

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GAP 09-15 Administrative Procedures
SPONSOR(S): Governmental Affairs Policy Committee
TIED BILLS: **IDEN./SIM. BILLS:** SB 2188

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Governmental Affairs Policy Committee	11 Y, 0 N	McDonald	Williamson
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SUMMARY ANALYSIS

PCB GAP 09-15, related to the Administrative Procedure Act (Act), makes the following revisions to chapter 120, F.S., at the request of the Joint Administrative Procedures Committee:

- Clarifies the definition of "agency" by codifying existing case law and simplifies the current definition that has been amended numerous times since the enactment of the Act in 1974; but does not make any substantive change to the entities or units of government currently subject to the Act, does not extend the application of the Act to units of government presently excluded from the definition, nor does it exclude any units of government presently included in the definition.
- Requires an agency to give notice of meetings, hearings, and workshops on the agency's website in addition to publication in the Florida Administrative Weekly, and to publish the agenda and any meeting materials available in electronic form on the agency's website.
- Makes the provisions of the Act relating to small business consistent with the definition of small business in the Florida Small and Minority Business Assistance Act.
- Clarifies that when a public hearing is held on a rule, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the rule and respond to questions.
- Clarifies that material submitted to the agency within 21 days after publication of the notice of proposed rulemaking or on or before the date of the final public hearing on the rule shall be considered by the agency and may serve as the basis for a notice of change.
- Requires specification of the effective date in the notice of rulemaking, which will provide more efficient notice to the public and simplify procedures.
- Deletes an obsolete exception from certain rulemaking requirements for the Department of Environmental Protection.

See "Fiscal Comments" for a discussion of fiscal impact.

The effective date of the bill is July 1, 2009.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Definition of "Agency" in the Administrative Procedure Act

Present Situation

Section 120.52(1), F.S., describes the various government entities that constitute "agencies" for the purposes of chapter 120, F.S., the Administrative Procedure Act (Act). The list includes the Governor in the exercise of executive powers other than those derived from the State Constitution; each state officer and state department; each authority, including a regional water supply authority; each board, including the Board of Governors and a state university board of trustees when acting pursuant to statutory authority derived from the Legislature; each commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature; each regional planning agency; each multicounty special district with a majority of its governing board comprised of nonelected persons; educational units; each entity described in chapters 163, 373, 380, and 582 and s. 186.504, F.S.; and each other unit of government, including counties and municipalities, to the extent they are expressly made subject to the Act by general or special law or existing judicial decisions. The definition also includes a number of specific exceptions from the Act.

Since the Administrative Procedure Act was enacted in 1974, the definition of "agency" has been amended numerous times, and it has become difficult to determine with certainty whether a particular entity is or is not an agency subject to the Act. The Florida courts generally apply a territorial or jurisdictional test in making this determination. If an entity operates in more than one county, it is subject to the Act. If an entity operates entirely within one county and has no authority outside that county, it is not subject to the provisions of the Act unless it has expressly been made subject to the Act by general or special law or existing judicial decisions.¹

Effect of Proposed Changes

PCB GAP 09-15 clarifies the definition of "agency" by codifying existing case law and simplifies the current definition that has been amended numerous times since the enactment of the Administrative

¹ *Orlando-Orange County Expressway Authority v. Hubbard Construction Co.*, 682 So. 2d 566 (Fla. 5th DCA 1996); *Booker Creek Preservation, Inc. v. Pinellas Planning Council*, 433 So. 2d DCA 1306 (Fla. 2d DCA 1986). See also *In re: Lower Florida Keys Hospital District*, 1977 Op. Att'y Gen. Fla. 077-142.

Procedure Act in 1974. The change in the definition is not intended to make any substantive change to the entities or units of government currently subject to the Act. It will not extend the application of the Act to units of government presently excluded from the definition, nor will it exclude any units of government presently included in the definition.

Notice of Meetings

Present Situation

Section 120.525, F.S., requires each agency to give notice of public meetings, hearings, and workshops by publication in the Florida Administrative Weekly not less than 7 days before the event. The statute also requires the agency to ensure that a copy of the agenda be received at least 7 days before the event by any person who requests a copy and pays the reasonable cost of the copy.

Effect of Proposed Changes

PCB GAP 09-15 requires an agency to give notice of meetings, hearings, and workshops on the agency's website in addition to publication in the Florida Administrative Weekly, and to publish the agenda and any meeting materials available in electronic form on the agency's website. This will enhance public access to information and is consistent with other provisions of the Act that require electronic publication of materials.

Rule Adoption Procedures

In provisions of the Act relating to rule adoption procedures, the Joint Administrative Procedures Committee identified for needed revision areas related to the definition of small business, clarification of law to ensure availability of persons with responsibility for rule preparation at a public hearing, clarification of provisions related to material submitted to the agency, citing of the effective date of a rule, and the need for the inclusion of certain agency information on the agency website.

Present Situation

The Act requires agencies to consider the impact of a rule on small businesses as defined by s. 288.703, F.S., of the Florida Small and Minority Business Assistance Act.² Prior to 2000, s. 288.703(1), F.S., defined a "small business" in part as a business that employs 100 or fewer employees. In 2000, however, this portion of the definition was amended to refer to 200 or fewer employees. Currently, the Act still provides that an agency may define "small business" to include businesses employing more than 100 persons.

In the provision of the Act describing rule development procedures, an agency is required to ensure that persons responsible for preparing the proposed rule are available to explain the rule and respond to questions. That provision also requires that such a person not only be at a workshop but also at a public hearing.³ The same language regarding persons responsible for preparing the proposed rule to be at hearings is not mentioned in the specific provisions of the Act for hearings under rule adoption procedures, although the requirement exists in another provision of law.⁴

Any change to a proposed rule, other than a technical change, must be supported by the record of public hearings held on the rule, must be in response to written material received on or before the date of the final public hearing, or must be in response to a proposed objection by the Joint Administrative Procedures Committee.⁵

² Section 120.54(3)(b)2.a., F.S.

³ Section 120.54(2)(c), F.S.

⁴ Section 120.54(3)(c), F.S.

⁵ Section 120.54(3)(d)1., F.S.

The Act provides that, in certain circumstances, the effective date of a rule shall be specified or designated *in the rule*, meaning in the text of the rule itself.⁶ It would be confusing to have the effective dates of various portions of a rule printed in the text, however, and so the Department of State now removes these effective date provisions from the rule text and places them in the history note.

Section 120.54(5)(b)7., F.S., requires the uniform rules of procedure to include provision of a method by which each agency head must provide a description of the agency's organization and general course of its operations. Uniform Rule 28-101.001, F.A.C., states the agency head shall maintain a current statement of agency organization and operation and provide a copy to any person upon request.

Effect of Proposed Changes

PCB GAP 09-15 does the following:

- Makes the definition of small business in the Act consistent with the definition in s. 288.703, F.S.
- Requires that when a public hearing is held on a rule, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the rule and respond to questions. Adding the language to the Act in the section dealing with rulemaking hearings will provide better public notice of this existing requirement.
- Clarifies that material submitted to the agency within 21 days after publication of the notice of proposed rulemaking or on or before the date of the final public hearing on the rule shall be considered by the agency and may serve as the basis for a notice of change.
- Requires that the effective date be specified in the notice of rulemaking, which will provide more efficient notice to the public and simplify procedures.
- Requires the statement of agency organization and operation be published on the agency's website, which will make the agency statement more accessible to the public and is consistent with other provisions of the Act that require electronic publication of information.

Exceptions and Special Requirements

Present Situation

An exception from certain rulemaking requirements for the Department of Environmental Protection in implementing s. 403.08725, F.S., is provided in s. 120.80(16), F.S. Under that provision, the Department of Environmental Protection was responsible for undertaking rulemaking to establish best available control technology, lowest achievable emissions rate, or case-by-case maximum available control technology for citrus juice processing facilities under s. 403.08725, F.S. The exception excluded the Department of Environmental Protection from the requirement to adopt the lowest regulatory cost alternative if the implementation of federal requirements would be impaired. Chapter 2008-150, L.O.F., repealed s. 403.08725, F.S. The Division of Statutory Revision and the Department of Environmental Protection recommended that s. 120.80(16), F.S., be deleted.

Effect of Proposed Change

PCB GAP 09-15 deletes the repealed provision.

B. SECTION DIRECTORY:

Section 1. Amends s. 120.52, F.S., revising the definition of "agency" to codify existing case law and simplify the current definition.

Section 2. Amends s. 120.525, F.S., requiring that an agency give notice of meetings, hearings, and workshops on the agency's website and that the agency also publish on the website the agenda and any available meeting materials that are in an electronic format.

⁶ Section 120.54(3)(e)6. and (6)(b), F.S.

Section 3. Amends s. 120.54, F.S., revising the definition of "small business" to conform to the current definition in s. 288.703, F.S.; clarifying that an agency ensure that certain persons be available at a public hearing on a proposed rule; requiring that certain materials submitted to the agency on or before the date of the final date of the public hearing be considered and made part of the rulemaking proceeding hearing; requiring a change to a proposed rule be in response to written materials submitted to the agency within specified times; requiring the statement of an agency's organization and operations be published on the agency's website; and requiring the effective date of the proposed rule be specified in the agency notice of intent to adopt a rule.

Section 4. Amends s. 120.80, F.S., deleting an exception from certain rulemaking requirements for implementing s. 403.08725, F.S., pertaining to citrus juice processing facilities.

Section 5. Provides an effective date of July 1, 2009.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill requires additional information to be provided on agency websites. It is not known what, if any, additional expense or cost savings an agency might experience for such publications or if an agency can absorb any additional costs.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require a county or municipality to spend funds or take an action requiring expenditures; reduce the authority that counties and municipalities had as of February 1, 1989, to raise revenues in the aggregate; or reduce the percentage of a state tax shared in the aggregate with counties and municipalities as of February 1, 1989.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not grant new rulemaking authority to an agency; however, it does revise requirements related to rulemaking that impact all agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.