STORAGE NAME: h0107.grr
DATE: January 29, 1999

HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
GOVERNMENTAL RULES AND REGULATIONS
ANALYSIS

BILL #: HB 107

RELATING TO: Administrative Procedure Act

SPONSOR(S): Representative Pruitt and others

COMPANION BILL(S): SB 206 (Identical)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) WATER AND RESOURCE MANAGEMENT YEAS 5 NAYS 3
(2) GOVERNMENTAL OPERATIONS YEAS 6 NAYS 0
(3) GOVERNMENTAL RULES AND REGULATIONS
(4)
(5)

I. SUMMARY:

House Bill 107 addresses cases interpreting several recent amendments to the Administrative Procedure Act. It provides that:

- Agency rulemaking can only implement, interpret, or make more specific the detailed powers and duties granted by the enabling statute.
- An agency may not adopt a rule simply because it is reasonably related to the purpose of the enabling legislation or is within the agency's class of powers and duties and is not arbitrary and capricious.
- An agency has the burden of going forward and the burden to prove by a preponderance of the evidence that a proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.
- An agency in its final order may modify or reject the clearly erroneous conclusions of law over which it has substantive jurisdiction.

The bill also makes a technical correction to the definition of agency, and amends the definition of agency action to provide that agency confirmation or affirmation of the applicability of a statutory exemption shall not be considered agency action for the purposes of challenge under the APA.

The bill has an indeterminate fiscal impact and takes effect upon becoming law.

Amendments adopted by the Committee on Water and Resource Management and the Committee on Governmental Operations are traveling with the bill. Please see Part VI, Amendments or Committee Substitute Amendments, p. 10, for details.

II. SUBSTANTIVE ANALYSIS:

PRESENT SITUATION:

Chapter 120, F.S., The Administrative Procedure Act

Validity of Rulemaking

In 1996, the Legislature significantly revised the Administrative Procedure Act (APA), Chapter 120, Florida Statutes, to clarify definitions and exceptions and to simplify its procedures. Notable among the 1996 amendments to the APA are amendments establishing a standard to determine the validity of a proposed rule. Identical language is found in ss. 120.52(8) and 120.536(1), F.S.:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

Analysis of the standard. The first sentence requires that a rule have as its basis a specific enabling statute, and that a grant of rulemaking authority is not a sufficient basis for the adoption of a rule. The third sentence overrules a judicially created test to determine the validity of a rule. No longer would a rule be valid if it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor would an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. As it was described in the Final Bill Analysis of Senate Bill 2290 and 2288 (1996):

> These two provisions would overrule the decisions that followed the rule established prior to the enactment of the section 120.52(8), Florida Statutes, that "rules and regulations would be upheld so long as they are reasonably related to the purpose of the enabling legislation and are not arbitrary or capricious." *General Telephone Co. of Florida v. Florida Public Service Commission*, 446 So.2d 1063 (Fla. 1984); *Department of Labor and Employment Security, Division of Workers' Compensation v. Bradley*, 636 So.2d 802 (Fla. 1st DCA 1994); *Florida Waterworks Ass'n v. Florida Public Service Com'n*, 473 So.2d 237 (Fla. 1st DCA 1985); *Department of Professional Regulation, Board of Medical Examiners v. Durrani*, 455 So.2d 515 (Fla. 1st DCA 1984) *Agrico Chemical Co. v. State, Department of Environmental Protection*, 365 So.2d 759 (Fla. 1st DCA 1978); *Florida Beverage Corp. v. Wynne*, 306 So.2d 200 (Fla. 1st DCA 1975).

However, it is the standard for rulemaking found in the second sentence and reiterated in the fourth sentence, that have generated discussion since enactment. Several appellate cases have sought to interpret this standard. First, in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co., et al,* 717 So.2d 72, 23 Fla. L. Weekly D1787 (Fla. 1st DCA July 29, 1998), the petitioner land owners challenged proposed rules of the District that would create a regulatory subdistrict in the Spruce Creek and Tomoka River Hydrologic Basins, and would create new standards for managing and storing surface waters in developments within this basin. *Tomoka* at 717 So.2d 75. An Administrative Law Judge (ALJ) in the Division of Administrative Hearings held that although the proposed rules were not arbitrary or capricious, were supported by competent and substantial evidence, and substantially accomplish the statutory objectives, the rules were invalid as a matter of law because the rules lacked the underlying statutory detail required by the new rulemaking standard in ss. 120.52(8) and 120.536(1), F.S. *Id.* at 76. The District appealed on this issue.

The First District Court of Appeal reversed the ALJ's final order, holding that the proposed rules are valid. In doing so, the court applied a "functional test based on the nature of the power or duty at issue and not on the level of detail in the language of the applicable statute." *Tomoka* at 717 So.2d 80.

> The question is whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented.

Id. In applying this test, the court found that delegated legislative authority was to identify geographic areas that require greater environmental protection and to impose more restrictive permitting requirements in those areas. *Id.* at 81. The challenged rules fell within the class of powers delegated by the statute and therefore were a valid exercise of delegated legislative authority. *Id.*

Second, in *Department of Business and Professional Regulation v. Calder Race Course, Inc., et al.*, 23 Fla. L. Weekly D1795 (Fla. 1st DCA July 29, 1998), the respondent Department challenged the ALJ final order invalidating rules that would authorize the Department to conduct warrantless searches of persons and places within a permitted pari-mutual wagering facility. *Id.* at 23 Fla. L. Weekly D1795. The First District Court of Appeal affirmed the ALJ, noting first that where "government is to be given the right to conduct a warrantless search of a closely regulated business, the Fourth Amendment demands that the language of the statute delegating such power do so in clear and unambiguous terms," and second, that ". . . highly regulatory laws are subject to strict construction and may not be extended by interpretation." *Id.* at 23 Fla. L. Weekly D1797. The court, in applying the *Tomoka* reasoning, found that the Department did not have the statutory basis to adopt these rules because the enabling statute did not provide the specific law under which such a rule could be adopted. *Id.*

Third, in *St. Petersburg Kennel Club v. Department of Business and Professional Regulation,* 23 Fla. L. Weekly D2046 (Fla. 2d DCA Sept. 2, 1998), the petitioner kennel club appealed an ALJ final order validating Department rules defining the game of poker, and a Department final order denying application of three card games. *Id.* The court reversed both the ALJ final order that validated rules of the Department defining the game of poker and reversed a final order of the Department denying approval of three

particular card games. *Id.* The court, in applying s. 120.536(1), F.S., noted that the enabling statutes did not provide specifically that the Department is authorized to adopt rules to define the game of poker. *Id.* The Department could not administratively determine what would constitute the game of poker and therefore could not deny approval of card games because the denial was based upon application of an invalid rule. *Id.*

Order of Presentation of Evidence and Burdens of Proof in Rule Challenge Cases

The 1996 amendments to the APA also changed the burden of proof when challenge is made to the validity of a proposed rule. In amending s. 120.56(2), F.S., the Legislature removed the presumption of validity that cloaked a proposed rule; the APA now states that a proposed rule is not to be presumed valid or invalid. Further, when a petitioner challenges a proposed rule as an invalid exercise of delegated legislative authority, it is the agency that must proceed with the burden to prove the validity of the rule. *See* section 120.56(2)(a).

However, in *Tomoka*, the ALJ interpreted this procedure to mean that although the agency has the ultimate burden of establishing the validity of the proposed rule, the petitioner has the burden of going forward with the evidence supporting the objections. *Tomoka* at 717 So.2d 76-7.

In *Board of Clinical Laboratory Personnel v. Florida Ass'n of Blood Banks*, 23 Fla. L. Weekly D1851 (Fla. 1st DCA August 3, 1998), the respondent Board challenged the ALJ's invalidation of proposed rule changes to the licensure requirements of blood bank personnel made in response to changes in the federal licensure requirements. *Id. at* 23 Fla. L. Weekly D1852. The court reversed the ALJ's final order, noting that although s. 120.56(2) did require the agency to prove by a preponderance of the evidence that the proposed rules satisfied s. 120.52(8), that section did not require the agency to prove by a preponderance of the evidence that its proposed changes were not an invalid exercise of delegated legislative authority. *Id.* The court noted that the APA did not require this level of proof when challenging a proposed rule but the court did not state what should be the level of proof. *Id.*

Agency Confirmation of the Applicability of Statutory Exemptions

The statutes provide exemptions to regulatory approaches incorporated within the law. For example, s. 373.406(2), F.S. (1997) provides an exemption to Part IV, Ch. 373 F.S., Management and Storage of Surface Waters, for persons engaged in "agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation." It is argued that such an exemption is self-executing; no agency action need occur for a person to qualify under the exemption. However, persons concerned with violating the statute have made inquiry of the Department of Environmental Protection, asking that it confirm or affirm that the activity in question does qualify for the exemption. However, case law suggests that an agency confirmation or affirmation of the applicability of a statutory exemption may be considered final agency action for purposes of challenge under the APA. *See Friends of the Hatchineha, Inc. v. Dept. of Environmental Regulation*, 580 So.2d 267 (Fla. 1st DCA 1991).

Chapter 298, Florida Statutes

This chapter regulates the affairs of water control districts. These districts are limited-purpose local governmental units administratively separate from state and other local governments. These units are created to provide financing or maintain infrastructure when general-purpose local governments (cities and counties) are unwilling or unable to provide the needed capital or services. The chapter was significantly revised in 1997 to, among other things, create a circuit court process for adjudicating disputes resulting from ad valorem assessments. Additionally, the revisions repealed the water control districts' authority to adopt rules, substituting that with the authority to adopt policies and resolutions.

A. EFFECT OF PROPOSED CHANGES:

HB 107 addresses several cases interpreting 1996 amendments to the APA, deletes water control districts from the definition of an agency subject to the APA, and amends the definition of agency action.

It clarifies the rulemaking standard found in ss. 120.52(8) and 120.536(1), F.S., and rejects a judicial interpretation of this standard which created a functional test to determine whether a challenged agency rule is directly within the class of powers and duties identified in the statute to be implemented. *St. Johns River Water Management District v. Consolidated-Tomoka Land Co., et al,* 717 So.2d 72, 23 Fla. L. Weekly D1787 (Fla. 1st DCA July 29, 1998).

See below section III.E., Section-by-Section Analysis, for discussion of the effect of the proposed changes.

B. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Although HB 107 does not create any new authority for agencies to adopt rules, provisions found in the bill will clarify the authority of agencies to adopt rules pursuant to the more restrictive standard for rulemaking enacted in the 1996 amendments to the APA.

Placing on the agency the burden of going forward and the burden of proof by a preponderance of the evidence will not affect the authority of an agency to make rules, but will affect its ability to validate the rule in a rule challenge proceeding. Also, restricting an agency's ability to reject or modify an ALJ's recommended final order to "clearly erroneous" conclusions of law will reduce the ability of an agency to adjudicate disputes.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

C. STATUTE(S) AFFECTED:

ss. 120.52(1)(b), (2) and (8), 120.536(1), 120.56(2)(a), and 120.57(1)(1), F.S.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Removes citation to Ch. 298, F.S., from the definition of agency found at s. 120.52(1)(b), F.S. Inserts language that removes agency confirmation or affirmation of a statutory exemption from the definition of agency action found at s. 120.52(2), F.S. Amends the flush left paragraph of s. 120.52(8), F.S., relating to the standard to determine the validity of a challenged proposed rule, to clarify the meaning of the 1996 amendment to this subsection. Strikes the adjective "particular" and replaces it with "detailed."

Section 2: Amends s. 120.536(1), F.S., to clarify the meaning of the 1996 amendments to this subsection (identical to changes found in section 1, above, to s. 120.52(8)). Strikes the adjective "particular" and replaces it with "detailed."

Section 3: Amends s. 120.56(2)(a), F.S., relating to special provisions for challenging proposed rules. Provides that the agency has the burden of going forward and the burden of proof in demonstrating that a proposed rule is not an invalid exercise of delegated legislative authority. Also provides that the agency must prove that the proposed rule is not an invalid exercise of delegated legislative authority by a preponderance of the evidence.

Section 4: Amends s. 120.57(1)(1), F.S., relating to additional procedures applicable to hearings involving disputed issues of material fact. Makes clear that an agency may, in a final order, reject or modify clearly erroneous conclusions of law only when it has substantive jurisdiction over the law.

Section 5: Provides that the act takes effect upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

HB 107 does not require the counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

HB 107 does not reduce the authority that municipalities or counties have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

HB 107 does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Comments of the Committee on Governmental Operations:

Primarily, the bill would clarify the meaning of the 1996 APA law, about which some recent court opinions expressed uncertainty, rather than change the meaning of the rulemaking standards. The 1996 changes contemplated a comprehensive dialog between agencies and the legislature regarding the sufficiency of the delegated power in an enabling statute for then-existing rules, see s. 120.536(2), F.S. That process has proved very workable in determining an appropriate level of specificity in an enabling statute regarding the particular powers and duties of an agency. As a result of the 1996 changes, both the legislature and agencies are on notice to avoid enabling statutes without sufficient detail, even while recognizing that the level of specificity will vary according to the particular powers and duties authorized. In practice, the dialog between the legislature and agencies will assist in the oversight function of the legislature as intended by the legislature when it enacted the 1996 amendments.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 7, 1999, the Committee on Water and Resource Management adopted by a vote of 7-3 one amendment to HB 107. The amendment specifies that judges hearing appeals of agency rules shall not defer, or otherwise give any special weight, to an agency's interpretation of a law or a rule. The amendment was not incorporated into the bill, but will travel separately. The Committee on Governmental Operations adopted without objection a substitute amendment to this traveling amendment (amendment 10) which merely moved the language to another subsection of s. 120.68, F.S.

On January 21, 1999, the Committee on Governmental Operations adopted without objection all eleven amendments offered. In numerical order:

Amendment 1. The amendment removes from the definition of agency action certain language which excludes agency confirmation of a statutory exemption; amends s. 120.52, F.S. (1998 Supp.). Its effect is to maintain current law.

Amendment 2. This amendment clarifies the 1996 standards when agencies adopt rules pursuant to statutory authority, and does not change the standard; amends s. 120.52, F.S. (1998 Supp.). The words "particular" and "detailed" are replaced by "specific", which may better reflect the intent of the 1996 APA law.

Amendment 3. This amendment is technical in that it provides for a parallel structure in the paragraph.

Amendment 4. This amendment is identical to amendment 2, above; it addresses the same language found in s. 120.536(1), F.S.

Amendment 5. This amendment is identical to amendment 3, above, but amends s. 120.536(1)F.S.

Amendment 6. This amendment establishes that the petitioner has the burden of going forward with particular objections when challenging the validity of a proposed rule under s. 120.56, F.S., rather than requiring the agency to go forward and disprove everything in the petition. This amendment also makes clear

that the burden of proof will be by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority.

Amendment 7. This amendment provides for a two-year rule authorization process, similar to the three-year process provided by the 1996 APA law. The process protects certain rules from challenge until the agency determines if it has sufficient statutory authority to adopt the rule, and if not, to ask the Legislature to enact authorizing legislation; amends s. 120.56, F.S.

Amendment 8. This amendment merely moves language from one part of a sentence in s. 120.52, F.S. (1998 Supp.) to another in the same sentence in order to not disrupt the flow of an existing legal test of validity.

Amendment 9. This amendment repeats the same language change from amendment 8 above in an identical paragraph in another subsection of s. 120.536, F.S.

Amendment 10. Technical amendment; moves the language of the amendment adopted by the Committee on Water and Resource Management from 120.68(7)(e) to 120.68(7)(d).

Amendment 11. This amendment prohibits the retroactive application of rules; amends s. 120.54, F.S. (1998 Supp.).

VII. SIGNATURES:

COMMITTEE ON WATER AND RESOURCE MANAGEMENT:

Prepared by:	Staff Director:
Joyce Pugh	Joyce Pugh

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:	Staff Director:
Douglas Pile	Jimmy O. Helms

AS FURTHER REVISED BY THE COMMITTEE ON GOVERNMENTAL RULES AND REGULATIONS:

Prepared by:	Staff Director:
David M. Greenbaum	David M. Greenbaum