



# ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XXXIII, No. 3

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April 2012

## The 2012 Amendments to the APA: The Legislature Responds to *Whiley*--and More

by Lawrence E. Sellers, Jr.

During the 2012 Regular Session, the Florida Legislature enacted several measures amending the Florida Administrative Procedure Act (APA). Among other things, these include a legislative response to the Florida Supreme Court's decision in *Whiley v. Scott*; provision for the nullification, repeal and summary removal of rules; and making the online versions of the *Florida Administrative Code* and the

*Florida Administrative Register* the official versions. Here's a brief summary of some of the bills that passed. Look for a more detailed discussion of one or more of these in the next issue of this Newsletter.

*Administrative Authority*. CS/HB 7055 is the legislative response to the Florida Supreme Court's decision in *Whiley v. Scott* that Governor

Rick Scott "impermissibly suspended agency rulemaking to the extent that Executive Orders 11-01 and 11-72 include a requirement that the Office of Fiscal Accountability and Regulatory Reform (OFARR) must first permit an agency to engage in the rulemaking which has been delegated by the Florida Legislature."<sup>1</sup> The bill affirms that Executive Orders 11-01 and 11-72<sup>2</sup> are consistent with state law,

See "2012 Amendments" page 10

## Practice Tips for Private Attorneys New to Administrative Law

by Garnett Chisenhall

In the last edition of the Administrative Law Section's Newsletter, I presented an article explaining what government attorneys can (and cannot) do with unfavorable recommended orders. While a great deal of the information in that article was also relevant for private attorneys who practice before the Division of Administrative Hearings ("DOAH"), I thought it would be appropriate to submit a follow-up article more

geared to the perspective of private attorneys.

In the course of representing state agencies over the last ten years, I have worked with many outstanding private attorneys who know the Administrative Procedure Act backward and forward. I have also worked with private attorneys who had little or no previous experience with administrative law. Sometimes, these attorneys became involved in an administrative

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and it provides express legislative authorization for the direction and supervision by elected officials over the exercise of administrative authority by appointees of those officials.

*Repeal of Unused Statutory Rulemaking Authority.* CS/HB 7029 also repeals or revises over 50 statutory provisions authorizing rulemaking, including statutes that are no longer necessary or for other reasons have never been used. In addition, the bill directs the Office of Statutory Revision to include duplicative, redundant, or unused statutory rulemaking authority among its recommended repeals in reviser's bill recommendations. Rulemaking authority is considered unused if the provision has been in effect for more than 5 years and no rule has been promulgated in reliance thereon during that time.

*Nullification and Repeal of Administrative Rules.* HB 7029 amends the APA to provide that the repeal of a substantive statute also acts to repeal the administrative rules adopted to implement that statute, to the extent the rule implements the repealed statute. A rule is nullified if the only provisions of law it implemented subsequently are repealed. The repeal of one or more provisions of law implemented by a rule, but not all statutes implemented by the rule, requires an agency to publish a notice of rule development within 80 days of the effective date of the act, stating which parts of the rule are nullified by the new act. In other instances when the repeal of a statute creates uncertainty about the continued enforceability of a rule, the Department of State (DOS) is to use the summary removal process described below. In all cases, DOS is directed to remove such rules from the *Florida Administrative Code* (FAC) as of the effective date of the law repealing the specific law implemented.

HB 7029 also creates a summary removal process to repeal published rules that DOS identifies, as part of the continuous revision system authorized by s. 120.55, that may

be no longer in full force and effect. This process includes notice to and review by the affected agency (or the Governor, where no agency may be identified). If DOS is advised that the rule is no longer in effect or receives no timely response from the agency, DOS is to provide notice of such and that the rule will be repealed summarily and removed from the FAC. An objection to the summary repeal must be filed as a petition challenging a proposed rule within 21 days of publication of notice in the *Florida Administrative Weekly*.

HB 7029 also provides for the nullification and repeal of 270 existing rules that are no longer needed or for which the specific law implemented has been repealed. These include 165 rules of five separate water management districts identified as a result of reviews conducted by the districts and OFFAR that found these rules are outdated or otherwise unnecessary for effective program function.

The repealed rules also include another 105 "orphan rules" for which the adopting agency was abolished, the grant of rulemaking authority repealed, or the specific law implemented was repealed. Where no agency appears to have authority to repeal these rules, legislative action is required to remove them from the FAC. The orphan rules also include rules implementing statutes for which responsibility has been transferred to another agency or the specific statute was repealed but reenacted under a different agency, without a clear transfer of the rules or rulemaking authority to the new agency. Examples of orphan rules include rules of the former Department of Commerce, the former Department of Health and Rehabilitative Services, the former Advisory Council on Intergovernmental Relations and the former Department of Labor and Employment Security.

*Florida Administrative Register.* HB 541 revises provisions in the APA with respect to the *Florida Administrative Code* and the *Florida Administrative Weekly*. The bill provides that the online version of the *Florida Administrative Code* is the official version for the state, and that DOS is no longer required to publish a printed version. In addition, the bill

changes the name of the *Florida Administrative Weekly* to the *Florida Administrative Register*. The online version of the *Florida Administrative Register* is the official version.

DOS is no longer responsible for reviewing submissions to the *Florida Administrative Register* for formatting, grammatical, or typographical errors. Entities are responsible for proofreading their documents and assume full responsibility for the accuracy of documents submitted.

*New Duties for Rule Ombudsman.* CS/HB 7043 amends the APA by transferring to the rules ombudsman in the Executive Office of the Governor certain rulemaking duties previously performed by the Small Business Regulatory Advisory Council and the Department of Economic Opportunity.

*Summary Hearing for Challenges to Deepwater Ports.* Section 42 of SB 1998 and section 80 of HB 599 provide that, notwithstanding s. 120.569 or s. 120.57, a challenge to a consolidated environmental resource permit or any associated variance or any sovereign submerged lands authorization proposed or issued by the Department of Environmental Protection in connection with the state's deepwater ports shall be conducted pursuant to the summary hearing provisions of s. 120.574 with some variations. Notably, the summary proceeding must be conducted within 30 days after a party files a motion for a summary hearing, regardless of whether the parties agree to the summary proceeding, and the administrative law judge's decision shall be in the form of a recommended order and does not constitute final agency action of the Department. The Department must issue the final order within 45 working days after receipt of the administrative law judge's recommended order. These summary hearing provisions apply to pending administrative proceedings.<sup>3</sup>

*Ratification of NFPA Rule.* HB 7121 ratifies the Department of Agriculture and Consumer Services rule updating the minimum standards for the storage and handling of liquefied petroleum gases. The statement of estimated regulatory costs for Rule 5F-11.002, Standards of National

Fire Protection Association Adopted, showed the rule would have a specific, adverse economic effect or would increase regulatory costs by more than \$1 million over the first 5 years of implementation of the rule. Accordingly, the rule must be ratified by the Legislature before it may go into effect.<sup>4</sup> The rule is ratified for the sole and exclusive purpose of satisfying this rulemaking condition and, as such, appears to remain subject to legal challenge pursuant to s. 120.56.<sup>5</sup>

*DEP Numeric Nutrient Criteria Rule Exempt from Legislative Ratification.* HB 7051 exempts from the legislative ratification requirement certain proposed amendments to Chapters 62-302 and 62-303, establishing numeric nutrient criteria, published by the Department of Environmental Protection.

*Publication of Notices.* CS/CS/HB 937 amends the APA to delete the authorization to publish the administrative complaint in Leon County if the licensee's last known address is located in another state or in a foreign jurisdiction. The bill also makes

a number of changes to various notice provisions when contact cannot be made by the Department of Business and Professional Regulation (DBPR) regarding an administrative complaint for failure of a licensee to notify DBPR of a change of address, including deleting certain newspaper notice requirements and instead requiring the notice to be posted on the front page of DBPR's website; and requiring DBPR to send notice via e-mail to all newspapers of general circulation and all news departments of broadcast network affiliates in the county of the licensee's last known address of record.

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This article was submitted for publication shortly after the end of the Regular Session, and as of that time none of these bills had yet been submitted to the Governor. So, stay tuned!

#### Endnotes:

<sup>1</sup> 36 Fla. L. Weekly S 451 (Fla. Aug. 16, 2011). For a discussion of the Court's decision in *Whiley v. Scott*, see Lawrence E. Sellers, Jr., *Governor's Rules Freeze: Supreme Court Says Legislative Power Trumps "Supreme Executive Power,"* Administrative Law Section Newsletter, Vol.

XXXIII, No. 1 (Sept. 2011).

<sup>2</sup> Both of these executive orders have been superseded; Executive Order 11-72 expressly supersedes Executive Order 11-01, and Executive Order 11-211 expressly supersedes Executive Order 11-72.

<sup>3</sup> It appears there are such pending administrative proceedings at DOAH involving challenges to a consolidated notice of intent to issue certain approvals that would authorize the widening and deepening of several portions of the Miami Harbor channels and turning basins. See DOAH Case Nos. 11-6242, -6243 and -6244, in which the final hearing is currently scheduled to commence on August 14, 2012.

<sup>4</sup> For a discussion of the legislative ratification requirement, see Lawrence E. Sellers, Jr., *The 2010 Amendments to the APA: Legislature Overrides Veto of Law to Require Legislative Ratification of "Million Dollar Rules,"* 85 Fla. B. J. 37 (May 2011).

<sup>5</sup> The bill expressly provides: "This act does not alter rulemaking authority delegated by prior law, does not constitute legislative preemption of or exception to any provision of law governing adoption or enforcement of the rules cited, and is intended to preserve the status of any cited rule as a rule under chapter 120, Florida Statutes. This act does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of the legal requirements governing the adoption of any rule cited."

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# Join us for the 2012 Annual Florida Bar Convention

**June 20 -23**  
**Gaylord Palms Resort & Convention Center**

## Administrative Law Section Activities:

**Thursday, June 21 – Section Reception**

**Friday, June 22 – Executive Council / Section Annual Meeting**

See The Florida Bar's website for the most up-to-date information: [www.floridabar.org](http://www.floridabar.org)