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 Environment and Natural Resources

BILL:	SB 742
INTRODUCER:	Senators Grall and Hooper
SUBJECT:	Administrative Procedures
DATE:	March 24, 2023
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McVaney	GO	**Favorable**
2.	Barriero	Rogers	EN	**Pre-meeting**
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 no substantive changes are required, the agency must repromulgate the rule;
- Requires agencies to prepare a statement of estimated regulatory costs (SERC) before adopting or amending a rule, other than an emergency rule, and specifies the economic impacts and compliance costs an agency must consider in creating a SERC. Each agency is required to have a website where each of its SERCs may be viewed in their 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 annual regulatory plans to identify each rule the agency expects to develop, adopt, or repeal for the 12-month period beginning October 1 and ending September 30;
- 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;
- Requires at least seven days to pass between the publication of a notice of rule development and a notice of proposed rule; and
- Requires the Department of Environmental Protection and Water Management Districts to review and report on their permitting processes.

II. Present Situation:

The Administrative Procedure Act

The Administrative Procedure Act (APA) is contained in Chapter 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.[1] 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.[2]

Delegation of Authority

The Legislature, as the sole branch of government having the inherent power to create laws,[3] may delegate to agencies in the executive branch the quasi-legislative ability, or authority, to create rules.[4] 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.[5] An agency is empowered to adopt rules if two requirements are satisfied. First, there must be a statutory grant of rulemaking authority,[6] and second, there must be a specific law to be implemented.[7] The APA[8] sets forth the uniform set of procedures agencies must follow when exercising delegated rulemaking authority.

Rulemaking Process – Filing a Notice of Rule Development

An agency begins the formal rulemaking process[9] 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.[10] The notice may include the preliminary text of the proposed rule, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft.[11] Such notice is required for all rulemaking, except for rule repeals.[12]

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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. 20, 2023).
[2] *Id.*
[3] FLA. CONST. art. III, s. 1; see also FLA. CONST. art. II, s. 3.
[4] *See Whiley v. Scott*, 79 So. 3d 702, 710 (Fla. 2011).
[5] Section 120.52(16), F.S.
[6] "Rulemaking authority" means statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term "rule." Section 120.52(17), F.S.
[7] *Id.*
[8] Chapter 120, F.S.
[9] 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.
[10] Section 120.54(2)(a), F.S.
[11] *Id.*
[12] *Id.*

An agency may hold public workshops for purposes of rule development; however, an agency is required to hold such workshops if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary.[13]

Rulemaking Process – Filing a Notice of Proposed Rule

Next, an agency must file, upon approval of the agency head, a notice of proposed rule.[14] The notice of proposed rule is published by the Department of State (DOS) in the FAR[15] and must contain the full text of the proposed rule or amendment and a summary thereof.[16] Before 2012, the FAR was published weekly, which could result in a period of at least seven days between the publication of a notice of rule development and actual notice of the proposed rule.[17] In 2012, the Legislature changed the FAR from a weekly publication to a publication that is continuously revised and, as a result, eliminated the seven-day period between the two notices.[18]

The adopting agency must file with the Joint Administrative Procedures Committee (JAPC), at least 21 days prior to the proposed adoption date, a copy of each rule it proposes to adopt; a copy of any material incorporated by reference in the rule; a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of any SERC that has been prepared; a statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and the notice of proposed rule.[19]

Agency Hearing

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.[20] 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 JAPC stating that it did not make any changes to the rule.[21] This notice must be filed at least seven days before the agency can file the rule for adoption with the DOS.[22] However, if a hearing is requested, the agency may, based upon the comments received at the hearing, publish a notice of change.[23] Any notice of 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.[24]

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

[13] Section 120.54(2)(c), F.S.
[14] Section 120.54(3), F.S.
[15] Section 120.55(1)(b), F.S.
[16] Section 120.54(3)(a)1., F.S.
[17] Chapter 2012-63, Laws of Fla.
[18] *Id.*
[19] Section 120.54(3)(a)4., F.S.
[20] Section 120.54(3)(c), F.S.
[21] Section 120.54(3)(d)1., F.S.
[22] *Id.*
[23] *Id.*
[24] *Id.*

proceeding and initiate a hearing at the Division of Administrative Hearings (DOAH)[25] pursuant to ss. 120.569 and 120.57, F.S. The rulemaking proceeding cannot be resumed until this separate hearing is concluded.[26]

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.[27] The petitioner must specify the proposed rule and action requested.[28] 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.[29]

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.[30] Most adopted rules are published in the Florida Administrative Code (FAC).[31]

Challenging a Rule for Invalid Delegation of Authority

An interested party may challenge the validity of a rule or a proposed rule at DOAH as an invalid delegation of legislative authority.[32] An invalid delegation of legislative authority is an action that goes beyond the powers, functions, and duties delegated by the Legislature.[33] A rule or proposed rule is an invalid delegation of legislative authority if any of the following applies:[34]

- The agency has materially failed to follow the rulemaking procedures or requirements in the APA;
- The agency has exceed its grant of rulemaking authority;
- The rule enlarges, modifies, or contravenes the specific provisions of the law implemented;
- 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; or
- The rule imposes regulatory costs on the regulated person, county, municipality that could have been reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

[25] DOAH is an agency in the executive branch, administratively housed under the Department of Management Services but not subject to its control. The DOAH employs administrative law judges who serve as neutral arbiters presiding over disputes arising under the APA. Section 120.65, F.S.
[26] Section 120.54(3)(c)2., F.S.
[27] Section 120.54(7)(a), F.S.
[28] *Id.*
[29] *Id.*
[30] Section 120.54(3)(e)6., F.S.
[31] 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 FAC. Forms are not published in the FAC. Section 120.55(1)(a), F.S. Emergency rules are also not published in the FAC.
[32] Section 120.56(1), F.S.
[33] Section 120.52(8), F.S.
[34] Section 120.52(8)(a)-(f), F.S.

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.[35] The petitioner and the agency whose rule is challenged are adverse parties.[36] The ALJ's decision constitutes final agency action, which means an agency may not alter the decision after its issuance,[37] but an agency may appeal the decision to the District Court of Appeal where the agency maintains its headquarters.[38]

Statement of Estimated Regulatory Cost

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.[39] Agencies are encouraged to prepare a SERC before adopting, amending, or repealing any rule.[40] 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.[41] 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.[42] 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.[43]

A SERC must include:[44]

- 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 five years after implementation on:[45]

- Economic growth, private-sector job creation or employment, or private-sector investment;
- Business competitiveness, productivity, or innovation; or
- Regulatory costs, including any transactional costs.

[35] Section 120.56(1), F.S.
[36] Section 120.56(1)(e), F.S.
[37] *Id.*
[38] Section 120.68(2)(a), F.S.
[39] Section 120.541(2), F.S.
[40] Section 120.54(3)(b)1., F.S.
[41] Section 120.54(3)(a)1., F.S.
[42] Sections 120.54(3)(b) and 120.541(1)(b), F.S.
[43] Section 120.541(1)(c), F.S.
[44] Section 120.541(2)(b)-(e), F.S.
[45] Section 120.541(2)(a), F.S.

If the economic analysis results in an adverse impact or regulatory costs in excess of $1 million within five years after implementation of the rule, then the rule must be ratified by the Legislature in order to take effect.[46]

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 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.[47]

Small Business Impact in Rulemaking

Each agency, before the adoption, amendment, or repeal of a rule, must consider the impact of the rule on small businesses.[48] If the agency determines that the proposed action will affect small businesses, the agency must send written notice to the rules ombudsman[49] in the Executive Office of the Governor at least 28 days before the intended action.[50] 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.[51]

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.[52]

Lower Cost Regulatory Alternative

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).[53] The LCRA must be a written proposal, made in good faith, which substantially accomplishes the objectives of the law being implemented.[54] 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.[55] If a LCRA is submitted to an agency, the agency must

[46] Section 120.541(3), F.S.
[47] Section 120.541(1)(f), F.S.
[48] Section 120.54(3)(b)2., F.S.
[49] 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.
[50] Section 120.54(3)(b)2.b.(I), F.S.
[51] Section 120.54(3)(b)2.b.(II), F.S.
[52] Section 120.54(3)(b)2.b.(III), F.S.
[53] Section 120.541(1)(a), F.S.
[54] *Id.*
[55] *Id.*

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.[56]

Additionally, if a LCRA is submitted, the 90-day period for filing a rule is extended an additional 21 days.[57] 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.[58]

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 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.[59]

Joint Administrative Procedures Committee

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.[60] Specifically, the JAPC may examine existing rules and must examine each proposed rule to determine whether:[61]

- 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.
- 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.

[56] *Id.*
[57] *Id.*
[58] Section 120.541(1)(d), F.S.
[59] Section 120.541(1)(f), F.S.
[60] Fla. Leg. J. Rule 4.6; see also s. 120.545, F.S.
[61] Section 120.545(1), F.S.

Annual Regulatory Review

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.[62] 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.[63] 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.[64] 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.[65] 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.[66]

Repromulgation

The APA requires each agency to annually review its rules.[67] 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.

Incorporation by Reference

The APA allows an agency to incorporate material external to the text of the rule by reference.[68] The material to be incorporated must exist on the date the rule is adopted.[69] 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.[70] However, an agency rule that incorporates another rule by reference automatically incorporates subsequent amendments to the referenced rule.[71] A rule cannot be amended by reference only.[72] 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

[62] Section 120.74(1)(a), F.S.
[63] Section 120.74(1)(b), F.S.
[64] Section 120.74(1)(d), F.S.
[65] Section 120.74(2)(a)1., F.S.
[66] Sections 120.74(2)(a)2. and 120.74(2)(a)3., F.S.
[67] *See* section 120.74. F.S.
[68] Section 120.54(1)(i)1., F.S.; *see also* Fla. Admin. Code R. 1-1.013.
[69] Section 120.54(1)(i)1., F.S.
[70] *Id.*
[71] Section 120.54(1)(i)2., F.S.
[72] Section 120.54(1)(i)4., F.S.

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.[73]

The DOS has adopted a rule governing the requirements for materials incorporated by reference through an adopted rule.[74] 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.[75]

Emergency Rules

Agencies are authorized to respond to immediate dangers to the public health, safety, or welfare by adopting emergency rules.[76] Emergency rules are not adopted using the same procedures required of other rules.[77] 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.[78] 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.[79] The agency's findings of immediate danger are judicially reviewable.[80]

Emergency rules are effective immediately, or on a date less than 20 days after filing if specified in rule,[81] but are only effective for a period of no longer than 90 days.[82] 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.[83]

Florida Administrative Code

The FAC is an electronic compilation of all rules adopted by each agency and maintained by the DOS.[84] The DOS retains the copyright over the FAC.[85]

Each rule in the FAC must cite the grant of rulemaking authority and the specific law implemented.[86] 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

[73] Section 120.54(1)(i)3., F.S.
[74] Fla. Admin. Code R. 1-1.013.
[75] Fla. Admin. Code R. 1-1.013(5)(d).
[76] Section 120.54(4), F.S.
[77] Section 120.54(4)(a), F.S.
[78] Section 120.54(4)(a)3., F.S.
[79] *Id.*
[80] *Id.*
[81] Section 120.54(4)(d), F.S.
[82] Section 120.54(4)(c), F.S.
[83] *Id.*
[84] Section 120.55(1)(a)1., F.S.
[85] *Id.*
[86] *Id.*

required to be included in the FAC.[87] 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.[88]

The DOS is required to adopt rules allowing adopted rules and materials incorporated by reference to be filed in electronic form.[89] 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.[90] 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.[91]

Infrastructure Permitting Process Review

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.[92] 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.[93] Seaward of the CCCL, new construction and improvements to existing structures require a CCCL permit from DEP.[94] The line defines the landward limit of DEP's authority to regulate construction.[95] DEP's CCCL Program regulates structures and activities which can cause beach erosion, destabilize dunes, damage upland properties, or interfere with public access.[96] CCCLs currently exist for large portions of Florida's coast.[97]

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.[98] 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

[87] Section 120.55(1)(a)2., F.S.
[88] Section 120.55(1)(a)3., F.S.
[89] Section 120.55(1)(a)5., F.S.
[90] Section 120.55(1)(c), F.S.
[91] Fla. Admin. Code R. 1-1.010(5)(a) (referencing Fla. Admin. Code R. 1-1.011(3)(c)).
[92] Section 161.053(1)(a), F.S.
[93] Section 161.053, F.S.; Fla. Admin. Code R. 62B-33.005(1); DEP, *The Homeowner's Guide to the Coastal Construction Control Line Program*, 3 (2017), *available at* https://floridadep.gov/sites/default/files/Homeowner%27s%20Guide%20to%20the%20CCCL%20Program%206_2012%20%28002%29_0.pdf.
[94] DEP, *The Homeowner's Guide to the Coastal Construction Control Line Program* at 2.
[95] *Id.*
[96] DEP, *Coastal Construction Control Line Program*, https://floridadep.gov/water/coastal-construction-control-line (last visited Mar. 20, 2023).
[97] DEP, *Geospatial Open Data, CCCL*, https://geodata.dep.state.fl.us/datasets/4674ee6d93894168933e99aa2f14b923_2/explore (last visited Mar. 20, 2023).
[98] Fla. Admin. Code Ch. 62B-33.

area.[99] 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.[100] 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.

Joint Costal Permitting (JCP)

DEP implements a concurrent processing of applications for coastal construction permits, environmental resource permits and sovereign submerged lands authorizations.[101] A JCP is required for activities that meet all of the following criteria:

- Located on Florida's natural sandy beaches facing the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida or associated inlets.
- Activities that extend seaward of the mean high water line.
- Activities that extend into sovereign submerged lands.
- Activities that are likely to affect the distribution of sand along the beach.

Activities that require a JCP include beach restoration or nourishment; construction of erosion control structures such as groins and breakwaters; public fishing piers; maintenance of inlets and inlet-related structures; and dredging of navigation channels that include disposal of dredged material onto the beach or in the nearshore area.[102]

Environmental Resource Permits

Part IV of Chapter 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 generally required for the construction or alteration of any stormwater management system, dam, impoundment, reservoir, or appurtenant work.[103] 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[104] complies with state law and rules, and will not be harmful to water resources.[105] 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.[106]

[99] Fla. Admin. Code R. 62B-33.005.
[100] Section 161.053(2), F.S.
[101] Section 161.055, F.S.; *see also* DEP, *Beaches, Inlets and Ports*, https://floridadep.gov/rcp/beaches-inlets-ports (last visited Mar. 21, 2023).
[102] *Id*.
[103] Section 373.413(1).
[104] Section 373.403(10), F.S.
[105] Section 373.413(1), F.S.
[106] Section 373.223(1), F.S.

Pursuant to statutory authority,[107] DEP adopted a comprehensive chapter of rules that govern the permitting process.[108]

State Administered Federal Section 404 Dredge and Fill Permits

In 2020,[109] Florida assumed responsibility under section 404 of the federal Clean Water Act[110] for dredge and fill permitting.[111] DEP adopted rules to implement the section 404 program.[112] The State 404 Program is responsible for overseeing the permitting for any project that proposes dredge or fill activities within state assumed waters.[113] There is significant overlap between the federal 404 permitting program and the ERP program.

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.[114] If it is incomplete, DEP or the WMD must request additional information within 30 days after its receipt of the application.[115] DEP's rules allow an applicant up to 90 days to respond to such a request.[116] Within 30 days after its receipt of additional information, the DEP or the WMD must review the submissions.[117] If the application is complete, the DEP or WMD must decide whether to issue or deny the ERP within 60 days.[118] Except for permits delegated through the 404 program,[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]

III. Effect of Proposed Changes:

Section 1 amends s. 120.52, F.S., which defines terms within the Administrative Procedure Act (APA), to include the following definitions:

- "Repromulgation" means 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 statutes.
- "Technical change" means a change limited to correcting grammatical, typographical, and similar errors not affecting the substance of the rule.

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[107] Section 373.4131, F.S.
[108] Fla. Admin. Code Ch. 62-330.
[109] *See generally* DEP, State *404 Program*, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program (last visited Mar. 21, 2023) (citing 85 FR 83553).
[110] 33 U.S.C. s. 1251 et seq.
[111] Section 373.4146, F.S.
[112] *See* Fla. Admin. Code Ch. 62-331.
[113] DEP, *State 404 Program*, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program (last visited Mar. 20, 2023).
[114] DEP, *Environmental Resource Permit Applicant's Handbook, Vol. 1*, AH 5.5.3, incorporated by reference in Fla. Admin. Code R. 62- 330.010(4) (Oct. 1, 2013), *available at* https://www.flrules.org/Gateway/reference.asp?No=Ref-03174.
[115] Section 373.4141(1), F.S.
[116] DEP, *Environmental Resource Permit Applicant's Handbook, Vol. 1* at AH 5.5.3.5.
[117] Section 373.4141(1), F.S.
[118] Section 373.4141(2), F.S. Most state licensure decisions must be made within 90 days. Section 120.60(1), F.S.
[119] Section 373.4146(5)(a), F.S.
[120] Section 120.60(1), F.S.

Section 2 amends s. 120.54, F.S., regarding rulemaking procedures. Currently, for rules adopted after December 31, 2010, material may not be incorporated by reference unless certain conditions are met, including that the material has been submitted in the prescribed electronic format and made available for free public access or, if an agency determines that posting the incorporated material online would violate federal copyright law, the agency must include in the notice a statement to that effect, along with the addresses of locations at the Department of State (DOS) and the agency at which the material is available for public inspection and examination. The bill applies these conditions to rules repromulgated on or after July 1, 2023.

The bill provides that a notice of rule development must cite the grant of rulemaking authority for the proposed rule and the law being implemented and include the proposed rule number. The notice must also include a request for the submission of any information that would be helpful to the agency in preparing the statement of estimated regulatory costs (SERC) and a statement of how a person may submit comments to the proposal and how a person may provide information regarding the potential regulatory costs. If a notice of a proposed rule is not filed within 12 months after the most recent notice of rule development, the agency must withdraw the rule and publish notice of the withdrawal in the next available issue of the Florida Administrative Register (FAR).

The bill amends the information required in a notice of proposed rule to include a concise summary of the SERC describing the regulatory impact of the proposed rule in readable language; an agency website address where the SERC can be viewed in its entirety; and a request for submission of any information that could help the agency regarding the SERC.

The bill provides that a notice of a proposed rule must be published in FAR at least seven days after the publication of the notice of rule development. Currently, a proposed rule must be available for inspection and copying at the time the notice is published. The bill provides that the SERC and all materials proposed to be incorporated by reference must also be made available in the prescribed format.

Currently, the notice must be mailed to all persons named in the proposed rule and to all persons who, at least 14 days prior to such mailing, have made requests of the agency for advance notice of its proceedings. The bill permits electronic delivery of notices to persons who, at least 14 days before publication of the notice, requested advance notice.

The bill requires an agency to prepare a SERC before adopting or amending a rule, other than an emergency rule (agencies are currently only encouraged to do so). However, an agency is not required to prepare a SERC for a rule repeal process unless the repeal would impose a regulatory cost. In any challenge to a rule repeal, a rule repeal that only reduces or eliminates regulations on those individuals or entities presently regulated by the rule must be considered presumptively correct in any proceeding before the division or in any proceeding before a court of competent jurisdiction.

The bill allows agencies to hold public workshops for the purpose of gathering information pertinent to its preparation of the SERC. However, the bill requires such a workshop if requested in writing by any affected person. When a workshop or public hearing is held, the bill requires

the agency to ensure that the person responsible for preparing the proposed rule and the SERC is available to receive public input and respond to questions or comments 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 public workshops regarding the SERC.

Regarding small business impacts, the bill provides that an adverse impact on small business exists if, for any small business:

- An owner, officer, operator, or manager must complete any education, training, or testing to comply, or is likely to spend at least 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;
- 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 because of the rule;
- Operating costs are expected to increase by at least $1,000 annually because of the rule; 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 Joint Administrative Procedures Committee (JAPC) at least 21 days before filing the rule for adoption.

Regarding hearings, the law currently provides that if the agency determines that the rulemaking proceeding is not adequate to protect a person's interests, it must suspend the rulemaking proceeding and convene a separate proceeding. The bill requires the agency to publish notice of convening a separate proceeding in the FAR. The bill also provides that all timelines are tolled during any suspension of the rulemaking proceedings, beginning on the date the notice of convening a separate proceeding is publishes and resuming on the day after conclusion of the separate proceeding. 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 lower cost regulatory alternative.

Regarding the modification or withdrawal of proposed rules, the bill provides that any change, other than a technical change, to a SERC requires a notice of change. In addition, any change to materials incorporated by reference requires the agency to provide a copy of a notice of change upon request. The notice of change must include a summary of any revision of the SERC. Material proposed to be incorporated by reference must be made publicly available in the prescribed format. After the notice of proposed rule is published, the agency must withdraw the proposed rule if the agency has failed to adopt it within the prescribed timeframes in Chapter 120, F.S.. If the agency, 30 days after notice by the JAPC that the agency has failed to adopt the proposed rule within the prescribed timeframes, has not given notice of the withdrawal of the rule, the JAPC must notify the DOS that the date for adoption of the rule has expired, and the DOS must publish a notice of withdrawal of the proposed rule.

In addition, the bill requires emergency rules to be published in the Florida Administrative Code (FAC). The bill 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.

Regarding a petition to initiate rulemaking, the bill provides that the agency must file a copy of the petition with the JAPC.

Section 3 amends s. 120.541, F.S., regarding SERCs. The bill specifies that a lower cost regulatory alternative (LCRA) may be submitted after publication of a notice of proposed rule or a notice of change. The agency must provide a copy of any proposal for a LCRA to JAPC at least 21 days before filing the rule for adoption.

The bill provides that, if submitted after a notice of change, a proposal for a 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 increases the regulatory costs or creates an adverse impact on small business. The bill provides that if an agency that receives a LCRA may reject the alternative proposal or modify the proposed rule to reduce the regulatory costs. If the agency rejects or modifies the proposed rule, it must state its reasons for doing so. If the rule is modified in response to an LCRA, the agency must revise its SERC. A summary of the revised SERC must be included in subsequent published rulemaking notices.

Currently, a revised SERC must be provided to the person who submitted the LCRA and to the JAPC. The bill provides it must also be provided to the rules ombudsman in the Executive Office of the Governor and published in the same manner as the original SERC. The bill provides that failure publish a SERC is a material failure to follow the applicable rulemaking procedures.

Currently, a SERC must include an economic analysis showing whether the rule directly or indirectly is likely to increase any "transactional costs" in excess of $1 million in the aggregate within five years after the implementation of the rule. The bill replaces "transactional costs" with "all costs and impacts estimated in the statement."

Under existing law, a SERC must include a good faith estimate of the "transactional costs"[121] likely to be incurred by individuals and entities required to comply with the rule. The bill replaces "transactional costs" with "compliance costs." In estimating compliance costs, the agency must consider, among other matters, all direct and indirect costs necessary to comply with the proposed rule which are readily ascertainable based upon standard business practices, including, but not limited to, costs related to:

- Filing fees.
- Expenses to obtain a license.
- Necessary equipment.
- Installation, utilities, and maintenance of necessary equipment.

[121] "Transactional costs" are direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, the cost of monitoring and reporting, and any other costs necessary to comply with the rule. Section 120.541(2)(d), F.S.

- Necessary operations and procedures.
- Accounting, financial, information management, and other administrative processes.
- Other processes.
- Labor based on relevant rates of wages, salaries, and benefits.
- Materials and supplies.
- Capital expenditures, including financing costs.
- Professional and technical services, including contracted services necessary to implement and maintain compliance.
- Monitoring and reporting.
- Qualifying and recurring education, training, and testing.
- Travel.
- Insurance and surety requirements.
- A fair and reasonable allocation of administrative costs and other overhead.
- Reduced sales or other revenues.
- Other items suggested by the rules ombudsman in the Executive Office of the Governor or by any interested person, business organization, or business representative.

The bill clarifies that an emergency rule is not subject to the legislative ratification process.[122]

The bill provides that, in evaluating the impacts related to an economic analysis required under s. 120.541(2)(a), F.S., or an analysis of the impact to small businesses, counties, or cities under s. 120.541(2)(e), F.S., an agency must include good faith estimates of market impacts likely to result from compliance with the proposed rule, including:

- Increased customer charges for goods or services.
- Decreased market value of goods or services produced, provided, or sold.
- Increased costs resulting from the purchase of substitute or alternative goods or services.
- The reasonable value of time to be spent by owners, officers, operators, and managers to understand and comply with the proposed rule, including, but not limited to, time to be spent to complete required education, training, or testing.
- Capital costs.
- Any other impacts suggested by the rules ombudsman in the Executive Office of the Governor or by any interested persons.

The bill provides that, in estimating the information related to good faith estimates, the agency may use surveys of individuals, businesses, business organizations, counties, and municipalities to collect data helpful to estimate the costs and impacts.

[122] 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, 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.

The bill requires the Department of State (DOS) to include on the Florida Administrative Register (FAR) website addresses where SERCs can be viewed in their entirety. An agency that prepares a SERC must provide, as part of the notice of proposed rule, the agency website address where the SERC can be read in its entirety to DOS for publication in the FAR. If an agency revises its statement of estimated regulatory costs, the agency must provide notice that a revision has been made. Such notice must include the agency website address where the revision can be viewed in its entirety.

Section 4 creates s. 120.5435, F.S., which provides for a "repromulgation" process. The bill provides that the legislative intent that each agency periodically review its rules for consistency with the powers and duties granted by its enabling statutes.

If, after reviewing a rule, the agency determines that substantive changes to update the rule are not required, the agency must repromulgate the rule to reflect the date of the review. 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.

Failure of an agency to adhere to these deadlines is a basis for any person regulated by the agency or having substantial interest in the agency rule to petition the agency requesting a review of the rule. Upon receipt of the petition, the agency shall have 30 days to either comply with the requirements of this section or, if the agency determines that the duties imposed on the agency are not applicable to the specified rule at that time, deny the petition with a statement explaining the basis for the denial.

The bill requires an agency, before repromulgation of a rule and upon approval by the agency head, to:
- 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 made on behalf of JAPC. 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.

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 seven days after the decision not to repromulgate. The decision not to repromulgate may not become effective until adjournment sine die of the next regular session following the agency decision.

The bill requires the DOS to adopt rules to implement the bill's repromulgation provision by December 31, 2023.

Section 5 creates s. 120.5436, F.S. regarding infrastructure and environmental permitting review. The bill provides that the Legislature intends to:

- Build a more resilient and responsive government infrastructure to allow for quick recovery after natural disasters, including hurricanes and tropical storms.
- Promote efficiency in state government across all branches, agencies, and other governmental entities and to identify any areas of improvement that would allow for the quick and effective delivery of services.
- Seek out ways to improve the state's administrative procedures in relevant fields to build a streamlined permitting process that withstands disruptions caused by natural disasters, including hurricanes and tropical storms.

The bill directs the Department of Environmental Protection (DEP) and water management districts (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 permitting processes must include, but need not be limited to, the coastal construction control line permits, joint coastal permits, environmental resource permits, and, consistent with the terms of the Environmental Protection Agency's approval, state administered section 404 permits. The scope and purpose of the review must be to identify areas of improvement and to increase efficiency within each process. The review must consider the following factors:

- Requirements to obtain a permit;
- Time periods for permit review, including review by commenting agencies, and the approval process;
- Areas for improved efficiency and decision-point consolidation within a single project's process;
- Areas of duplication across one or more permit programs;
- Methods of requesting permits; and
- Any other factors that can increase permitting efficiency, especially to allow for improved storm recovery.

The bill directs DEP and WMDs to submit a report with their findings to the Governor and Legislature by December 31, 2023.

Section 6 amends s. 120.545, F.S., regarding committee review of agency rules. The bill requires JAPC to examine existing rules.

Section 7 amends s. 120.55, F.S., regarding publication of rules. The bill requires the FAC be published once daily by 8 a.m. If a rule, after publication, is corrected and replaced, the FAC must indicate that the FAC has been republished and DOS has corrected the rule.

The bill also requires all materials incorporated by reference in any part of an adopted or repromulgated rule to be filed in the prescribed electronic with the full text available on the Internet for free public access.

In addition, the bill requires the history note appended to each rule include the date of any technical changes to the rule and provide that such change does not affect the rule's effective date.

Section 8 makes conforming changes.

Section 9 amends s. 120.74, F.S., regarding agency annual rulemaking and regulatory plans. The bill replaces the 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.

The bill also requires that the annual regulatory plan contain a declaration that the agency head and the principal legal advisor 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.

Sections 10 through 14 make conforming changes.

Section 15 provides an effective date of July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

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 statements for estimated regulatory costs. 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 five 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 Florida Administrative Register 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 Joint Administrative Procedures Committee states that, as a general rule, notices of rule development are not withdrawn, nor do they always contain the language of the proposed rule).[123]

VII. Related Issues:

The bill's amendment to s. 120.54(3)(d)3., F.S., requires the Joint Administrative Procedures Committee (JAPC) to notify the Department of State 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.

[123] 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.