (Fla 1976).
[6] *Gopman v. Dep't of Educ.,* 908 So. 2d 1118, 1120 (Fla. 1st DCA 2005).
[7] *See supra* note 4.
[8] FLA. CONST. art. III, s. 1; *see also* FLA. CONST. art. II, s. 3.
[9] *See Whiley v. Scott*, 79 So. 3d 702, 710 (Fla. 2011),
[10] *Id*.
[11] Chapter 120, F.S.
[12] Section 120.52(16), F.S.
[13] Section 120.52(17), F.S.

which they are charged with oversight."[14] Agencies do not have the discretion in and of themselves to engage in rulemaking.[15] To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.[16] The grant of rulemaking authority itself need not be detailed. However, the specific statute being interpreted or implemented through agency rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[17]

<u>Rulemaking Process – Filing a Notice of Rule Development</u>
An agency begins the formal rulemaking process[18] by filing a notice of rule development of a proposed rule in the Florida Administrative Register (FAR), which must indicate the subject area that will be addressed by the rule development and include a short, plain explanation of the purpose and effect of the proposed rule.[19] The notice may include the preliminary text of the proposed rule, but it is not necessary. Such notice is required for all rulemaking, except for rule repeals.

<u>Rulemaking Process – Filing a Notice of Proposed Rule</u>
Next, an agency must file, upon approval of the agency head, a notice of proposed rule.[20] The notice of proposed rule is published by the Department of State (DOS) in the FAR[21] and must contain the full text of the proposed rule or amendment and a summary thereof.[22]

Before 2012, the FAR was published weekly, which could result in a period of at least 7 days between the publication of a notice of rule development and actual notice of the proposed rule.[23] In 2012, the Legislature changed the FAR from a weekly publication to a publication that is continuously revised and, as a result, eliminated the 7-day period between the two notices.[24]

<u>Agency Hearing</u>
An agency must hold a hearing on the proposed rule if a person requests one within 21 days of publication of the notice of proposed rule in the FAR.[25] If the agency does not substantively change the rule after the hearing (or if no hearing was timely requested), the agency must file a notice with the Joint Administrative Procedures Committee (JAPC) stating that it did not make any changes to the rule. This notice must be filed at least 7 days before the agency can file the rule for adoption with the DOS.[26] However, if a hearing is requested, the agency may, based upon the comments received at the hearing, publish a notice of change.[27] Any notice of

[14] *Whiley v. Scott*, 79 So. 3d 702, 711 (Fla. 2011).
[15] Section 120.54(1)(a), F.S.
[16] Sections 120.52(8) and 120.536(1), F.S.
[17] *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assoc., Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).
[18] Alternatively, a person regulated by an agency or having a substantial interest in an agency rule may petition the agency to adopt, amend, or repeal a rule. Section 120.54(7)(a), F.S.
[19] Section 120.54(2)(a), F.S.
[20] Section 120.54(3), F.S.
[21] Section 120.55(1)(b), F.S.
[22] Section 120.54(3)(a)1., F.S.
[23] Chapter 2012-63, Laws of Fla.
[24] *Id.*
[25] Section 120.54(3)(c), F.S.
[26] Section 120.54(3)(d)1., F.S.
[27] *Id.*

substantive change triggers a 21-day waiting period before the agency may file the rule for adoption with the DOS, thereby allowing further input from the public.[28]

Alternatively, if a person whose substantial interests will be affected by the agency action cannot be provided adequate opportunity to protect his or her interests in the agency hearing described above (or otherwise), and if the agency agrees, then the agency must suspend the rulemaking proceeding and initiate a hearing at DOAH pursuant to ss. 120.569 and 120.57, F.S. The rulemaking proceeding cannot be resumed until this separate hearing is concluded.[29]

Petition Alternative

As an alternative to the agency initiated process delineated above, a person who is regulated by the agency or who has a substantial interest in an agency rule may petition the agency to adopt, amend, or repeal a rule.[30] The petitioner must specify the proposed rule and action requested.[31] The agency can initiate rulemaking or decline to do so; however, if the agency chooses the latter, it must issue a written statement of its reasons for the denial.[32]

Rule Adoption

Once an agency has completed the steps of rulemaking, the agency may file the rule for adoption with the DOS, and the rule becomes effective 20 days later, unless a different date is indicated in the rule.[33] Most adopted rules are published in the Florida Administrative Code (FAC).[34]

Challenging a Rule for Invalid Delegation of Authority

An interested party may challenge the validity of a rule or a proposed rule at the Division of Administrative Hearings (DOAH)[35] as an invalid delegation of legislative authority.[36] An invalid delegation of legislative authority is an action that goes beyond the powers, functions, and duties delegated by the Legislature.[37] A rule or proposed rule is an invalid delegation of legislative authority if any of the following applies:[38]

- The agency has materially failed to follow the rulemaking procedures or requirements in the APA.
- The agency has exceeded its grant of rulemaking authority.
- The rule enlarges, modifies, or contravenes the specific provisions of the law implemented.

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[28] *Id.*

[29] Section 120.54(3)(c)2., F.S.

[30] Section 120.54(7)(a), F.S.

[31] *Id.*

[32] *Id.*

[33] Section 120.54(3)(e)6., F.S.

[34] Rules general in form but applicable to only one school district, community college district, or county, or a part thereof, or a state university rules relating to internal personnel or business and finance are not published in the Florida Administrative Code (FAC). Forms are not published in the FAC. Section 120.55(1)(a), F.S. Emergency rules are also not published in the FAC.

[35] Division of Administrative Hearings (DOAH) is an agency in the executive branch, administratively housed under the Department of Management Services (DMS) but not subject to its control. The DOAH employs administrative law judges who serve as neutral arbiters presiding over disputes arising under the Administrative Procedures Act (APA).
Section 120.65, F.S.

[36] Section 120.56(1), F.S.

[37] Section 120.52(8), F.S.

[38] Section 120.52(8)(a)-(f), F.S.

- The rule is vague, fails to establish adequate standards for agency decisions, or vests the agency with unbridled discretion.
- The rule is arbitrary or capricious.
- The rule imposes regulatory costs on the regulated person, county, or municipality that could have been reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

Hearing Before an Administrative Law Judge
An administrative law judge (ALJ) at the DOAH hears the rule challenge in a de novo proceeding and, within 30 days after the hearing, makes a determination on the rule's validity based upon a preponderance of the evidence standard. The petitioner and the agency whose rule is challenged are adverse parties.[39] The ALJ's decision constitutes final agency action, which means an agency may not alter the decision after its issuance,[40] but an agency may appeal the decision to the District Court of Appeal where the agency maintains its headquarters.[41]

Effect of Proposed Changes (Section 2)

The bill requires a notice of proposed rule to be filed within 12 months after a notice of rule development. If not, the agency must withdraw the rule and give notice of the withdrawal in the next issue of the FAR. The bill also reestablishes the mandatory 7-day period between the publication of a notice of rule development and the publication of a notice of proposed rule in the FAR.

The bill further requires that a proposed rule be withdrawn if, *after issuing a notice of proposed rule*, the agency fails to adopt it within the APA's prescribed timeframes. Although not clearly stated, the bill appears to contemplate that *once an agency has exceeded the timeframe to adopt the rule, the bill requires the JAPC to notify the agency of the failure.* If the agency has not withdrawn the rule within 30 days following the notice, the JAPC must notify the DOS that the date for adoption of the rule has expired. The DOS must then publish a notice of withdrawal of the proposed rule.

The bill requires a notice of rule development and a notice of proposed rule to include the proposed rule number.

The bill also requires an agency to file a copy of a petition to initiate rulemaking with the JAPC.

The bill amends the separate hearing process provided for in s. 120.54(3)(c)2., F.S., for those individuals whose substantial interests will be affected by the rulemaking, but who are not provided adequate protection by the proceeding. Specifically, the agency must publish a notice in the FAR that it is convening a separate proceeding. The bill also clarifies that all timelines in s. 120.54, F.S., regarding rulemaking procedures, are tolled beginning on the date of publication of a separate proceeding in the FAR, and ending the day after the separate proceeding finishes.

[39] Section 120.56(1)(e), F.S.
[40] *Id.*
[41] Section 120.68(2)(a), F.S.

Finally, section 1 of the bill defines the term "technical change" to mean a change limited to correcting grammatical, typographical, and similar errors not affecting the substance of the rule.

Statement of Estimated Regulatory Cost

Present Situation

A statement of estimated regulatory cost (SERC) is an agency estimate of the potential impact of a proposed rule on the public, particularly the potential costs of complying with and implementing the rule.[42] Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.[43] The agency must seek public input in its creation of the SERC. For example, in its notice of proposed rule, an agency must give notice that the public may submit information relating to the agency SERC.[44] A SERC is required if the proposed rule will have an adverse impact on small businesses or increase regulatory costs by more than $200,000 in the aggregate in this state within 1 year after implementation of the rule.[45] If the agency revises a rule before adoption and the revision increases the regulatory costs of the rule, the agency must revise the SERC to reflect that alteration.[46]

A SERC must include:[47]
- A good faith estimate of the number of people and entities affected by the proposed rule;
- A good faith estimate of the cost to the agency and other governmental entities to implement the proposed rule;
- A good faith estimate of transactional costs likely to be incurred by people, entities, and governmental agencies for compliance; and
- An analysis of the proposed rule's impact on small businesses, small counties, and small municipalities.

The SERC must also include an economic analysis on the likelihood that the proposed rule will have an adverse impact in excess of $1 million within the first 5 years after implementation on:[48]
- Economic growth, private-sector job creation or employment, or private-sector investment;
- Business competitiveness, productivity, or innovation; or
- Regulatory costs, including any transactional costs.

If the economic analysis results in an adverse impact or regulatory costs in excess of $1 million within 5 years after implementation of the rule, then the rule must be ratified by the Legislature in order to take effect.[49]

An agency's failure to prepare an SERC can be raised in a proceeding at the DOAH to invalidate a rule as an invalid exercise of delegated legislative authority, if it is raised within 1 year after

[42] Section 120.541(2), F.S.
[43] Section 120.54(3)(b)1., F.S.
[44] Section 120.54(3)(a)1., F.S.
[45] *Id.*
[46] Section 120.541(1)(c), F.S.
[47] Section 120.541(2)(b)-(e), F.S.
[48] Section 120.541(2)(a), F.S.
[49] Section 120.541(3), F.S.

the effective date of the rule and is raised by a person whose substantial interests are affected by the regulatory costs of the rule.[50]

Effect of Proposed Changes (Sections 2 and 3)

The bill mandates a SERC before an agency may adopt or amend a rule, other than an emergency rule. An agency's failure to publish a SERC constitutes a material failure to meet the requirements of the APA. However, an agency is not required to prepare a SERC for a rule repeal process unless the repeal would impose a regulatory cost. The bill creates a presumption in rule repeals challenges before the DOAH or in any court of competent jurisdiction that a rule repeal that exclusively reduces or eliminates regulations on currently regulated individuals or entities is correct.

The bill allows agencies to hold public workshops for the purpose of gathering information pertinent to its preparation of the SERC. An agency may hold such a workshop at its own discretion, but it must hold one if so requested in writing by any affected person. Additionally, agencies can survey individuals, businesses, business organizations, counties, and municipalities to collect helpful data and to analyze the impacts of the proposed rule.

The bill clarifies the elements an agency must consider in a SERC when evaluating the economic impacts of the rule. Specifically, the bill requires agency estimates of economic, market, and small business impacts likely to result from compliance with the proposed rule. The agency must include elements such as:
- Increased or decreased consumer prices or value of goods and services;
- The value of time, training, or testing, or education, expended by business owners and other business personnel to comply with the proposed rule;
- Capital costs incurred to comply with the proposed rule; and
- Any other impacts suggested by the rules ombudsman or an interested person.

In addition, the bill replaces the term "transactional costs" with "compliance costs," and requires agencies to consider all direct and indirect compliance costs, including but not limited to, costs relating to:
- Filing and licensing fees;
- Expense of necessary equipment, and the installation and maintenance thereof;
- Costs related to necessary operations and procedures, including accounting, financial, information management, and other administrative processes;
- Labor, materials, and supply costs;
- Capital expenditures;
- Professional and technical services, including monitoring and reporting;
- Qualifying and recurring education, training and testing;
- Travel;
- Insurance and surety requirements;
- Allocation of administrative and other overhead costs;
- Reduced sales or other revenues; and
- Other items suggested by the rules ombudsman or any interested person, or business.

[50] Section 120.541(1)(f), F.S.

The bill requires each agency to have a website where each of its SERCs may be viewed in their entirety; the DOS must include a link to this website on any related FAR notice. If an agency revises a SERC, it must provide a notice that a revision has been made and include a link to the revised SERC on the FAR website.

The bill requires an agency notice of rule development to include a request for information that would be helpful in the agency's preparation of the SERC, and clear instructions for the submission of such information. If an agency holds a hearing on a proposed rule, the bill requires the agency to ensure that the person responsible for preparing the SERC be made available to respond to questions or comments.

The bill amends the information required in a notice of proposed rule to include (1) a summary of the SERC describing the regulatory impact of the proposed rule in readable language, (2) a web address where the SERC can be viewed in full, and (3) a request for submission of any information that could help the agency regarding the SERC.

The bill makes conforming changes throughout to reflect that a SERC must be performed in all rule amendments or proposed rulemaking, and to accommodate the SERC public workshops that are now permitted.

Small Business Impact in Rulemaking

Present Situation

Each agency, before the adoption, amendment, or repeal of a rule, must consider the impact of the rule on small businesses.[51] If the agency determines that the proposed action will affect small businesses, the agency must send written notice to the rules ombudsman[52] in the Executive Office of the Governor at least 28 days before the intended action.[53] The agency must adopt the regulatory alternatives that the rules ombudsman offers if the alternatives are feasible and consistent with the stated objectives of the proposed rule, and would reduce the impact on small businesses.[54]

If the agency does not adopt the alternatives offered, before rule adoption or amendment, the agency must file a detailed written statement with the JAPC explaining the reasons for failure to adopt such alternatives.[55]

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[51] Section 120.54(3)(b)2., F.S.

[52] The Governor must appoint a rules ombudsman in the Executive Office of the Governor for purposes of considering the impact of agency rules on the state citizens and businesses. The rules ombudsman must carry out the duties related to rule adoption procedures with respect to small businesses; review agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses; and make recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to business. Each agency must cooperate fully with the rules ombudsman in identifying such rules and take the necessary steps to waive, modify, or otherwise minimize the adverse effects of any such rules. Section 288.7015, F.S.

[53] Section 120.54(3)(b)2.b.(I), F.S.

[54] Section 120.54(3)(b)2.b.(II), F.S.

[55] Section 120.54(3)(b)2.b.(III), F.S.

Effect of Proposed Changes (Section 2)

The bill declares that an adverse impact on small business exists if, in order to comply with the rule:

- An owner, officer, operator, or manager of a small business must complete any education, training, or testing to comply with the proposed rule in the first year;
- An owner, officer, operator, or manager of a small business is likely to expend 10 hours or purchase professional advice to understand and comply with the rule in the first year;
- Taxes or fees assessed on transactions are likely to increase by $500 or more in the aggregate in one year because of the rule;
- Prices charged for goods and services are restricted or are likely to increase because of the rule;
- Specially trained, licensed, or tested employees will be required;
- Operating costs are expected to increase by at least $1,000 annually; or
- Capital expenditures in excess of $1,000 are necessary to comply with the rule.

If the rules ombudsman of the Executive Office of the Governor provides a regulatory alternative to the agency to lessen the impact of the rule on small businesses, the bill requires the agency to provide the regulatory alternative to the JAPC at least 21 days before filing the rule for adoption.

Lower Cost Regulatory Alternative

Present Situation

A person substantially affected by a proposed rule may, within 21 days after the publication of a notice of adoption, amendment, or repeal of a rule, submit a lower cost regulatory alternative (LCRA).[56] The LCRA must be a written proposal, made in good faith, which substantially accomplishes the objectives of the law being implemented.[57] A LCRA may recommend that a rule not be adopted at all, if it explains how the "lower costs and objectives of the law will be achieved by not adopting any rule."[58] If a LCRA is submitted to an agency, the agency must prepare an SERC if one has not been previously prepared, or revise its prior SERC, and either adopt the LCRA or provide a statement to explain the reasons for rejecting the LCRA.[59] Additionally, if a LCRA is submitted, the 90-day period for filing a rule is extended an additional 21 days.[60] At least 21 days before filing a rule for adoption, an agency that is required to revise an SERC in response to a LCRA must provide the SERC to the person who submitted the LCRA and to the JAPC and must provide notice on the agency's website that it is available to the public.[61]

Just as in the case of an agency's failure to prepare a SERC, an agency's failure to respond to a LCRA may be raised in a proceeding at the DOAH to invalidate a rule as an invalid delegation of

[56] Section 120.541(1)(a), F.S.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Section 120.541(1)(d), F.S.

legislative authority if it is raised within one year after the effective date of the rule and is raised by a person whose substantial interests are affected by the regulatory costs of the rule.[62]

Effect of Proposed Changes (Section 3)

The bill specifies that a LCRA may be submitted after a notice of proposed rule or a notice of change. If submitted after the latter, the LCRA is deemed to have been made in good faith only if the person reasonably believes, and the proposal states the reasons for believing, that the proposed rule as *changed by the notice of change* increases the regulatory costs or creates an adverse impact on small business.

The bill allows an agency that receives a LCRA to choose whether to (1) modify the proposed rule to reduce regulatory costs, (2) adopt the LCRA, or (3) reject the LCRA. If the agency rejects or modifies the LCRA, it must state its reasons doing so. If the rule is modified in response to an LCRA, the agency must revise its SERC. When a SERC is revised because a change to a proposed rule increases the projected regulatory costs or the agency modified the rule in response to a LCRA, a summary of the revised SERC must be included in subsequent published rulemaking notices. Under the bill, the revised SERC must be provided to the rules ombudsman, the party that submitted the LCRA, and the JAPC, and must be published in the same manner as the original SERC.

Section 2 of the bill requires an agency to provide a copy of a LCRA to the JAPC at least 21 days before filing the rule for adoption.

Additionally, an agency must ensure that a person who is responsible for preparing the proposed rule and the SERC are present to respond to questions or comments regarding the agency's decision to adopt or reject a submitted LCRA.

Joint Administrative Procedures Committee

Present Situation

Background

The JAPC is a standing committee of the Legislature established by joint rule and created to maintain a continuous review of administrative rules, the statutory authority upon which those rules are based, and the administrative rulemaking process.[63] Specifically, the JAPC may examine existing rules and must examine each proposed rule to determine whether:[64]

- The rule is an invalid exercise of delegated legislative authority.
- The statutory authority for the rule has been repealed.
- The rule reiterates or paraphrases statutory material.
- The rule is in proper form.
- The notice given prior to adoption was sufficient.
- The rule is consistent with expressed legislative intent.

[62] Section 120.541(1)(f), F.S.
[63] Fla. Leg. J. Rule 4.6; *see also* s. 120.545, F.S.
[64] Section 120.545(1), F.S.

- The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law that the rule implements.
- 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.
- The rule could be made less complex or more easily comprehensible to the general public.
- The rule's statement of estimated regulatory cost complies with the requirements of the APA and whether the rule does not impose regulatory costs on the regulated person, county, or municipality that could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
- The rule will require additional appropriations.

Effect of Proposed Changes (Section 6)

The bill removes the permissive authority of the JAPC to examine existing rules and makes such examination mandatory to align with the JAPC's mandate to examine proposed rules.

Annual Regulatory Review

Present Situation

Annually, each agency must prepare a regulatory plan that includes a list of each law enacted during the previous 12 months, which creates or modifies the duties or authority of the agency, and state whether the agency must adopt rules to implement the newly adopted laws.[65] The plan must also include a list of each additional law not otherwise listed that the agency expects to implement by rulemaking before the following July 1, except emergency rules.[66] The plan must include a certification by the agency head or, if the agency head is a collegial body, the presiding officer, and the individual acting as principal legal advisor to the agency verifying the persons have reviewed the plan, verifying the agency regularly reviews all of its rules, and identifying the period during which all rules have most recently been reviewed to determine if the rules remain consistent with the agency's rulemaking authority and the laws implemented.[67] By October 1 of each year, the plan must be published on the agency's website or on another state website established for publication of administrative law records with a hyperlink to the plan.[68] The agency must also deliver a copy of the certification to the JAPC and publish a notice in the FAR identifying the date of publication of the agency's regulatory plan.[69]

Effect of Proposed Changes (Section 9)

The bill replaces the s. 120.74, F.S., requirement that the annual regulatory plan include a listing of each law it expects to implement with rulemaking with a requirement that the plan identify and describe each rule, by rule number or proposed rule number, that the agency expects to develop, adopt, or repeal for the 12-month period beginning October 1 and ending September 30. The annual regulatory plan must identify any rules required to be repromulgated for the 12-month period. These publishing requirements do not apply to emergency rules.

[65] Section 120.74(1)(a), F.S.
[66] Section 120.74(1)(b), F.S.
[67] Section 120.74(1)(d), F.S.
[68] Section 120.74(2)(a)1., F.S.
[69] Sections 120.74(2)(a)2. and 120.74(2)(a)3., F.S.

The bill also requires that the annual regulatory plan contain a declaration that the agency head and the general counsel understand that regulatory accountability is necessary to ensure public confidence in the integrity of state government and to that end the agency is diligently working toward lowering the total number of rules adopted. The bill requires the declaration to contain the total number of rules adopted and repealed during the previous 12 months.

Repromulgation

Present Situation

The APA requires each agency to annually review its rules.[70] Although an agency may amend or repeal the rule, rules generally do not expire or sunset and many agencies have adopted rules that have not been updated in years.

Effect of Proposed Changes (Section 4)

The bill creates a process called "repromulgation," whereby each agency is required to review its rules for consistency with the powers and duties granted by the agency's enabling statutes. If, after reviewing the rule, the agency determines that substantive changes are not required, the agency must repromulgate the rule to reflect the date of the review. Section 1 of the bill defines the term "repromulgation" to mean the publication and adoption of an existing rule following an agency's review of the rule for consistency with the powers and duties granted by its enabling statute. Each agency must review its rules according to the following schedule:

- If the rule was adopted *before* January 1, 2010, within five years after July 1, 2023; or
- If the rule was adopted on or *after* January 1, 2010, within 10 years after the rule is adopted.

An agency, before repromulgation of a rule and upon approval of its agency head, must:

- Publish a notice of repromulgation in the FAR, which is not required to include the text of the rule; and
- File the rule with the DOS. The rule may not be filed for repromulgation less than 28 days before or more than 90 days after the publication of the notice.

An agency must file a notice of repromulgation with the JAPC at least 14 days before filing the rule with the DOS. The JAPC must certify at the time of filing whether the agency has responded to all of the JAPC's material or written inquiries. The bill specifies that a repromulgated rule is not subject to the hearing requirements of the APA, nor is it subject to challenge as a proposed rule.

The bill requires each agency, upon approval of the agency head, to submit three certified copies of the repromulgated rule it proposes to adopt with the DOS and one certified copy of any material incorporated by reference in the rule. The repromulgated rule is adopted upon its filing with the DOS and becomes effective 20 days later. The DOS must then update the history note of the rule in the FAC to reflect the new effective date. The bill requires the DOS to adopt rules to implement the bill's repromulgation provision by December 31, 2023.

[70] *See* s. 120.74. F.S.

If an agency fails to meet the deadline to review the rule or the timeframe to file the rule for repromulgation, the rule is subject to petition for request to review the rule by any person who is regulated by the agency, or who otherwise has a substantial interest in the agency rule. The agency has 30 days from such a petition to conduct a repromulgation review or deny the petition on the basis that no duty of repromulgation applies to that rule at that time, with an explanation to the petitioner of the basis for the denial.

If an agency does not repromulgate a rule, it must be submitted to the President of the Senate and the Speaker of the House of Representatives within 7 days of such a decision. The agency decision not to repromulgate may not become effective until the Legislature adjourns its next regular session sine die, following the agency decision.

Incorporation by Reference

Present Situation

The APA allows an agency to incorporate material external to the text of the rule by reference.[71] The material to be incorporated must exist on the date the rule is adopted.[72] If after the rule has been adopted the agency wishes to alter the material incorporated by reference, the rule itself must be amended for the change to be effective.[73] However, an agency rule that incorporates another rule by reference automatically incorporates subsequent amendments to the referenced rule.[74] A rule cannot be amended by reference only.[75] An agency may not incorporate a rule by reference unless:

- The material has been submitted in the prescribed electronic format to the DOS and the full text of the material can be made available for free public access through an electronic hyperlink from the rule making the reference in the FAC; or
- The agency has determined that posting the material publicly on the Internet would constitute a violation of federal copyright law, in which case a statement stating such, along with the address of locations at the DOS and the agency at which the material is available for public inspection and examination, must be included in the notice.[76]

The DOS has adopted a rule governing the requirements for materials incorporated by reference through an adopted rule.[77] The rule requires each agency incorporating material by reference in an administrative rule to certify that the materials incorporated have been filed with the DOS electronically or, if the agency claims the posting of the material would constitute a violation of federal copyright law, the location where the public may view the material.[78]

[71] Section 120.54(1)(i)1., F.S.; *see also* r. 1-1.013, F.A.C.
[72] Section 120.54(1)(i)1., F.S.
[73] *Id.*
[74] Section 120.54(1)(i)2., F.S.
[75] Section 120.54(1)(i)4., F.S.
[76] Section 120.54(1)(i)3., F.S.
[77] Rule 1-1.013, F.A.C.
[78] Rule 1-1.013(5)(d), F.A.C.

Effect of Proposed Changes (Section 2)

Beginning July 1, 2023, the bill requires an agency, in all notices of rulemaking, repromulgated rules, or rule modifications which include material incorporated by reference, to submit the incorporated material in the prescribed electronic format to the DOS with the full text available for free public access through an electronic hyperlink. Alternatively, if an agency determines that posting the incorporated material on the Internet would constitute a violation of federal copyright law, the agency must include in the notice a statement to that effect, along with the addresses of locations at the DOS and the agency at which the material is available for public inspection and examination.

The bill requires the DOS to prescribe by rule that material incorporated by reference included in a notice of proposed rule and a notice of change be formatted in such a way that additions to the text appear underlined and deletions appear as text stricken through.

Emergency Rules

Present Situation

Agencies are authorized to respond to immediate dangers to the public health, safety, or welfare by adopting emergency rules.[79] Emergency rules are not adopted using the same procedures required of other rules.[80] The notice of the emergency rule and the text of the rule is published in the first available issue of the FAR, however, there is no requirement that an emergency rule be published in the FAC.[81] The agency must publish prior to, or contemporaneous with, the rule's promulgation the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare.[82] The agency's findings of immediate danger are judicially reviewable.[83] Emergency rules are effective immediately, or on a date less than 20 days after filing if specified in rule,[84] but are only effective for a period of no longer than 90 days.[85] An emergency rule is not renewable, except when the agency has initiated rulemaking to adopt rules relating to the subject of the emergency rule and a challenge to the proposed rules has been filed and remains pending or the proposed rules are awaiting ratification by the Legislature.[86]

Effect of Proposed Changes (Sections 2 and 3)

The bill requires emergency rules to be published in the FAC. The bill also allows an agency to make technical changes to the emergency rule within the first seven days after adoption and prohibits an agency from superseding an emergency rule currently in effect. The bill clarifies that an emergency rule is not subject to the legislative ratification process.[87]

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[79] Section 120.54(4), F.S.
[80] Section 120.54(4)(a), F.S.
[81] Section 120.54(4)(a)3., F.S.
[82] *Id.*
[83] *Id.*
[84] Section 120.54(4)(d), F.S.
[85] Section 120.54(4)(c), F.S.
[86] *Id.*
[87] In 2011, the Legislature passed two bills, CS/CS/CS/HB 993 (2011) and CS/CS/CS/HB 849 (2011) that contained conflicting provisions concerning the exemption of emergency rules from the legislative ratification process. In one bill, CS/CS/CS/HB 993 (2011), the provision exempting emergency rules in s. 120.541(4), F.S., from the legislative ratification process was expressly included in the bill. In the other, CS/CS/CS/HB 849 (2011), the provision was erroneously deleted,

Florida Administrative Code

Present Situation

The FAC is an electronic compilation of all rules adopted by each agency and maintained by the DOS.[88] The DOS retains the copyright over the FAC.[89]

Each rule in the FAC must cite the grant of rulemaking authority and the specific law implemented.[90] Rules applicable to only one school district, community college district, or county or state university rules relating to internal personnel or business and finance are not required to be included in the FAC.[91] The DOS is required to publish the following information at the beginning of each section of the code concerning an agency:

- The address and telephone number of the executive offices of the agency.
- The manner by which the agency indexes its rules.
- A listing of all rules of that agency excluded from publication in the FAC and a statement as to where those rules may be inspected.[92]

The DOS is required to adopt rules allowing adopted rules and materials incorporated by reference to be filed in electronic form.[93] Further, the DOS is required to prescribe by rule the style and form required for rules, notices, and other materials submitted for filing in the FAC.[94] The rule the DOS has adopted requires rules that are being amended to be coded by underlining new text and by striking through deleted text.[95]

Effect of Proposed Changes (Section 7)

The bill requires the FAC be published once daily, by no later than 8 a.m. If, after publication, a rule is corrected and replaced, the FAC must indicate the rule has been republished and indicate the DOS has corrected it. The bill also requires the history note appended to each rule include the date of any technical changes to the rule and provides such change does not affect the rule's effective date.

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leading to a statutory conflict. In 2013, the Legislature passed CS/CS/SB 1410 (2013), which amended s. 120.541(4), F.S., to correct a cross reference and in the process the bill erroneously continued the omission of the provision exempting emergency rules. This bill corrects those previous errors by reinstating the provision exempting emergency rules from the legislative ratification process.

[88] Section 120.55(1)(a)1., F.S.

[89] *Id.*

[90] *Id.*

[91] Section 120.55(1)(a)2., F.S.

[92] Section 120.55(1)(a)3., F.S.

[93] Section 120.55(1)(a)5., F.S.

[94] Section 120.55(1)(c), F.S.

[95] Rule 1-1.010(5)(a), F.A.C. *referencing* r. 1-1.011(3)(c), F.A.C.

Infrastructure Permitting Process Review

Present Situation

Coastal Construction Permits

Coastal construction is regulated by the Department of Environmental Protection (DEP) in order to protect Florida's beaches and dunes from imprudent construction that may jeopardize the stability of Florida's natural resources.[96] The coastal construction control line (CCCL) defines the portion of the beach-dune system that is subject to severe fluctuations caused by a 100-year storm surge, storm waves, or other forces such as wind, wave, or water level changes.[97] Seaward of the CCCL, new construction and improvements to existing structures require a CCCL permit from DEP.[98] The line defines the landward limit of DEP's authority to regulate construction.[99] DEP's CCCL Program regulates structures and activities which can cause beach erosion, destabilize dunes, damage upland properties, or interfere with public access.[100] CCCLs currently exist for large portions of Florida's coast.[101]

Due to the potential environmental impacts and greater risk of hazards from wind and flood, the standards for construction seaward of the CCCL are often more stringent than those applied in the rest of the coastal building zone.[102] Approval or denial of a permit application is based upon a review of factors such as the location of structures and their potential impacts on the surrounding area.[103] CCCLs are established by DEP on a county basis, but only after such a line has been determined necessary for protecting upland structures and controlling beach erosion, and after a public hearing has been held in the affected county.[104] These hearings are conducted in the manner described in s. 120.54(3)(c), F.S., must be published in the FAR in the same manner as a rule, and are subject to an invalidity challenge as described in s. 120.56(3), F.S. A petitioner may challenge a rule under s. 120.56(3), F.S., on the basis that it is an invalid delegation of legislative authority, and must substantiate this allegation by a preponderance of the evidence.

Environmental Resource Permits

Part IV of ch. 373 F.S., regulates the construction, alteration, operation, maintenance, abandonment, and removal of stormwater management systems, dams, impoundments, reservoirs, works, and appurtenant works. DEP regulates activities in, on, or over surface waters, as well as any activity that alters surface water flows, through environmental resource permits (ERPs). ERPs are required for development or construction activities that usually involve the

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[96] Section 161.053(1)(a), F.S.

[97] Section 161.053, F.S.; r. 62B-33.005(1), F.A.C; DEP, *The Homeowner's Guide to the Coastal Construction Control Line Program* p. 3 (2017), https://floridadep.gov/sites/default/files/Homeowner%27s%20Guide%20to%20the%20CCCL%20Program%206_2012%20%28002%29_0.pdf (last visited Mar. 14, 2023).

[98] DEP, *The Homeowner's Guide to the Coastal Construction Control Line Program*, 2 (2017).

[99] *Id.*

[100] DEP, *Coastal Construction Control Line Program*, https://floridadep.gov/water/coastal-construction-control-line (last visited Mar. 9, 2019).

[101] DEP Geospatial Open Data, *Coastal Construction Control Lines (CCCL)*, http://geodata.dep.state.fl.us/datasets/4674ee6d93894168933e99aa2f14b923_2?geometry=-102.41%2C25.011%2C-60.596%2C31.77 (last visited Mar. 9, 2019).

[102] Fla. Admin. Code Ch. 62B-33.

[103] Fla. Admin. Code Ch. 62B-33.005.

[104] Section 161.053(2), F.S.

dredging or filling of surface waters, construction of flood protection facilities, building dams or reservoirs, or any other activities that affect state waters.[105] A water management district (WMD) or the DEP may require an ERP and impose conditions necessary to assure that the construction or alteration of any water management system[106] complies with state law and rules, and will not be harmful to water resources.[107] Pursuant to statutory authority,[108] the DEP adopted a comprehensive chapter of rules that govern the permitting process.[109]

Generally, to receive a permit for a proposed use of water resources, an applicant must demonstrate that the proposed activity is a reasonable-beneficial use, will not interfere with any existing legal use of water, and is consistent with the public interest.[110]

State Administered Federal Section 404 Dredge and Fill Permits

In 2018, Florida assumed responsibility under section 404 of the federal Clean Water Act[111] for dredge and fill permitting.[112] DEP adopted rules to implement the section 404 program.[113] The State 404 Program is responsible for overseeing the permitting for any project that proposes dredge or fill activities within state assumed waters.[114]

Permitting Process

Upon receiving a permit application for use of water resources, DEP or the WMD evaluates the material to determine if the application is complete.[115] If it is incomplete, DEP or the WMD must request additional information within 30 days after its receipt of the application.[116] DEP's rules allow an applicant up to 90 days to respond to such a request.[117] Within 30 days after its receipt of additional information, the DEP or the WMD must review the submissions.[118] If the application is complete, the DEP or WMD must decide whether to issue or deny the ERP within 60 days.[119] Any application that the DEP or WMD does not approve or deny within 60 days of completion of the application is deemed approved by default.[120]

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[105] *See*, s. 373.413(1), F.S.

[106] Section 373.403(10), F.S.

[107] Section 373.413(1), F.S.

[108] Section 373.4131, F.S.

[109] Ch. 62-330, F.A.C.

[110] Section 373.223(1), F.S.

[111] 33 U.S.C. s. 1251 et seq.

[112] Section 373.4146, F.S.

[113] *See* ch. 62-330, F.A.C.

[114] Florida DEP, *State 404 Program*, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program (last visited Mar. 14, 2023).

[115] DEP, *Environmental Resource Permit Applicant's Handbook, Vol. 1*, AH 5.5.3, incorporated by reference in r. 62-330.010(4), F.A.C. (Oct. 1, 2013), *available at* https://www.flrules.org/Gateway/reference.asp?No=Ref-03174 (last visited Mar. 14, 2023).

[116] Section 373.4141(1), F.S.

[117] *Supra*, note 115 at AH 5.5.3.5.

[118] Section 373.4141(1), F.S.

[119] Section 373.4141(2), F.S. Most state licensure decisions must be made within 90 days. Section 120.60(1), F.S.

[120] Section 120.60(1), F.S.

Effect of Proposed Changes (Section 5)

The bill directs the DEP and WMDs to conduct a holistic review of their current coastal permitting programs and other permit programs in order to increase efficiency within each process. These reviews must consider:

- Requirements to obtain a permit;
- Time periods for permit review and approval process;
- Areas for improved efficiency and consolidation of decisions;
- Whether there are areas of duplication across one or more permit programs;
- The methods required to request a permit; and
- Any other factors that can increase permitting efficiency, especially to allow for improved storm recovery.

The DEP and WMDs must submit a report with their findings to the Governor, President of the Senate, and Speaker of the House of Representatives by December 31, 2023.

Remaining Sections

Sections 6, 8, 10, 11, 12, 13, and 14 are amended to incorporate non-substantive, conforming changes and to incorporate cross-references in the bill.

The bill takes effect July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may have an indeterminate, negative fiscal impact on state government. The bill requires each agency to review and repromulgate its rules, includes additional requirements to comply with notice, publication, and hearing requirements of rules, and includes additional requirements for SERCs. Agencies will likely be required to spend funds to implement the requirements of the bill. Whether these new requirements could be absorbed within each agency's existing resources is not known.

However, the bill specifies that agencies have to complete rule review within 5 years for rules adopted before January 1, 2010, and within 10 years for rules adopted after January 1, 2010. Agencies should have sufficient time to request additional funding or personnel through the Legislative Budget Request process should it be determined additional funding or personnel will be required to implement the provisions of the bill.

The Department of State may have additional costs associated with publishing the specified material in the bill.

VI. Technical Deficiencies:

The bill's change to s. 120.54(2)(a)2., F.S., requires an agency to file a notice of proposed rule in the FAR within 12 months after the most recent notice of rule development; if it fails to, the bill requires the agency to withdraw the rule. There may not be a rule to withdraw at this point. From context, it appears that the agency should instead be directed to withdraw its notice of rule development (however, the JAPC states that, "as a general rule, notices of rule development are not withdrawn, nor do they always contain the language of the proposed rule…").[121]

VII. Related Issues:

The bill's amendment to s. 120.54(3)(d)3., F.S., requires the JAPC to notify the DOS of the expiration of an agency's timeframe in which it may act to adopt a rule *if* the agency fails to withdraw its notice of a proposed rule within 30 days of a notice from the JAPC about the expiration. However, the bill does not direct the JAPC to send any notice to delinquent agencies.

The bill requires emergency rules to be published in the Florida Administrative Code. They may be better situated in the Florida Administrative Register.

[121] JAPC, *SB 742 JAPC Reviews/Comments/Recommendations* (on file with the Governmental Oversight and Accountability Committee).

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 120.52, 120.54, 120.541, 120.545, 120.55, 120.56, 120.74, 120.80, 120.81, 420.9072, 420.9075, and 443.091.

This bill creates the following sections of the Florida Statutes: 120.5435, and 120.5436.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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