

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB RORS 15-04 Ratification of Department of Environmental Protection Rules (relating to liners and leachate collection systems for construction and demolition debris disposal facilities)

**SPONSOR(S):** Rulemaking Oversight & Repeal Subcommittee

**TIED BILLS:**                   **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee	12 Y, 0 N	Stranburg	Rubottom

### SUMMARY ANALYSIS

On January 26, 2015, the Florida Department of Environmental Protection (FDEP) filed for adoption amendments to Rule 62-701.730, F.A.C., "Construction and Demolition Debris Disposal and Recycling." The solid waste rule requires liners and leachate collection systems for new or expanding construction and demolition debris facilities that are not able to demonstrate a liner is not needed.

The Statement of Estimated Regulatory Cost (SERC) estimates Rule 62.701.730 to have an impact in excess of \$1 million over 5 years. A rule meeting that threshold cannot become effective unless ratified by the Legislature.<sup>1</sup>

PCB RORS 15-04 ratifies Rule 62-701.730, authorizing the rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

<sup>1</sup> Section 120.541(3), F.S.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

##### Rulemaking Authority and Legislative Ratification

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.<sup>2</sup> Rulemaking authority is delegated by the Legislature<sup>3</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>4</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>5</sup> To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>6</sup> The grant of rulemaking authority itself need not be detailed.<sup>7</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>8</sup>

An agency begins the formal rulemaking process by filing a notice of the proposed rule.<sup>9</sup> The notice is published by the Department of State in the Florida Administrative Register<sup>10</sup> and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule’s adverse effect on specified aspects of the state’s economy or increase in regulatory costs.<sup>11</sup>

The economic analysis mandated for each SERC must analyze a rule’s potential impact over the 5 year period from when the rule goes into effect. First is the rule’s likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.<sup>12</sup> Next is the likely adverse impact on business competitiveness,<sup>13</sup> productivity, or innovation.<sup>14</sup> Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.<sup>15</sup> If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature.<sup>16</sup>

Present law distinguishes between a rule being “adopted” and becoming enforceable or “effective.”<sup>17</sup> A rule must be filed for adoption before it may go into effect<sup>18</sup> and cannot be filed for adoption until

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<sup>2</sup> Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>3</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>4</sup> Section 120.52(17), F.S.

<sup>5</sup> Section 120.54(1)(a), F.S.

<sup>6</sup> Sections 120.52(8) & 120.536(1), F.S.

<sup>7</sup> *Save the Manatee Club, Inc.*, supra at 599.

<sup>8</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>9</sup> Section 120.54(3)(a)1, F.S.

<sup>10</sup> Section 120.55(1)(b)2, F.S.

<sup>11</sup> Section 120.541(2)(a), F.S.

<sup>12</sup> Section 120.541(2)(a)1., F.S.

<sup>13</sup> This factor includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>14</sup> Section 120.541(2)(a) 2., F.S.

<sup>15</sup> Section 120.541(2)(a) 3., F.S.

<sup>16</sup> Section 120.541(3), F.S.

<sup>17</sup> Section 120.54(3)(e)6, F.S. Before a rule becomes enforceable, thus “effective,” the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

<sup>18</sup> Section 120.54(3)(e)6, F.S.

completion of the rulemaking process.<sup>19</sup> As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

### Solid Waste Management permitting by Florida Department of Environmental Protection

The Florida Department of Environmental Protection (FDEP) began permitting of solid waste disposal facilities in 1989.<sup>20</sup> Prior to 2010, chapter 403, Florida Statutes, did not require the use of liners or leachate collection systems for most facilities. Liners or collection systems were only required if FDPE could demonstrate that it reasonably expects that a lack of liners or collection systems would result in violations of ground water standards and criteria.<sup>21</sup>

In 2010, the Legislature amended s. 403.707(9)(b), F.S., to require liners and leachate collection systems at disposal units that did not have a department permit authorizing construction or operation prior to July 1, 2010.<sup>22</sup> A disposal unit may be excepted from the liner and collection system requirement if the owner or operator demonstrates, based upon types of waste received, the methods for controlling types of waste disposed of, the proximity of the groundwater and surface water, and the results of the hydrogeological and geotechnical investigations, that the facility is not expected to result in violations of the groundwater standards and criteria if built without a liner.<sup>23</sup>

### Adoption of Rules

In February 2014, FDEP initiated rulemaking on construction and demolition debris disposal and recycling. On January 26, 2015, FDEP filed for adoption Rule 62-701.730, F.A.C., titled "Construction and Demolition Debris Disposal and Recycling." The amendments to the rule relate to standards for liners and leachate collection systems for construction and demolition debris disposal facilities. This rule requires legislative ratification based on SERCs<sup>24</sup> estimating an impact in excess of \$1 million over 5 years.

### Impact of Rules

Rule 62-701.730, F.A.C., implemented statutory authority for FDEP to establish standards for permitting facilities that collect solid waste from construction and demolition projects.<sup>25</sup> The statute was amended in 2010<sup>26</sup> to require liners and leachate collection systems at individual disposal units and lateral expansions of existing disposal units that had not received a FDEP permit authorizing construction or operation prior to July 1, 2010.

The rule as amended by FDEP requires liners and leachate collection systems for new or expansion of existing construction and demolition debris disposal facilities that are not able to demonstrate that a liner is not needed. The rule is estimated to have a recurring annual cost of \$828,854 for construction and demolition debris facilities to maintain the qualifications required by the rule. The projected costs of the rule for the first five years of implementation exceed \$4,000,000.

### Effect of Proposed Changes

The bill ratifies Rule 62-701.730, allowing the rule to become effective.

## B. SECTION DIRECTORY:

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<sup>19</sup> Section 120.54(3)(e), F.S.

<sup>20</sup> Section 403.707, F.S. (1989).

<sup>21</sup> Rule 64-701.730(4)(a), F.A.C. (2012).

<sup>22</sup> Ch. 2010-205, LOF

<sup>23</sup> Section 403.707(9)(b), F.S.

<sup>24</sup> Copies of the SERCs prepared on the rule ratified by the bill are in the possession of the staff of the Regulatory Oversight & Repeal Subcommittee and are expected to be provided in published meeting materials when the PCB is noticed for consideration.

<sup>25</sup> Section 403.707(9), F.S.

<sup>26</sup> Ch. 2010-205, LOF.

Section 1: Ratifies Rule 62-701.730, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. The bill expressly limits ratification to the effectiveness of the rule. The bill directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill creates no additional source of state revenues.

#### 2. Expenditures:

The bill itself requires no state expenditures. The SERC estimates the department will expend \$104.24 per inspection for each facility covered by the rule twice a year under the rule. The SERC also estimates the department will spend \$535.20 annually in reviewing applications for new construction and demolition debris disposal facilities.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill appears to have no impact on local government revenues.

#### 2. Expenditures:

The bill does not impose additional expenditures on local governments.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill itself does not directly impact the private sector. Any resulting economic impacts are due to the substantive policy of the rule as addressed in the SERC for the rule. The SERC describes the rule's economic impact to be \$828,854 per new facility incurred by an estimated 2 permittees operating solid waste management facilities in the first five years of implementation. The impact would be expected to also affect the construction and demolition industries that use such facilities by raising the cost and/or limiting access to the facilities.

### D. FISCAL COMMENTS:

The economic impacts projected in the statement of estimated regulatory costs would result from the application and enforcement of the liner and leachate collection system requirements.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties and municipalities.

#### 2. Other:

No other constitutional issues are presented by the bill.

**B. RULE-MAKING AUTHORITY:**

The bill meets the final statutory requirement for DEP to exercise its rulemaking authority implementing liner and leachate collection system standards for construction and demolition debris disposal facilities. No additional rulemaking authority is required.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**