AS PASSED BY THE LEGISLATURE

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HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL OPERATIONS
FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: HB 1879 (PCB GO 91-01)

RELATING TO: The Administrative Procedure Act

SPONSOR(S): Committee on Governmental Operations, Representative Figg & others

STATUTE(S) AFFECTED: 119.041; 120.53; 120.535; 120.57; 120.59; and 120.68

COMPANION BILL(S): SB 1836; SB 900; SB 2504

COMMITTEES OF REFERENCE:

(1) GOVERNMENTAL OPERATIONS YEA 15 NAY 2
(2) APPROPRIATIONS YEA 34 NAY 2
(3)
(4)
(5)

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I. SUMMARY:

This bill addresses issues related to the implementation of delegated legislative authority by administrative agencies under Florida's Administrative Procedure Act (APA). At present, agencies exercise broad discretion when determining whether delegated authority will be implemented by rulemaking or by statements of agency policy not adopted by the rulemaking procedure. The courts interpret the APA to provide agencies with this discretion. This bill limits agency discretion when selecting the means for implementation of delegated authority by providing a statutory standard for determining when rulemaking is required. The bill provides a procedure for challenging agency statements alleged to violate the rulemaking standard and remedies for violations of the standard. The bill codifies the procedure for review of agency statements defined as "rules" that are not adopted by the rulemaking procedure in administrative hearings.

The Division of Administrative Hearings is granted authority to develop a full-text retrieval system to provide access to administrative orders. The bill requires state agencies to preserve index, and provide public access to designated agency orders. The Department of State is responsible for establishing minimum criteria for the preservation, indexing, and availability of agency orders. Each agency must develop by rule a system which meets the criteria established by the Department of State for the reservation, indexing, and availability of orders.

I I. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Under the Administrative Procedure Act (APA), agencies implement delegated legislative authority by rulemaking and issuing orders. When an agency implements delegated authority by rulemaking or issuing orders, the procedures required by the APA are designed to facilitate legislative oversight and provide for public notice and participation in the administrative process.

The APA defines a rule as:

> [E]ach agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

Section 120.52(16), Florida Statutes (F.S.).

Under the APA, an agency must give notice of each rule proposed for adoption, s. 120.54(1), F.S., 1990 Supp. Any person affected by a proposed rule may present evidence and argument to the agency on the issues under consideration, s. 120.54(3), F.S., 1990 Supp. An agency may hold a public hearing prior to adoption of a proposed rule, and, if requested by any person affected by the proposed rule, an agency must hold a public hearing, s. 120.54(3), F.S., 1990 Supp. Before a proposed rule is adopted, any person who would be substantially affected by the proposed rule may challenge the validity of the rule, s. 120.54(4), F.S., 1990 Supp. An agency must submit each proposed rule to the Legislature's Administrative Procedures Committee prior to adoption of the rule, s. 120.54(11), F.S., 1990 Supp. That committee reviews each proposed rule for statutory authority and compliance with the procedural requirements of the APA, s. 120.545, F.S. After a rule is adopted, any person substantially affected by the rule may challenge the validity of the rule, s. 120.56, F.S. Most agencies are required to compile adopted rules in a published volume, the Florida Administrative Code (F.A.C.), s. 120.55, F.S.

An order is a final agency decision which does not have the effect of a rule and which is not exempted from the definition of a rule, whether affirmative, negative, injunctive, or declaratory in form, s. 120.52(11), F.S. Agency determinations that affect the substantial interests of a party must be made in accordance with designated procedures, s. 120.57, F.S., 1990 Supp. When factual issues are disputed a trial-type hearing is, provided under s. 120.57(1), F.S., 1990 Supp. Orders result when an agency determines substantial interests and often these orders contain statements of agency policy not adopted by rulemaking (nonrule policy).

Initially, the APA required that all agency orders, issued or adopted after January 1, 1975, be included in a current subject matter index and available for public

inspection and copying at no more than cost, s. 120.53(2), F.S., 1990 Supp. In 1979, this requirement was modified. At present, an agency may comply with the indexing requirement by designating an official reporter to publish and index by subject matter each agency order issued after a "proceeding which affects substantial interests," s. 120.53 (4) , F.S., 1990 Supp.

The terms of the APA sufficiently provide for the legislative objectives of oversight and public notice and participation when an agency implements delegated legislative authority. Agency statements of general applicability are defined as "rules" and must be adopted by the rulemaking procedure. Rulemaking provides for legislative review and public notice and participation. Agency orders, including those that contain statements of nonrule policy, are required to be indexed and available to the public and the Legislature.

However, judicial decisions modified the procedural requirements of the APA. The First District Court of Appeal in McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977), determined that "incipient policy" is not of general applicability and can be implemented by agencies on a case-by- case basis. Subsequent decisions interpreted "general applicability" restrictively. This restrictive interpretation excludes agency statements from the statutory definition of "rule" and limits the applicability of the rulemaking procedure. See Hill v. School Board of Leon County, 351 So. 2d 732 (Fla. 1st D.C.A.); Florida League of Cities, Inc. v. Administration Commission, 12 F.L.A.R. 1149 (March 2, 1990); (DOAH Case No. 89- 6203R). The judicially created exception from rulemaking provided for "incipient policy" is viewed expansively. This creates a broad exemption from the rulemaking procedure for agency statements. See Southern Bell Telephone and Telegraph Company v. Public Serv. Comm'n, 443 So 2d 92 (Fla. 1983); Florida Cities Water Co. v. Public Serv. Comm'n, 384 So. 2d 1280 (Fla. 1980); Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So. 2d 1177 (Fla. 1st D.C.A.); Florida Power Corporation v. State Siting Board, 513 So. 2d 1341 (Fla. 1st D.C.A. 1987). These decisions allow agencies to exercise broad discretion when selecting between rulemaking and statements of nonrule policy as a means for the implementation of delegated authority. See generally, Burris, The Failure of the Florida Judicial Review Process to Provide Effective Incentives for the Rule Making Process under the Administrative Procedure Act, 18 Fla. St. U. L. Rev. ---(1991)

A meaningful system for access to agency orders is necessary because these orders may provide the only means for identification of statements of an agency's nonrule policy. However, while some agencies comply with the spirit and requirements of the law with respect to the indexing and availability of orders, the practices and procedures of a significant number of agencies fail to carry out the objectives or requirements of the APA.

At present, many agencies neither subject policies of general applicability to the rulemaking procedure, nor index and make available orders that contain statements of nonrule policy in the manner required by law. This restricts legislative oversight and limits public notice and participation in the administrative process.

B. EFFECT OF PROPOSED CHANGES:

This bill is intended to limit the discretion currently exercised by administrative agencies when selecting the means for implementation of delegated legislative authority. The bill provides a statutory standard for determining when an agency is required to implement delegated authority by rulemaking.

The bill creates s. 120.535, F.S. Section 120.535(1) requires that each agency statement defined as a rule under s. 120.52(16), F.S., be adopted by the rulemaking procedure provided by s. 120.54, F.S., 1990 Supp., as soon as feasible and practicable. The term "rule" should be interpreted broadly. The word "statement" used in the definition of "rule" is intended to encompass any form of communication by an agency. The words "general applicability" used in the definition of "rule" are intended to be given their plain meaning. The restrictive interpretation given "general applicability" by the case decisions should be reversed. See Hill v. School Board of Leon County, 351 So. 2d 732 (Fla. 1st D.C.A.); Florida League of Cities, Inc. v. Administration Commission, 12 F.L.A.R. 1149 (March 2, 1990) (DOAH Case No. 89-6203R). A broad interpretation of the term "rule" gives effect to the Legislature's intent to maximize the applicability of the rulemaking standard to the implementation of delegated authority by administrative agencies.

The only limitation on the broad rulemaking requirement established by s. 120.535 is consideration of the feasibility and practicability of rulemaking. Feasibility concerns the time at which an agency statement must be addressed by rulemaking. Practicability concerns the amount of detail and precision with which an agency statement must be addressed by rulemaking at a given point in time. The Legislature intends for agencies to adopt rules as soon as feasible and with as much detail and precision as is practicable at the time. An agency's ability to provide further elaboration of its policy will usually increase over time. Because rulemaking is a dynamic and not a static process, agencies must periodically consider whether new rules need to be adopted or further detail and precision added to existing rules. The bill provides an exclusive set of factors for consideration in determining whether rulemaking is feasible and practicable. The Legislature intends for these factors to be construed strictly against an agency that has not adopted a statement by rulemaking.

Rulemaking is presumed feasible under the bill. An agency may overcome this presumption if it proves that at least one of the factors provided in s. 120.535(1)(a) is applicable. If an agency demonstrates that a factor is applicable, rulemaking is not required at that time. The factors provided include the time an agency has had to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking. This factor is applicable if an agency proves it has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking. An important consideration regarding the time an agency needs to address a statement by rulemaking is prior reliance by the agency on the statement or a substantially similar statement. This factor is not applicable if an agency has gained sufficient knowledge and experience from prior reliance on a statement to permit rulemaking. The frequency with which an agency has relied on a

statement or a substantially similar statement is another important consideration. This factor is not applicable if an agency has relied upon a statement with a degree of frequency that indicates rulemaking is reasonably possible. The second factor provided is the extent to which related matters are sufficiently settled to permit an agency to address a statement by rulemaking. This factor allows consideration of related matters that must be resolved as a condition precedent to rulemaking. This factor is applicable if related matters are not sufficiently resolved to permit rulemaking. An agency must proceed to rulemaking as soon as related matters are sufficiently settled to permit rulemaking. The final factor provided is expeditious, good faith, use of the rulemaking procedure by an agency to adopt rules which address a statement. An agency must currently be using the rulemaking procedure for this factor to apply. Use of the rulemaking procedure must be expeditious and in good faith. An agency should not be penalized if it is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address a statement.[1] Evidence that an agency is using the workshop process to develop proposed rules may indicate that this factor is applicable.

Rulemaking is presumed practicable under the bill to the extent necessary to provide fair notice to affected parties of relevant agency procedures and applicable principles, criteria, or standards for agency decisions. The Legislature intends for agencies to adopt all rules necessary to provide affected persons with knowledge of pertinent agency procedures and the standards, criteria, or principles upon which agency decisions will be based. The pertinent consideration with regard to the practicability of rulemaking is whether adopted rules provide fair notice. Actual knowledge of an agency statement not adopted by rulemaking does not suffice as fair notice. Rulemaking is practicable unless fair notice may be attained solely upon review of adopted agency rules.

Rulemaking is presumed practicable to the extent necessary to provide fair notice unless the agency demonstrates that at least one of the factors provided by s. 120.535(1)(b) is applicable. Rulemaking is not practicable if detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the ciI1cu stances. Under this factor, if no reasonable consensus of opinion exists within a discipline on an issue, an agency may not be able to provide further detail or precision by rulemaking. Further, if the technology necessary to provide detail or precision by rulemaking is not reasonably available to an agency, this factor may be applicable. Finally, rulemaking is not required to the extent that the questions that must be addressed are so narrow in scope that more detail or precision is precluded outside of a case-by- case determination based on individual circumstances.

Section 120.535(2) provides the procedure for challenging an agency statement alleged to violate the standard for rulemaking. Under subsection (2), any person

[1] The presumption created under s. 120.535(5) that an agency is not proceeding expeditiously and in good faith to adopt rules does not apply to s. 120.535(1)(a)3.

substantially affected by an agency statement may challenge the statement as a violation of the rulemaking standard. The requirement that person be substantially affected by an agency statement is parallel with the standing requirement under s. 120.56, F.S.[2] Standing is provided to associations under the substantially affected person standard, Florida Home Builders Ass'n v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982). A challenge to an agency statement under s. 120.535 is instituted by petition to the Division of Administrative Hearings (DOAH). The petition must be in writing and allege facts sufficient to demonstrate that the person is substantially affected by an agency statement, that the statement constitutes a rule under s. 120.52 (16), F.S., and that the statement has not been adopted by the rulemaking procedure. The petition must include the text of the challenged statement or a description of the statement sufficient to provide notice of the substance of the challenged statement. Upon receipt of a petition, the DOAH must forward copies of the petition to the agency whose statement is challenged, the Legislature's Joint Administrative Procedures Committee (JAPC), and the Department of State. The Department of State must publish notice of the petition including the text or a description of the challenged statement sufficient to provide notice of the substance of the statement in the first available issue of the Florida Administrative Weekly (FAW). If the director of the DOAH finds that the allegations of the petition are sufficient, the petition is assigned to a hearing officer. The hearing officer must conduct a hearing within 30 days of assignment of the petition, unless the petition is withdrawn. The hearing officer may postpone the date for hearing for good cause. If a hearing is held, the petitioner has the initial burden of proving the allegations of the petition. The petitioner is not required to prove that rulemaking is feasible and practicable. Rulemaking is presumed feasible and practicable under s. 120.535 (1). If the allegations of the petition are proven, the burden shifts to the agency which must prove under the factors provided by s. 120.535(1) that it is not feasible and practicable to address the challenged statement by rulemaking.

Section 120.535(3) requires the hearing officer to issue a written order within 30 days of the conclusion of the hearing. The hearing officer's order constitutes a final order. The hearing officer may find that all or part of an agency statement violates the rulemaking standard. The DOAH must provide copies of the final order to the JAPC and the Department of State which must publish notice of the final order in the FAW.

Section 120.535(4) provides that if the hearing officer determines that all or part of an agency statement violates the rulemaking standard, the agency must immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action. Upon entry of a final order determining that an agency statement violates the rulemaking standard, the agency must refrain from all current or future use of the statement or any substantially similar statement as a basis for agency action. However, the agency may publish proposed rules which address the statement under s. 120.535(5).

[2] This is not the applicable standard for purposes of demonstrating entitlement to costs and attorney's fees under s. 120.535(6).

Section 120.535(5) provides that subsequent to a determination that an agency statement violates the rulemaking standard, the agency is permitted to resume reliance upon the statement as a basis for agency action, if, prior to reliance on the statement, the agency publishes proposed rules which address the statement. An agency need not publish proposed rules which address the statement verbatim. However, the substance of the agency statement must be addressed by the proposed rules. If an agency publishes proposed rules that address the statement, the agency is permitted to rely upon the statement as a basis for agency action if the agency proceeds expeditiously and in good faith to adopt rules that address the statement. An agency is permitted to amend proposed rules prior to adoption, but the rules that the agency ultimately adopts must address the substance of the statement that was determined to violate the rulemaking standard. If the agency fails to adopt rules which address the statement within 180 days of publication of proposed rules, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. The presumption that an agency is not proceeding expeditiously and in good faith to adopt rules is only applicable for purposes of subsection (5) and does not apply to determinations of the feasibility of rulemaking under s. 120.535(1). If an agency's proposed rules are challenged under s. 120.54(4), F.S., 1990 Supp., the 180 day period is tolled until the rule challenge proceeding is resolved. When an agency is permitted to rely upon a statement under s. 120.535(5), if the statement is challenged in a proceeding under s. 120.57(1), F.S., 1990 Supp., the statement must be determined to comply with s. 120.57(1)(b)15.

Section 120.535(6) provides for payment of reasonable costs and attorney's fees under designated circumstances. This subsection provides that subsequent to a determination that an agency statement violates the rulemaking standard, if an agency relies upon the statement or a substantially similar statement as the basis for agency action, and the substantial interests of a person are determined by the agency action, that person is entitled to payment by the agency of all reasonable costs and attorney's fees incurred by the person, if the person successfully demonstrates that under s. 120.535(4) or (5) the agency is not permitted to rely upon the statement as a basis for agency action. No payment is available in a s. 120.535 proceedings brought to determine as an initial matter whether an agency statement violates the rulemaking standard. Payment is available when an agency continues to apply a statement which was determined in a prior s. 120.535 proceeding to violate the rulemaking standard. The agency must rely on the statement as the basis for an agency action. The substantial interests of the person seeking payment must be determined as a result of that agency action. This standard contemplates more direct and significant harm to the person than is required by the substantially affected person standard. The person must successfully demonstrate that the agency is not permitted under s. 120.535(4) or (5) to rely upon the statement as a basis for agency action. Subsection (4) prohibits reliance upon a statement as a basis for agency action if the statement is determined to violate the rulemaking standard. However, subsection (5) permits an agency to rely upon a statement previously determined to violate the rulemaking standard, if, prior to such reliance, the agency publishes proposed rules that address the statement. Subsection (5) requires the agency to proceed expeditiously and in good faith to adopt rules which address the statement.

If an agency is proceeding expeditiously and in good faith to adopt rules, reliance on the statement is permitted under subsection (5). If an agency is not proceeding expeditiously and in good faith to adopt rules, subsection (5) does not permit the agency to rely upon a statement previously determined to violate the rulemaking standard. If an agency is in compliance with subsection (5), reliance on the statement is permitted and payment is not required.

When interpreting this legislation the Legislature's intent to promote rulemaking should be considered. The intent of this legislation is to promote rulemaking and not to bestow benefits upon aggrieved persons.

An action for payment of costs and attorney's fees may be brought pursuant to s. 120.57(1), F.S., 1990 Supp., or s. 120.535. To prove entitlement to payment under either section a person must prove that an agency statement was previously determined to violate the rulemaking standard, that the agency *is* relying on the statement or a substantially similar statement as the basis for agency action, that the person's substantial interests are determined by the agency action, and that the agency is not permitted to rely upon the statement as a basis for agency action under s. 120.535(4) or (5). Proceedings brought pursuant to s. 120.535 result in a final order by the hearing officer and are otherwise conducted in the same manner as proceedings pursuant to s. 120.57(1), F.S., 1990 Supp. A proceeding for payment under s. 120.535 may be brought in conjunction with or consolidated with a proceeding under any other section of chapter 120. If a s. 120.535 proceeding is brought in conjunction with or consolidated with another proceeding, the hearing officer's order on all matters relevant to the s. 120.535 determination is a final order

Payment of costs and attorney's fees must be made from the budget entity of the head of the agency whose statement is determined to violate the rulemaking standard. The agency may not be reimbursed for such payment under any provision of law. Structuring payments in this manner is intended to reinforce the serious nature of continuing violations of the standard for rulemaking.

The bill amends s. 120.68(3), F.S., 1990 Supp., to provide that the filing of a petition appealing a final order issued by a hearing officer pursuant to s. 120.535 does not stay enforcement of the order, regardless of whether the petition is filed by the agency or another party. If an agency received an automatic stay of a s. 120.535 order upon filing a petition for review, the Legislature's policy in favor of rulemaking would be frustrated while the case is on appeal. Agencies could simply appeal an adverse determination and avoid rulemaking. An automatic stay could create an incentive for appellate litigation. Agencies might misallocate finite resources in favor of appellate litigation and not provide appropriate levels of resources for rulemaking. The bill provides that an agency or any other party may petition the appellate court to stay a final order pursuant to s. 120.535. The appellate court may stay the hearing officer's final order if it determines that a stay is necessary to avoid probable danger to the health, safety or welfare of the state. A finding of probable danger means that without the stay it is highly likely that a significant harm will occur. The likelihood of such harm must be balanced against

the Legislature's strong policy in favor of rulemaking. If a petition to stay the final order is granted the agency may continue to rely on the statement as a basis for agency action until the appeal is resolved. However, if challenged, an agency statement not adopted by rulemaking must be determined to comply with s. 120.57(1)(b)15. This provision should not conflict with Rule 9.310, Florida Rules of Appellate Procedure. This provision is designed as an exception to that rule provided by general law allowed under Rule 9.3l0(a), Florida Rules of Appellate Procedure. But see City of Jacksonville Beach v. Public Employees Relations Commission, 359 So. 2d 578 (Fla. 1st DCA 1978).

Section 120.57(1)(b)15 codifies the procedure for review of agency statements within the statutory definition of a "rule" and not adopted by the rulemaking procedure. This section provides that when an agency relies on a statement to determine the substantial interests of a party the statement is subject to de novo review by a hearing officer. This section reiterates the constitutional requirement that an agency statement may not enlarge, modify, of contravene the specific provision of law implemented or otherwise exceed delegated authority. Any statement applied in a proceeding pursuant to s. 120.57(1), F.S., 1990 Supp., must be demonstrated within the scope of delegated legislative authority. Recommended and final orders must explain the basis for all statements applied. The explanation of a statement must identify the evidentiary basis for a statement, and discuss generally why the statement applied is justified. The intent of the procedure required by this section is to assure that statutory authority exists for all agency statements and that an evidentiary basis for each statement is provided in the record of an adjudication.

The bill authorizes the Division of Administrative Hearings (DOAH) to direct a study and pilot project to implement a full-text retrieval system to provide access to recommended orders, final orders, and declaratory statements. This provision allows the DOAH to explore alternative means and available technologies to assure public access to agency orders.

The bill amends current law to clarify which agency orders must be indexed and indicates an agencies responsibilities for preserving, indexing, and making orders available to the public. Section 119.041, F.S., is amended to provide that designated agency orders are documents of continuing legal significance and must be preserved in accordance with rules and guidelines of the Department of State.

Section 120.53(2)(a), F.S., 1990 Supp., provides that designated orders must be included in a current subject-matter index. Those orders designated for indexing include final agency orders from proceedings under s. 120.57(1) or (2), F.S., 1990 Supp., orders under s. 120.53(3), F.S., 1990 Supp., which contain a statement of agency policy that may be the basis of future agency decisions or contain a statement of presidential value, declaratory statements, and orders issued pursuant to s. 120.54(4), F.S., 1990 Supp., and s. 120.56, F.S. Orders issued pursuant to s. 120.53(3), F.S., 1990 Supp., that are not specified for indexing must be listed. This list of orders must include the name of the parties to the proceeding and the number assigned to the final order. All orders must be available for public inspection and

copying. Orders designated for indexing or listing must be indexed or listed within 120 days after the order is issued.

The Department of State must establish by rule procedures for indexing and the availability of orders. Each agency must adopt rules approved by the Department of State for indexing and listing of orders, which provide public access to indexes and lists, and designate those types or classes of orders exempted from the indexing and listing requirement. The bill allows agencies to exempt specified types or categories of orders from the indexing requirement with the approval of the Department of State.

The bill provides that an agency may comply with the indexing requirement by designating by rule an official reporter to index and make available to the public its orders. A reporter designated by an agency and approved by the Department of State constitutes the official compilation of that agency's orders. The agency remains responsible for the quality of the designated reporter. If designated by an agency the Department of State may publish the reporter for that agency.

C. SECTION-BY-SECTION ANALYSIS:

Section 1 --Amends s. 119.041, F.S., to provide for the preservation of agency orders.

Section 2 --Amends s. 120.53, F.S., 1990 Supp., to specify which agency orders must be preserved, indexed, and made available to the public; designates the Department of State to develop minimum criteria for agency indexing systems; requires agencies to develop systems for indexing orders approved by the Department of State.

Section 3 --Creates s. 120.535, F.S., which provides a standard for required rulemaking; a procedure for challenges to agency statements alleged to violate the standard for required rulemaking; provides a remedy for violations of the standard for rulemaking.

Section 4 --Amends s. 120.S7(1)(b), F.S., 1990 Supp., to provide a uniform procedure for the review of agency statements not adopted by rulemaking in administrative hearings.

Section 5 --Amends s. 120.59/ F.S., to provide that agency orders must identify and specify the manner for obtaining all materials incorporated by reference; requires that all agency orders be sequentially numbered.

Section 6 --Amends s. 120.68(3), F.S., 1990 Supp., to provide for the stay of final orders issued pursuant s. 120.535 pending judicial review.

Section 7 --Authorizes the Division of Administrative Hearings to direct a study and pilot project to implement a full-text retrieval system to provide public access to designated agency orders.

Section 8 --Provides for the preservation of agency orders

Section 9 --Provides for the preservation, indexing and availability of agency orders.

Section 10 --Requires agencies to submit to the Department of State for approval plans for the preservation, indexing, and availability of agency orders.

Section 11-- Provides that the bill applies to actions instituted after January 1, 1992.

Section 12 --Provides an effective date for the bill of January 1, 1991.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

Indeterminate.

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

2. Recurring Effects:

3. Long Run Effects Other Than Normal Growth:

4. Total Revenues and Expenditures:

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

2. Recurring Effects:

3. Long Run Effects Other Than Normal Growth:

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Director Private Sector Costs:

2. Direct Private Sector Benefits:

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

D. FISCAL COMMENTS:

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

None.

A. APPLICABILITY OF THE MANDATES PROVISION:

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

V. COMMENTS:

This bill is intended to reestablish rulemaking as the primary means for administrative agency implementation of delegated legislative authority. Under the bill, agencies will be required to adopt all decisions have provided agencies to choose between rulemaking and statements of nonrule policy. The bill codifies the procedure for review of agency statements within the statutory definition of a rule and not adopted by rulemaking in proceedings to determine the substantial interests of parties. The bill seeks to take full advantage of technology to provide public access to agency orders by granting the Division of Administrative Hearings authority to develop a pilot project for the implementation of a full-text retrieval system for agency orders.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Proposed Committee Bill 91-01 was reported favorably by the House Committee on Governmental Operations on 2/20/91. PCB 91-01 was introduced on 3/6/91 as House Bill 1879.

HB 1879 was reported favorably by the House Committee on Appropriations with two amendments on 3/12/91. The first amendment removed excess language from s. 120.535(6) regarding the procedure for recovery of costs and attorney's fees. The amendment clarified the requirement that a party seeking costs and attorney's fees under either s. 120.535 or s. 120.57(1), F.S., 1990 Supp., must demonstrate its substantial interests are determined by the, challenged agency statement. The second amendment clarified the stay provision for orders issued pursuant to s. 120.535 pending appellate review. Orders issued pursuant to s. 120.535 are not stayed upon filing of a petition for appellate review. A party that desires a stay, including an agency, must petition the court for a stay. The court must determine that a stay is necessary to avoid probable danger to the health, safety, or welfare of the State prior to granting a stay.

HB 1879 was placed on special order calendar, read for the second time, and amended by the full House on 3/14/91. The first and second amendments were offered by the Committee on Appropriations. These amendments, described above, were previously adopted by that Committee. The third amendment removed language from HB 1879 which required the Department of Community Affairs to adopt certain rules. The fourth amendment was a title amendment.

HB 1879 as amended passed the House on 3/19/91.

Senate Bill 1836 was introduced on 3/14/91. SB 1836 as introduced vias identical to HB 1879 as it passed the House on 3/19/91. SB 1836 was amended and reported favorably by the Senate Committee on Governmental Operations on 3/28/91. The first amendment adopted by that Committee removed a cross reference to s. 120.57(1)(b)15 from s. 120.535(5). The language removed by the amendment stated explicitly the implicit requirement that an agency statement, upon a challenge to proposed agency action which involves the statement, must be determined to comply with s. 120.57(1)(b)15. This amendment removes a redundant reference to s. 120.57(1)(b)15 and does not alter the requirement that an agency statement comply with this provision. The second amendment removes the word "all" from s. 120.535(6). This amendment is intended to clarify that "all" or "part" of the costs and attorney's fee incurred by a party may be awarded. The third amendment clarifies the requirement that prior to an award of costs and attorney's fees a person must demonstrate that an agency is not permitted to rely on a statement under subsections (4) or (5) of s. 120.535. The fifth amendment added subsection (9) to s. 120.535. This subsection provides that prisoners, as defined by s. 944.02(5), F.S., are not permitted to challenge agency statements under s. 120.535. The sixth amendment states explicitly that an agency statement within the definition of a rule and not adopted by the rulemaking procedure is subject to de novo review by a hearing officer. The eighth amendment provides that an agency statement must not enlarge, modify, or contravene the specific provision of law implemented or otherwise exceed delegated legislative authority. An agency statement that is applied as the result of a proceeding pursuant to s. 120.57(1), F.S., 1990 Supp., must be demonstrated within the scope of the agency's delegated authority.

Senate Bill 900 was introduced on 3/5/91. SB 900 was the Senate's package on indexing and the availability of agency orders.

On 4/9/91 HB 1879 was taken up by the full Senate. The Senate amended HB 1879 by striking everything after the enacting clause and substituting the text of SB 1836 and SB 900. HB 1879 as amended passed the full Senate on 4/9/91.

The House concurred in the Senate amendments to HB 1879 on 4/16/91. HB 1879 became law on 4/27/91.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:	Staff Director:
David W. Narn	Jimmy O. Helms

COMMITTEE ON APPROPRIATIONS:

Prepared by:	Staff Director:
Ruth M. Storm	Peter J. Mitchell

FINAL ANALYSIS PREPARED BY COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:	Staff Director:
David W. Nam	Jimmy O. Helms