



# The Florida Senate

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Committee on Communications and Public Utilities

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## LEGISLATIVE PROCESS FOR RULE RATIFICATION OF RENEWABLE PORTFOLIO STANDARD AND CAP-AND-TRADE REGULATORY REFORM

### Issue Description

Chapter 2008-227, Laws of Florida, embodied significant energy policy for the state of Florida and included three provisions directing the Department of Environmental Protection (DEP) and the Public Service Commission (PSC) to adopt rules and submit those rules to the Legislature for ratification. The first, section 42 of that chapter, requires the PSC to adopt rules for a renewable portfolio standard requiring each provider to supply renewable energy directly, by procuring, or through renewable energy credits.<sup>1</sup> The section further states that the rule shall not be implemented until ratified by the Legislature. Next, section 65 directs the DEP to adopt rules for a cap-and-trade regulatory program to reduce greenhouse gas emissions from major emitters.<sup>2</sup> That section further provides that the DEP shall not adopt rules until after January 1, 2010. The rules do not become effective until ratified by the Legislature. Finally, section 115 provides for ratification of emission standards if adopted by the DEP.<sup>3</sup> Chapter 120, F.S., sets forth the process for rulemaking but does not contemplate ratification by the Legislature. The term “ratification” is not defined in the Florida Statutes. This project explores the question: what are the appropriate legal options for legislative ratification of the proposed rules after the rules have been adopted by the respective agencies?

### Background

#### Rulemaking under the Administrative Procedures Act

An overview of the rulemaking process set forth in chapter 120, F.S., will provide a frame of reference for discussion of ratification. An agency has 180 days to draft and formally propose rules if directed by statute to implement an act, unless otherwise provided in the statutes.<sup>4</sup> An agency has more flexibility with certain parts of the timeframes to develop or amend rules when it has not been directed by statute to adopt rules. For example, there is no limit to the number of workshops that an agency can hold or how long before the rules must be proposed.<sup>5</sup> The rule adoption process provides for public notice and numerous opportunities for an interested person to participate in the proceedings.<sup>6</sup>

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<sup>1</sup> Section 42 provides: s. 366.92(3), F.S. - The commission shall adopt rules for a renewable portfolio standard requiring each provider to supply renewable energy to its customers directly, by procuring, or through renewable energy credits. In developing the RPS rule, the commission shall consult the Department of Environmental Protection and the Florida Energy and Climate Commission. The rule shall *not be implemented until ratified* by the Legislature. *The commission shall present a draft rule for legislative consideration by February 1, 2009.* (Italics added for identification in discussion below.)

<sup>2</sup> Section 65 provides: s. 403.44(5), F.S., - The department may adopt rules for a cap-and-trade regulatory program to reduce greenhouse gas emissions from major emitters. When developing the rules, the department shall consult with the Florida Energy and Climate Commission and the Florida Public Service Commission and may consult with the Governor’s Action Team for Energy and Climate Change. *The department shall not adopt rules until after January 1, 2010.* The rules shall *not become effective until ratified* by the Legislature. (Italics added.)

<sup>3</sup> Section 115 provides: Motor vehicle emissions standards.—If the Department of Environmental Protection *proposes to adopt* the California motor vehicle emission standards, such standards shall not be implemented until ratified by the Legislature. If the department *proposes to modify its rule* adopting the California motor vehicle emission standards, such rule modifications shall *not be implemented until ratified* by the Legislature. (Italics added.)

<sup>4</sup> Section 120.54(1)(b), F.S.

<sup>5</sup> Section 120.54(2)(c), F.S.

<sup>6</sup> Section 120.54(3)(a)1.-3., F.S.

Rulemaking begins with a Notice of Rule Development published in the Florida Administrative Weekly (FAW).<sup>7</sup> A preliminary draft of the rule may also be included in the Notice.<sup>8</sup> Interested persons are put on notice as to what the agency intends and may become involved in the process. If not already held, the agency may hold workshops to more finely tune its rule concepts.<sup>9</sup>

A Notice of Proposed Rules, which includes the full text of the proposed rules, is published in the FAW commencing a 90-day clock within which the rules must either be filed for adoption or withdrawn. A hearing may be scheduled or must be held if requested within 21 days of the publication. A Statement of Estimated Regulatory Cost (SERC) should also be prepared by the agency as one will likely be requested. The proposed rules are also sent to the Joint Administrative Procedures Committee (JAPC) for review.<sup>10</sup>

A public hearing will be held by the agency if scheduled or requested. If the rules are changed based upon the testimony and evidence presented at the hearing, a Notice of Change must be published in the FAW and provided to the JAPC at least 21 days before adoption of the rules.<sup>11</sup>

Substantially affected persons may challenge the proposed rules within 21 days of the Notice of Proposed Rules, within 10 days of the final public hearing on the rule, within 20 days of preparation of the statement of estimated regulatory cost, or within 20 days of the Notice of Change. A challenge is heard by the Division of Administrative Hearings (DOAH).<sup>12</sup> The 90-day deadline for filing the rules for adoption is extended for 45 days after the adjournment of the hearing.<sup>13</sup>

The rule is then filed for adoption with the Department of State and takes effect 20 days after filing unless a later date is specified.<sup>14</sup> Once a rule has been adopted, it may be challenged anytime by a person substantially affected on the grounds that it is unconstitutional. A rule that is successfully challenged is usually readdressed by the Legislature. Moreover, the Legislature may change the statutes to gain an intended effect should an agency act contrary to Legislative intent or if the effect of any law has unintended consequences.

Finally, s. 120.542, F.S., provides for variances and waivers of rule requirements where strict application can lead to unreasonable, unfair, and unintended results in particular instances. Uniform procedures have been established and agencies are provided guidelines to apply when granting a variance or waiver.

### **Current instances of legislative ratification of agency rules**

There are three instances currently found in the Florida Statutes in which the Legislature has directed agencies to adopt rules that do not become effective unless ratified by the Legislature. (See Appendix A for excerpts from the relevant statutes. An additional section, s. 380.05, F.S., requires the Legislature to review rules adopted by the Administration Commission relating to areas of critical state concern.)

Section 373.036, F.S., provided for the development and adoption of a Florida Water Plan by the Department of Environmental Protection. Upon adoption by the agency, the Legislature was required to ratify the rules before they were to become effective. In ratifying the rules, the Legislature amended s. 373.036, F.S., to provide a procedure by which amendments to those rules would subsequently be adopted. Specifically, amendments adopted by the Secretary of the Department must be submitted to the President of the Senate and the Speaker of the House of Representatives within seven days after publication in the Florida Administrative Weekly. Amendments are not effective until the conclusion of the next regular session of the Legislature following their

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<sup>7</sup> Section 120.54(2)(a), F.S.

<sup>8</sup> *Id.*

<sup>9</sup> Section 120.54(2)(c), F.S.

<sup>10</sup> Section 120.54(3)(a)1., F.S.

<sup>11</sup> *Id.*

<sup>12</sup> The Public Service Commissioners may refer rule challenges to DOAH or hear the challenge themselves in their quasi-judicial role.

<sup>13</sup> Section 120.54(3)(e)2., F.S.

<sup>14</sup> Section 120.54(3)(e)6., F.S.

adoption. The rules under this provision go into effect unless opponents of the rules obtain passage of a bill in the Legislature to change the rules. This process allows the Legislature the opportunity to review the agency action, but does not require additional action on the agency's part to pass a bill.

A different procedure was utilized in ss. 373.421 and 373.4211, F.S., relating to wetlands delineation. The rules were ratified in s. 373.4211, F.S., which states in part: "Pursuant to s. 373.421, the Legislature ratifies chapter 17-340, Florida Administrative Code, approved on January 13, 1994, by the Environmental Regulation Commission, with the following changes. . . ." Those rules adopted under s. 373.4211, F.S., have been determined by the Florida Supreme Court to have the effect of law and administrative proceedings can have no effect on the constitutional issues involved. Occidental Chemical Agricultural Products, Inc. v. Department of Environmental Regulation, 501 So. 2d 674, 678 (Fla. 1987). Having the effect of law means that only a statutory change will amend the rule and is so stated in s. 373.4211(26), F.S., which provides: "Any future amendments to rule 17-340, Florida Administrative Code, shall be submitted in bill form to the Speaker of the House of Representatives and to the President of the Senate for their consideration and referral to the appropriate committees. Such rule amendments shall become effective only upon approval by act of the Legislature." Senate committee staff and staff from the Department of Environmental Protection have stated that bills to change this section have failed.

Section 163.3177, F.S., required the Department of Community Affairs to adopt rules for minimum review of local government comprehensive plans and determinations of compliance. The rules were ratified with changes, but more importantly the Legislature specified when they were effective, for how long, and that they could not be changed for a specified period.<sup>15</sup> The purpose and effect of the provision required all local governments to develop plans using the same criteria and all plans were reviewed using the same standard. The initial compliance period has since expired. When it ratified the rules, the Legislature directed that the rules are the same as any other rule and may be changed under ch. 120, F.S., so long as the rules comply with specified legislative intent.<sup>16</sup> Since then, the rules have been amended numerous times.

## Findings and/or Conclusions

The three provisions in Ch. 2008-227, L.O.F., requiring rule ratification are not consistent. However, these appear to be differences without real distinctions. A reasonable interpretation of each of these provisions would be that the agencies will follow the rulemaking process under chapter 120, F.S., and file the rule for adoption with the Department of State with an effective date upon ratification by the Legislature. Following the rulemaking process will allow for the development of all relevant issues, create a record of evidence presented, and will allow all interested persons to participate.

## Options and/or Recommendations

The following are options the Legislature may consider:

- Incorporate the rules into statute. By incorporating rules into statutes, the rules become law and require Legislative changes.
- Direct the agency to modify the rules as directed in statute and direct the provisions to be treated as rules in the future.
- Set a time certain for the rules to remain unchanged.
- Continue legislative oversight by requiring ratification of any changes to the rules in one of two ways: first, require the agency to present the President of the Senate and the Speaker of the House of Representatives with a bill or, second, allow the rules to become ratified at the end of the Legislative session if, after presentation to the President of the Senate and the Speaker of the House of Representatives, no action is taken.
- Repeal ratification requirements and set forth guidelines to adopt rules under chapter 120, F. S.
- Do nothing.

<sup>15</sup> See Addendum for s. 163.3177(9), F.S.

<sup>16</sup> See Addendum for s. 163.3177(10), F.S.

What the Legislature actually receives from each agency will have a significant impact on the ratification review. For example, the review process would be very different for an agency-proposed rule that was only partially developed and had only been through a portion of the rulemaking process as opposed to a rule that has been through the entire agency rulemaking process, has been fully developed, and has been filed for adoption. Initially, a preliminary determination would be necessary as to whether the agency has provided the Legislature with a work product that is sufficiently developed to consider ratification. If not, the Legislature could obtain an explanation for the deficiency and then either give the agency further direction and require further rulemaking or simply abandon this approach.

If the agency work product is sufficient so that it could be the basis for a fully-developed, ratified rule, then a more extensive review can begin. The Legislature should next review the rulemaking process to ensure that all procedural requirements were met. If not, it must determine whether and how these procedural deficiencies can be remedied as part of the ratification process. The Legislature may need to cure any defects in the rulemaking process with respect to adequate record and information, citizen participation, and access to courts. The core ratification process, however, should be uniform no matter what is received from an agency.

Notwithstanding the procedure the agencies have followed in adopting rules as directed, it will be up to the Legislature as to how to ratify these rules. For instance, does the Legislature want to adopt the rules into statute so they may not be changed by the agency? Does the Legislature want to keep the rules under the process of chapter 120, F.S.? Does the Legislature want to create some type of hybrid to keep revision under close scrutiny? The Legislature may enact laws as it sees fit short of unlawfully delegating authority by directing an agency to act without providing adequate standards for exercise of such power.<sup>17</sup>

Once the procedural evaluation of the rule is complete, the Legislature could take action to “ratify” the rule. The review process would then turn to the substance of the agency rule to determine whether the rule is sufficiently complete and satisfies the legislative intent of the law requiring the rulemaking. The Legislature has available the options discussed above. Dependent upon the outcome of the review, the Legislature can reject the rule in its entirety, adopt it as statute, adopt some portions and indicate approval of the remainder as effective rule, or indicate approval of the entirety as effective rule. In ratification, the Legislature should establish a clear distinction between statute and rule and between subsequent revision by Legislative amendment and rule change. Basic policy should be codified in statute and details that may require change as circumstances warrant, relying on agency expertise to do so, should be ratified as agency rule. If the Legislature wishes, it may retain a high level of substantive oversight by allowing the agency to make changes through the rulemaking process, but requiring that any changes to specified rules be submitted to the Legislature for approval. The approval could be by either requiring affirmative legislative action to amend the changes or prevent them from taking effect (as with the Florida Water Plan statute, s. 373.036, F.S.) or by requiring a full ratification process. The Legislature also may retain oversight by requiring periodic reporting from the agencies.

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<sup>17</sup> Cross Key Waterways v. Askew, 351 So. 2d 1062, 1066 (Fla. 1977).

**163.3177 Required and optional elements of comprehensive plan; studies and surveys.--**

(9) The state land planning agency shall, by February 15, 1986, adopt by rule minimum criteria for the review and determination of compliance of the local government comprehensive plan elements required by this act. Such rules shall not be subject to rule challenges under s. [120.56\(2\)](#) or to draw out proceedings under s. [120.54\(3\)\(c\)2](#). Such rules shall become effective only after they have been submitted to the President of the Senate and the Speaker of the House of Representatives for review by the Legislature no later than 30 days prior to the next regular session of the Legislature. In its review the Legislature may reject, modify, or take no action relative to the rules. The agency shall conform the rules to the changes made by the Legislature, or, if no action was taken, the agency rules shall become effective. . . .

(10) The Legislature recognizes the importance and significance of chapter 9J-5, Florida Administrative Code, the Minimum Criteria for Review of Local Government Comprehensive Plans and Determination of Compliance of the Department of Community Affairs that will be used to determine compliance of local comprehensive plans. The Legislature reserved unto itself the right to review chapter 9J-5, Florida Administrative Code, and to reject, modify, or take no action relative to this rule. Therefore, pursuant to subsection (9), the Legislature hereby has reviewed chapter 9J-5, Florida Administrative Code, and expresses the following legislative intent:

(a) – (i) [the Legislature further describes its intentions to fulfill the purpose of the act.]

(j) Chapter 9J-5, Florida Administrative Code, has become effective pursuant to subsection (9). The Legislature hereby directs the department to adopt amendments as necessary which conform chapter 9J-5, Florida Administrative Code, with the requirements of this legislative intent by October 1, 1986.

**373.036 Florida water plan; district water management plans.--**

(1) FLORIDA WATER PLAN.--In cooperation with the water management districts, regional water supply authorities, and others, the department shall develop the Florida water plan. The Florida water plan shall include, but not be limited to:

(d) Goals, objectives, and guidance for the development and review of programs, rules, and plans relating to water resources, based on statutory policies and directives. The state water policy rule, renamed the water resource implementation rule pursuant to s. [373.019\(23\)](#), shall serve as this part of the plan. Amendments or additions to this part of the Florida water plan shall be adopted by the department as part of the water resource implementation rule. In accordance with s. [373.114](#), the department shall review rules of the water management districts for consistency with this rule. Amendments to the water resource implementation rule must be adopted by the secretary of the department and be submitted to the President of the Senate and the Speaker of the House of Representatives within 7 days after publication in the Florida Administrative Weekly. Amendments shall not become effective until the conclusion of the next regular session of the Legislature following their adoption.

**373.421 Delineation methods; formal determinations.--**

(1) The Environmental Regulation Commission shall adopt a unified statewide methodology for the delineation of the extent of wetlands as defined in s. [373.019\(25\)](#). This methodology shall consider regional differences in the types of soils and vegetation that may serve as indicators of the extent of wetlands. This methodology shall also include provisions for determining the extent of surface waters other than wetlands for the purposes of regulation under s. [373.414](#). This methodology shall not become effective until ratified by the Legislature. Subsequent to legislative ratification, the wetland definition in s. [373.019\(25\)](#) and the adopted wetland methodology shall be binding on the department, the water management districts, local governments, and any other governmental entities. Upon ratification of such wetland methodology, the Legislature preempts the authority of any water management district, state or regional agency, or local government to define wetlands or develop a delineation methodology to implement the definition and determines that the exclusive definition and delineation methodology for wetlands shall be that established pursuant to s. [373.019\(25\)](#) and this section. Upon such legislative ratification, any existing wetlands definition or wetland delineation methodology shall be superseded by the wetland definition and delineation methodology established pursuant to this chapter. Subsequent to legislative ratification, a delineation of the extent of a surface water or wetland by the department or a water management district, pursuant to a formal determination under subsection (2), or pursuant to a permit issued under this part in which the delineation was field-verified by the permitting agency and specifically approved in the permit, shall be binding on all other governmental entities for the duration of the formal determination or permit. All existing rules and methodologies of the department, the water management districts, and local

governments, regarding surface water or wetland definition and delineation shall remain in full force and effect until the common methodology rule becomes effective. However, this shall not be construed to limit any power of the department, the water management districts, and local governments to amend or adopt a surface water or wetland definition or delineation methodology until the common methodology rule becomes effective.

**373.4211 Ratification of chapter 17-340, Florida Administrative Code, on the delineation of the landward extent of wetlands and surface waters.**--Pursuant to s. [373.421](#), the Legislature ratifies chapter 17-340, Florida Administrative Code, approved on January 13, 1994, by the Environmental Regulation Commission, with the following changes:

(26) Any future amendments to rule 17-340, Florida Administrative Code, shall be submitted in bill form to the Speaker of the House of Representatives and to the President of the Senate for their consideration and referral to the appropriate committees. Such rule amendments shall become effective only upon approval by act of the Legislature.

**380.05 Areas of critical state concern.**—

(1) (c) A rule adopted by the commission pursuant to paragraph (b) designating an area of critical state concern and principles for guiding development shall be submitted to the President of the Senate and the Speaker of the House of Representatives for review no later than 30 days prior to the next regular session of the Legislature. The Legislature may reject, modify, or take no action relative to the adopted rule. In its deliberations, the Legislature may consider, among other factors, whether a resource planning and management committee has established a program pursuant to s. [380.045](#). In addition to any other data and information required pursuant to this chapter, each rule presented to the Legislature shall include a detailed legal description of the boundary of the area of critical state concern, proposed principles for guiding development, and a detailed statement of how the area meets the criteria for designation as provided in subsection (2).