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ADMINISTRATIVE PROCEDURE ACT AMENDMENTS: THE 1991 AND 1992 AMENDMENTS TO THE FLORIDA ADMINISTRATIVE PROCEDURE ACT*

STEPHEN T. MAHER**

I. INTRODUCTION

OVER the last two years, the Florida Administrative Procedure Act¹ has been pushed and pulled by forces that have tried to reshape certain provisions of the Act in different ways. Although those efforts have only been partly successful, they have succeeded in making significant changes in the Act. Even the efforts that have not succeeded are important because they may be repeated, and that possibility raises uncertainty about the future of this basic document.

The Florida Administrative Procedure Act defines much of the way that citizens interact with their government. Today, much of the day-to-day work of government is done by the bureaucracy. The APA specifies what procedures the bureaucracy must follow in making individual determinations and broader policy decisions.

The kinds of concerns that tend to arise in the relationship between the individual and the bureaucracy and the kinds of decisions that must be made about the procedure that will be employed to govern decisionmaking in that relationship are not hard to anticipate. There will be concerns about maintaining efficiency in the decision-making process while at the same time guaranteeing that agency decisions that affect individual interests will be made fairly and accurately and will be recognized as legitimate.² To assure fairness in a system of agency decisionmaking, some ground rules must be established to specify the type of procedure that agencies must use to reach their decisions. The procedure used in making individual decisions may differ from that used in making agency rules, but, even if different procedures are es-

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1. FLA. STAT. §§ 120.50-73 (1991) [hereinafter "the Act" or "the APA"].

2. Efficiency, accuracy, and acceptability have been identified as the three normative requirements usually identified in administrative procedure. Roger Crampton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 592-93 (1972).

tablished, the same issues must be confronted and resolved in establishing each set of procedures. What agency decision making will be open to participation? Who will be permitted to participate in the decision-making process? What degree of participation will be permitted? Answers to these questions must be clear and detailed enough so that both the agencies and the public that is affected will be able to properly order their affairs. The procedures created should reflect a reasonable balance of competing concerns if the underlying principles of efficiency, accuracy, and acceptability are all to be adequately served by the procedural scheme.

The federal and state governments have wrestled with these questions for years and, over time, have adopted administrative procedure acts that reflect what they believe is a proper balance between competing interests. In Florida we have given different answers to the basic questions of administrative procedure than have other jurisdictions.³ Our APA is more concerned with limiting agency power and protecting individual interests than is the 1981 Model State Administrative Procedure Act (1981 MSAPA).⁴ Our statutory rulemaking procedure provides more opportunities to prevent agency encroachment on legislative prerogatives than does any other administrative procedure act because, both in rulemaking and after rules have been adopted, rule challenges decided by independent hearing officers are available to test the legality of rules against the claim that they exceed delegated legislative authority.⁵ In individual adjudications in Florida, with some exceptions, formal proceedings before independent hearing officers are guaranteed every time an agency affects an individual's substantial interests if a material issue of fact is in dispute.⁶ This approach provides more protection for substantial interests than do most other APAs.⁷ In cases where no facts are in dispute, informal proceedings are guaranteed.⁸ This bifurcated approach protects sub-

3. For further discussion of this point see Stephen T. Maher, *Patricia Ann Dore and the Florida Administrative Procedure Act*, 19 FLA. ST. U. L. REV. 951, 953 (1992).

4. *Id.*

5. Only the Florida APA provides substantially affected persons with rule challenges of this kind. Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U. L. REV. 967, 1012 (1986) [hereinafter Dore, *Access*]. Other states have rule review, but they do not use the Florida approach. Patricia A. Dore, *Seventh Administrative Law Conference Agenda And Report*, 18 FLA. ST. U. L. REV. 703, 725 (1991) [hereinafter Dore, *Agenda and Report*] (summarizing other state approaches).

6. See FLA. STAT. § 120.57(1) (1991).

7. "Most state APAs follow the 1961 MSAPA and the federal act by requiring a source of law external to the APA to trigger the adjudicatory procedures spelled out by the APA." ARTHUR E. BONFIELD & MICHAEL ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* 115 (1989). Florida has rejected this approach.

8. See FLA. STAT. § 120.57(2) (1991).

stantial interests while preserving flexibility. The 1981 MSAPA follows the Florida approach in this regard and provides for "several classes of adjudication of descending degrees of formality and complexity."⁹ The Florida APA thus contains powerful rights designed to protect the public against illegal or arbitrary agency action, but these are the remedies the Legislature has determined are necessary to protect individual interests against unwarranted intrusion by government. These different answers to traditional questions of administrative procedure reflect a distrust of administrative government that is uncharacteristic of other administrative procedure acts, but it is a distrust born of our experience.¹⁰

Recent legislative initiatives have attempted to push and pull the Florida Act in different directions. The widespread perception that the Legislature and the public needed better access to orders and rules—the documents most likely to illuminate agency policy—drove the changes to the Act adopted in 1991. Those amendments represent an attempt to give substance to the longstanding requirement that agencies create a subject matter index of their orders so that agency rulings in individual cases will be accessible. That change is designed to permit a better understanding of agency policy at the level of application. The 1991 amendments also require agencies, in most circumstances, to adopt their policies through the rulemaking procedures established by the Act. That change is designed to permit a better understanding of agency policy at the level of general applicability.

In the 1992 legislative session, the rulemaking provisions of the Act continued to be a focus of attention. The Governor had voiced concern when the 1991 amendments were being considered that required rulemaking would place too much of a burden on agencies. He threatened to veto the 1991 amendments, but withdrew that threat when the effective date of the amendments was delayed until March 1, 1992, in order to give him an opportunity to seek legislative changes before that effective date.¹¹ During the 1992 session, the Governor tried to amend the Act in a number of ways, but with only partial success.

Another theme emerged in the 1992 Legislature, one at odds with the fine-tuning of the Act that had been accomplished in 1991. A joint resolution proposing a constitutional amendment to permit the legislative repeal and veto of agency rules did not pass, but found support

9. BONFIELD & ASIMOW, *supra* note 7, at 116.

10. Maher, *supra* note 3, at 953. For a discussion of the historical background of the present Florida APA, see Symposium, *The New Florida Administrative Procedure Act: Selected Presentations from the Attorney General's Conference*, 3 FLA. ST. U. L. REV. 64 (1975) (including six articles); FLA. ADMIN. PRACTICE, § 1.02, at 1-1 to 1-5 (Supp. 1992).

11. Ch. 91-191, 1991 Fla. Laws 1604.

within the Legislature.¹² Also, more than two-thirds of the members of the Florida House of Representatives cosponsored a bill that would significantly changed the existing rulemaking system to provide greater legislative involvement in rulemaking.¹³ This bill did not pass, but the disenchantment with the present system that it reflected was surprising given the 1991 amendments. The 1991 amendments reaffirmed a number of the basic policy choices made in the Act and focused on making those requirements more enforceable. The 1992 session evidenced a different mood, although that difference was given only limited expression in the legislation that emerged. It is perhaps clearest in the parts of the new legislation that increased the power of the Legislature's Joint Administrative Procedures Committee (JAPC) in the agency rulemaking process.

The compromise that was voted out as the 1992 amendments did several things. The major 1992 amendments included changes to the economic impact statement requirement, changes giving the JAPC greater power, further limitations on the access of prisoners to the remedies provided under the Act, limitations on judicial review of rules, and the adoption of a new procedure for adopting federal standards as state administrative rules. These changes were adopted as part of a bill that emerged as a last-minute legislative compromise after it appeared likely that no APA amendments would pass in the 1992 session.

The 1992 amendments must be viewed in context to be fully understood. Some of the forces that shaped the 1992 amendments to the Act were a direct response to the 1991 amendments. For that reason, discussion begins with the 1991 amendments. After the 1991 amendments are analyzed, the 1992 amendments will be reviewed.

II. SETTING THE STAGE FOR THE 1992 AMENDMENTS

During the 1991 session, the Florida APA was amended in two important ways.¹⁴ First, the Act was amended to require agencies to adopt their policies as rules where it was feasible and practicable for them to do so.¹⁵ Second, the APA was amended to require agencies to index their orders so those orders would be more accessible to the

12. See Fla. S. Comm. on Approp., Amendment 1 to SJR 766 (1992) (proposed FLA. CONST. art. III § 19) (on file with comm.).

13. Fla. SB 824 (1992). This bill sought to require that agency rules be approved or adopted by the Legislature before they become effective. *Id.*

14. For further discussion of developments during the 1991 legislative session, see Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 FLA. ST. U. L. REV. 437 (1991).

15. Ch. 91-30, § 3, 1991 Fla. Laws 241, 244-46 (codified at FLA. STAT. § 120.535).

public.¹⁶ These changes were the result of many years of academic criticism and at least two years of legislative study.¹⁷ The problems the Legislature tried to address and the solutions it tried to craft to these problems demonstrate that the 1991 amendments reaffirmed the basic policy choices made in the Act.

A. *The 1991 Amendments*

1. *The Problems Addressed*

The problem the 1991 legislation sought to address was that “[t]he unchecked use of adjudication to develop policies and the lack of meaningful access to agency orders”¹⁸ had created a situation where “the people who need to know an agency’s position on a given issue cannot find it.”¹⁹ By addressing the problem two ways—by requiring more policy to be adopted as rules as well as requiring better access to the results of individual adjudication—the legislation sought to force agency policy out in the open, where it was more likely to be known and understood when it should be followed or to be debated and revised when it should be changed.

The problem of inadequate access to agency policy has been recognized and addressed before in Florida. The present APA was itself an innovation intended to “cut down on the private knowledge of the policies which shape agency decisions which is now possessed only by small groups of specialists and the agencies’ staff.”²⁰ The 1974 APA’s requirement that each agency maintain a subject matter index of its orders was always explicit.²¹ It was an innovation that made sense because indexing orders by subject matter would make decisions in prior similar cases available to both the agency and the public, and all involved in agency proceedings would have a better understanding of what the agency’s policy was and how it was being applied.

The Act’s rulemaking requirements were similarly designed to make agency policy clear and accessible to all. The advantages of policy-making by rule have been recognized by leading commentators in the

16. *Id.* § 2, 1991 Fla. Laws at 242-44 (codified at FLA. STAT. § 120.53(2)(a)3.).

17. For a survey of the academic criticism and legislative efforts, see Dore, *supra* note 14, at 438-39.

18. *Id.* at 438.

19. *Id.*

20. REPORTER’S COMMENTS ON PROPOSED ADMINISTRATIVE PROCEDURE ACT FOR THE STATE OF FLORIDA, Mar. 9, 1974, at 6, *reprinted in* 3 FLA. ADMIN. PRACTICE App. C (1979).

21. FLA. STAT. § 120.53(2)(c) (Supp. 1974) (provided that each agency shall make available “[a] current subject-matter index, identifying for the public any rule or order issued or adopted after January 1, 1975.”).

field.²² Rules are almost always more visible to the public and to elected officials monitoring the performance of agencies than are the results of individual adjudications.²³ Rules tend to be published and readily available at libraries. Individual agency decisions tend to be harder to find and, when they are found, their impact on future agency action is more difficult to understand.²⁴ In addition, there is a broader opportunity for public comment in rulemaking than in individual adjudication, and rulemaking is more efficient than making law by adjudication.²⁵

Although the indexing and rulemaking provisions were reasonable solutions to problems of access to agency information, they ultimately failed to guarantee access to agency policy because agencies failed to follow them and the courts failed to enforce agency compliance with these requirements. The indexing requirement of the 1974 Act,²⁶ which was revised in 1979 to permit agencies to use an official reporter,²⁷ was widely ignored. That is clear from a report by the Senate Committee on Governmental Operations that found "[w]hile some agencies are generally in compliance with the requirements of the law, the practices and procedures of a significant number of agencies fail to carry out the objectives or agency order requirements of the Administrative Procedure Act."²⁸ That is the opinion of other commentators as well.²⁹

The consequences of this noncompliance are significant for regulated persons, the Legislature, and the public at large, all of whom may not know what policies an agency is following in deciding individual cases. What may be worse, the agency itself may not know what those who act for it are doing. This ignorance may result in the development of inconsistent agency policies, which results in unfairness, or may require the agency to act without the benefit of its past experience, which is inefficient and may contribute to making arbitrary or incorrect decisions.

22. See generally ARTHUR E. BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* (1986).

23. *Id.* at 108.

24. *Id.* at 106-08.

25. *Id.*

26. FLA. STAT. § 120.53(2)(c) (Supp. 1974).

27. Ch. 79-299, § 2, 1979 Fla. Laws 1589, 1591 (codified at FLA. STAT. § 120.53(4)).

28. STAFF OF FLA. S. COMM. ON GOVTL. OPS., *A REVIEW OF INDEXING OF AGENCY ORDERS ISSUED PURSUANT TO CHAPTER 120, F.S., ADMINISTRATIVE PROCEDURE ACT 121 (1989)* (on file with comm.).

29. See Dore, *supra* note 14, at 438; David W. Nam & Barry Kling, *Agency Implementation of Delegated Authority: Towards Compliance with Legislative Intent*, FLA. B.J., Feb. 1991, at 64, 65.

The rulemaking provisions of the 1974 Act were also not faithfully followed. Section 120.54, which outlines rulemaking procedure, must be followed when an agency adopts a statement that comes within the definition of a rule.³⁰ Section 120.52(16) defines the term "rule" as "each agency statement of general applicability that implements, interprets, or prescribes law or policy."³¹ This broad definition was designed to define rules by their effect, not by the formalities used to adopt them. Under this definition, even an unpromulgated agency statement can be a rule. It was thought that this broad definition of a rule would subject a wide range of agency policy to the rigors of the rulemaking process.

Agencies have a long history of resistance to the use of the rulemaking process to adopt their policies as rules because they have tended to view the rulemaking procedures set forth in section 120.54 as onerous.³² In the earliest days of the Act, substantially affected persons could respond to noncompliance with the Act's rulemaking provisions by invalidating unpromulgated agency policy using the section 120.56 rule challenge remedy.³³ However, over time, the courts have softened their position on agency noncompliance with these requirements, and have decided that the failure to promulgate agency policy as rules may not necessarily render that policy invalid or unusable.³⁴ That has reduced the ability of substantially affected persons to protect themselves from unpromulgated policy and to force the agency into rulemaking.³⁵

This change in position was apparently the result of concern in the courts that requiring strict compliance with rulemaking requirements would spur agency compliance with the Act, but also would punish the public for an agency's procedural shortcomings. The concern that automatic invalidation of unpromulgated policy might more often reflect clever lawyering than substantial justice seemed quite real. There

30. FLA. STAT. § 120.54 (1974).

31. *Id.* § 120.52(16) (1991).

32. For my vision of how the rulemaking procedures of the Act should work, and why even the more expanded rulemaking process that I describe would not be onerous, see Stephen T. Maher, *We're No Angels: Rulemaking and Judicial Review in Florida*, 18 FLA. ST. U. L. REV. 767 (1991).

33. Dore, *supra* note 14, at 437. If the policy was invalidated, it "could not be used as a basis for agency action until it was properly adopted." *Id.*

34. See, e.g., *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977) (court excepted "incipient agency policy" from the Act's rulemaking requirements).

35. Of course, it has always been possible to require rulemaking, in limited circumstances, through the filing of a petition to initiate rulemaking pursuant to section 120.54(5), assisted by judicial review if the agency fails to comply voluntarily. See, e.g., *Guerra v. Department of Labor and Employment Sec.*, 427 So. 2d 1098 (Fla. 3d DCA 1983).

was also a concern that forcing an agency into rulemaking before its policy was fully developed was unwise. Apparently as a result of these concerns, the courts softened their position on this issue.

The courts accomplished this shift by recognizing an exception to the adoption of policy by rule where the policy involved was "incipient policy."³⁶ The theory behind this exception was that because such policy is still incipient, it is not yet of general applicability, and thus does not fit the definition of a rule in section 120.52(16).³⁷ As Professor Patricia Dore noted, "[t]he idea was to allow agencies to develop policies on a case-by-case basis until they had enough knowledge and experience to formalize the policy into rules."³⁸ She also stated, "[i]ncipient, emerging, nonrule policy had to be available for use or otherwise policy development would be stifled."³⁹

The courts began to permit agencies that had not adopted their incipient policies as rules to "prove up" those policies as they were applied at section 120.57 hearings.⁴⁰ Although this "prove up" requirement provided agencies with less incentive to adopt their policies as rules than the earlier invalidation approach, the courts apparently believed requiring the agency to prove up its policy repeatedly in section 120.57 proceedings would move the agency toward rulemaking to relieve itself of this burden. While this assumption seemed reasonable at the time, over the years it has become clear that this incentive has not been equal to the task. Many agencies have seemed content to repeatedly prove up their policies rather than to subject those policies to the rigors of the rulemaking process.⁴¹ At the point that legislation was proposed on this issue, rulemaking had become the exception rather than the rule.⁴²

2. *The Solutions Adopted*

The legislative history of chapter 91-30 reflects the sentiments behind this new legislation. It evidences a belief that the provisions of

36. *McDonald*, 346 So. 2d at 579.

37. *Id.* See also Dore, *supra* note 14, at 437-38; Nam & Kling, *supra* note 29, at 65.

38. Dore, *supra* note 14, at 437.

39. Dore, *Agenda and Report*, *supra* note 5, at 709.

40. See, e.g., *Health Care and Retirement Corp. of Am. v. Department of HRS*, 559 So. 2d 665, 668 (Fla. 1st DCA 1990) ("an agency may apply incipient or developing policy in a Section 120.57 administrative hearing *provided the agency explicates, supports and defends such policy with competent, substantial evidence on the record in such proceeding.*") (emphasis in original) (citation omitted).

41. See Dore, *Agenda and Report*, *supra* note 5, at 709.

42. See *id.* at 710; see also Dore, *supra* note 14, at 437-39.

the APA designed to provide access to agency precedent and to subject agency policy to scrutiny in the rulemaking process had broken down. As the House Committee on Governmental Operations found, “[a]t 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.”⁴³

The Legislature responded to this situation in two ways: by strengthening the indexing requirement and by requiring more agency rulemaking. It is significant that the remedy adopted in 1991 was much the same remedy to the problem of inadequate public access to agency policy that was adopted in 1974. That showed that the Legislature had not lost confidence in its basic approach. For its basic approach to work, however, the courts must be less forgiving than they have in the past with agency noncompliance with legislatively-created requirements.

a. *Indexing Orders*

In enacting changes to the requirement that agency orders be indexed, the Legislature recognized, as the earlier Senate Report had, that “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.”⁴⁴ The legislative history also explains the importance of the provisions on indexing that were included in that chapter. “A meaningful system of access to agency orders is necessary because these orders may provide the only means for identification of statements of an agency’s nonrule policy.”⁴⁵

The legislative response to the need for better indexes was contained in several sections of chapter 91-30.⁴⁶ Section 1⁴⁷ amended section 119.041, *Florida Statutes*, to provide that agency orders that comprise final agency action and that must be indexed or listed pursuant to section 120.53(2) shall be permanently maintained.

43. Staff of Fla. H.R. Comm. on Govtl. Ops., HB 1879 (1991) Staff Analysis 4 (final May 22, 1991) (on file with comm.) [hereinafter “1991 Final Bill Analysis”].

44. *Id.* at 3-4.

45. *Id.* at 3.

46. For additional discussion of these developments, see Dore, *supra* note 14, at 450-54.

47. Ch. 91-30, § 1, 1991 Fla. Laws 241, 242 (codified at FLA. STAT. § 119.041(1),(2)).

Section 2⁴⁸ amended section 120.53(2). Before amendment, that section provided that each agency must maintain "a current subject matter index, identifying for the public any rule or order issued or adopted after January 1, 1975."⁴⁹ That broad mandate had been widely ignored. The new amendment limited the type of orders that must be maintained and strengthened the indexing requirement. Section 2 of chapter 91-30 provided that "unless excluded under paragraph (c) or paragraph (d)," the following orders must be indexed:

- a. Each final agency order resulting from a proceeding under § 120.57(1) or (2);
- b. Each final agency order rendered pursuant to § 120.57(3) which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value;
- c. Each declaratory statement issued by an agency; and
- d. Each final order resulting from a proceeding under § 120.54(4) or § 120.56.⁵⁰

The statute goes on to require agencies to maintain a list of those final orders rendered pursuant to section 120.57(3),⁵¹ which have been excluded from the indexing requirements of this section with the approval of the Secretary of State "because they do not contain statements of agency policy or statements of precedential value."⁵² Thus, it is clear that while the indexing requirements of section 120.53(2)(a)3. are less broad than the old, unenforced indexing requirements they replace, the requirements are still intended to cover most of the final orders entered by agencies in their day-to-day work.

The legislation contains some exceptions to this broad mandate found in section 120.53(2)(c) and (d).⁵³ Subsection (c) establishes the areas in which agencies must seek approval in writing from the Secretary of State.⁵⁴ It provides that each agency must receive such approval for "the specific types and categories of agency orders that may be excluded"⁵⁵ from indexing and publication requirements; the

48. *Id.* § 2, 1991 Fla. Laws at 242-44 (codified at FLA. STAT. § 120.53(2)(a)1.-5.).

49. FLA. STAT. § 120.53(2) (1991).

50. Ch. 91-30, § 2, 1991 Fla. Laws 241, 242 (codified at FLA. STAT. § 120.53(2)(a)3.a.-d.).

51. Section 120.57(3) governs "informal disposition" by "stipulation, agreed settlement, or consent order."

52. Ch. 91-30, § 2, 1991 Fla. Laws 241, 243 (codified at FLA. STAT. § 120.53(2)(a)4.). Orders must be indexed or listed within 120 days of rendition. *Id.*, 1991 Fla. Laws at 244 (codified at FLA. STAT. § 120.53(2)(b)).

53. *Id.* § 2, 1991 Fla. Laws at 243 (codified at FLA. STAT. § 120.53(2)(c)-(d)).

54. *Id.* (codified at FLA. STAT. § 120.53(2)(c)).

55. *Id.* (codified at FLA. STAT. § 120.53(2)(c)1.).

method of maintaining indexes, lists, and orders;⁵⁶ the method of public inspection;⁵⁷ the numbering system used;⁵⁸ and the proposed rules implementing these requirements.⁵⁹ Subsection (d) provides that:

In determining which orders may be excluded from indexing and public inspection requirements, the Department of State may consider all factors specified by an agency, including precedential value, legal significance, and purpose. Only agency orders that are of limited or no precedential value, that are of limited or no legal significance, or that are ministerial in nature may be excluded.⁶⁰

Other amendments to section 120.53 require agencies to specify by rule the types of orders they were excluding and the locations from which and the methods by which the required documents could be obtained.⁶¹ Agencies also were required to specify by rule all systems in use by the agency to search and locate agency orders that are required to be indexed, including automated systems.⁶² The “search capabilities employed by the agency” shall be made available to the public “subject to reasonable terms and conditions, including a reasonable charge, as provided in s. 119.07.”⁶³ The agency must also specify by rule how assistance and information pertaining to orders may be obtained.⁶⁴

The requirements governing the use of a designated official reporter were also changed. Even where the agency contracts for the publication of its orders with an official reporter, the new provisions make the agency retain responsibility for the “quality, timeliness and usefulness of the reporter.”⁶⁵ The amendment also provides that the Department of State may publish an official reporter.⁶⁶

Section 5 of chapter 91-30⁶⁷ amends section 120.59 to add two paragraphs—paragraph (1)(b), which provides for a method of incorporating materials by reference in orders that must be indexed or listed pursuant to section 120.53, and paragraph (1)(c), which provides for the sequential numbering of orders that must be indexed or listed.

56. *Id.* (codified at FLA. STAT. § 120.53(2)(c)2.).

57. *Id.* (codified at FLA. STAT. § 120.53(2)(c)3.).

58. *Id.* (codified at FLA. STAT. § 120.53(2)(c)4.).

59. *Id.* (codified at FLA. STAT. § 120.53(2)(c)5.).

60. *Id.* (codified at FLA. STAT. § 120.53(2)(d)).

61. *Id.* (codified at FLA. STAT. § 120.53(2)(e)-(f)).

62. *Id.*

63. *Id.*, 1991 Fla. Laws at 244 (codified at FLA. STAT. § 120.53(2)(g)).

64. *Id.*

65. *Id.* (codified at FLA. STAT. § 120.53(4)(b)).

66. *Id.*

67. *Id.* § 5, 1991 Fla. Laws at 249 (codified at FLA. STAT. § 120.59).

Section 7 of chapter 91-30⁶⁸ provides that the Division of Administrative Hearings (DOAH) shall direct a study and pilot project to implement a full text retrieval system to provide access to recommended orders, final orders, and declaratory statements. The study and pilot project are well under way.

Section 9 of chapter 91-30⁶⁹ charges the Department of State with the responsibility to "[a]dminister the coordination of the indexing, management, preservation, and availability of agency orders that must be indexed or listed"⁷⁰ pursuant to section 120.53(2), *Florida Statutes*. The Department must also "[p]rovide, by rule, guidelines for the indexing of agency orders."⁷¹ It must also provide, by rule, the storage and retrieval systems that must be maintained for indexing and making available agency orders.⁷² These may include designating a reporter, a microfilming system, an automated system, or some other approach.⁷³

In addition to the responsibility to adopt the above-mentioned rules, the Department of State has responsibilities in connection with the adoption of rules by other agencies. It must:

[r]equire each agency, before adopting proposed rules, to report to the department concerning which types or categories of agency orders establish precedent for each agency. Each final order that establishes precedent for an agency and that has not been approved by the department for exclusion pursuant to paragraphs 120.53(2)(c) and (d), *Florida Statutes*, must be indexed.⁷⁴

It is also charged with determining "which final orders must be indexed for each agency, including all final orders that are not excluded from indexing requirements by the Department of State pursuant to paragraphs 120.53(2)(c) and (d), *Florida Statutes*."⁷⁵

In addition, the Department of State is charged with broad administrative responsibilities in this area. It is charged with assuring agency compliance with many of the new requirements,⁷⁶ and it must provide technical and other support for agencies in this area.⁷⁷ The Depart-

68. *Id.* § 7, 1991 Fla. Laws at 250.

69. *Id.* § 9, 1991 Fla. Laws at 251 (codified at FLA. STAT. § 120.533).

70. *Id.* § 9(1)(a), 1991 Fla. Laws at 251 (codified at FLA. STAT. § 120.533(1)(a)).

71. *Id.* § 9(1)(b), 1991 Fla. Laws at 251 (codified at FLA. STAT. § 120.533(1)(b)).

72. *Id.* § 9(1)(c), 1991 Fla. Laws at 251 (codified at FLA. STAT. § 120.533(1)(c)).

73. *Id.*

74. *Id.* § 9(1)(e), 1991 Fla. Laws at 251 (codified at FLA. STAT. § 120.533(1)(e)).

75. *Id.* § 9(1)(d), 1991 Fla. Laws at 251 (codified at FLA. STAT. § 120.533(1)(d)).

76. *Id.* § 9(1)(f), 1991 Fla. Laws at 251 (codified at FLA. STAT. § 120.533(1)(e)).

77. *Id.* § 9(1)(g)-(i), 1991 Fla. Laws at 251-52 (codified at FLA. STAT. § 120.533(1)(g)-(i)).

ment is further required to adopt rules "to administer its duties under this act."⁷⁸

b. Agency Rulemaking

Chapter 91-30 also contained the legislative response to the need for more agency rulemaking. That chapter created a new section 120.535, *Florida Statutes*,⁷⁹ which declares that "rulemaking is not a matter of agency discretion."⁸⁰ Now, all statements that are "rules," as that term is defined in section 120.52(16), *Florida Statutes*,⁸¹ "shall be adopted by the rulemaking procedure provided by s. 120.54 as soon as feasible and practicable."⁸² Rulemaking shall be presumed feasible and practicable unless the agency proves certain defined conditions exist which, in the Legislature's judgment, justify a departure from this requirement. This new provision also establishes a new type of administrative proceeding that may be used to enforce this rulemaking requirement.⁸³ An agency that loses a section 120.535 proceeding must not rely on the unpromulgated statement unless it takes specified actions to adopt the statement as a rule.⁸⁴ The provision also provides for the assessment of attorneys' fees against the agency heads of repeat offenders.⁸⁵

In conjunction with the adoption of section 120.535, the Legislature amended section 120.57 to add a new subsection 15:

Each agency statement defined as a rule under s. 120.52 and not adopted by the rulemaking procedure provided by s. 120.54 which is relied upon by an agency to determine the substantial interests of a party shall be subject to de novo review by a hearing officer. A statement shall not enlarge, modify or contravene the specific provision of law implemented or otherwise exceed delegated legislative authority. The statement applied as a result of a proceeding pursuant to this subsection shall be demonstrated to be within the scope of delegated legislative authority. Recommended and final orders pursuant to this subsection shall provide an explanation of the statement that includes the evidentiary basis which supports the statement applied and a general discussion of the justification for the statement.⁸⁶

78. *Id.* § 9(1)(j), 1991 Fla. Laws at 252 (codified at FLA. STAT. § 120.533(1)(j)).

79. *Id.* § 3, 1991 Fla. Laws at 244-46 (codified at FLA. STAT. § 120.535).

80. *Id.*, 1991 Fla. Laws at 244 (codified at FLA. STAT. § 120.535(1)).

81. *See supra* text accompanying note 31.

82. Ch. 91-30, § 3, 1991 Fla. Laws 241, 244 (codified at FLA. STAT. § 120.535(1)).

83. *Id.*, 1991 Fla. Laws at 245-46 (codified at FLA. STAT. § 120.535(2)-(3), (7)).

84. *Id.*, 1991 Fla. Laws at 246 (codified at FLA. STAT. § 120.535(4), (5)).

85. *Id.* (codified at FLA. STAT. § 120.535(6)).

86. *Id.* § 4, 1991 Fla. Laws at 249 (codified at FLA. STAT. § 120.57(1)(b)15.).

Finally, chapter 91-30 added section 120.68(3)(b)⁸⁷ to the *Florida Statutes*. That subsection provides there is no automatic stay of the hearing officer's decision in a section 120.535 proceeding. This section is designed to assure that an agency seeking to delay the effect of the hearing officer's decision in a section 120.535 case can demonstrate grounds for such a delay before one will be granted.

B. A Critique of the 1991 Amendments

1. The New Indexing Provisions

The new indexing requirements are clear at the level of general themes but become less clear when the text of the amendments is closely examined. At the level of general themes, the new amendments are intended to be a leaner and meaner version of the requirements they replace. The new requirements are leaner because fewer orders are covered: only final orders must be indexed. They are meaner because a specific agency response is required. Each agency is expected to respond by enacting rules, approved by the Department of State, that explain how to access their final orders and each must index these orders within 120 days of rendition. At the level of specifics, the statute is somewhat less clear.

The scheme the amendments establish can be summarized this way. All *final* orders in sections 120.57(1), 120.57(2), 120.54(4), and 120.56 proceedings are included within the indexing requirements unless they are of limited or no precedential value, are of limited or no legal significance, or are ministerial in nature. Section 120.57(3) orders must be indexed if they contain a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value.⁸⁸ If section 120.57(3) orders do not satisfy this standard, and if the Department of State agrees, section 120.57(3) orders need not be indexed, but they still must be listed.⁸⁹

It does not appear that final orders entered in proceedings authorized by sections 120.57(1), 120.57(2), 120.57(4), or 120.56 must be listed if they are excluded, although section 120.57(3) orders excluded on similar grounds must be listed. It is unclear why this distinction was made because there appears to be no sound reason to treat the two categories of excluded orders differently. What impact omitting categories of orders from the listing requirement will have is also unclear as even unlisted orders might be obtained through the public inspection requirements of this section.⁹⁰ However, it is unclear from the

87. *Id.* § 6, 1991 Fla. Laws at 250 (codified at FLA. STAT. § 120.68(3)(b)).

88. *Id.* § 2, 1991 Fla. Laws at 243 (codified at FLA. STAT. § 120.53(2)(a)3.b.).

89. *Id.* (codified at FLA. STAT. § 120.53(2)(a)4.).

90. FLA. STAT. § 120.53(2)(a)(2) (1991) (all agency orders shall be made available for public inspection and copying at no more than cost).

amendments how long unindexed and unlisted materials will be maintained. The amendment to section 119.041 contained in chapter 91-30⁹¹ provides only that indexed and listed orders with continuing legal significance must be permanently maintained.

The new indexing system has shortcomings in both design and execution. The system begins with the flawed assumption that only some agency orders are important. The problem with this assumption is that which agency orders are "important" and which are "unimportant" cannot necessarily be determined in the abstract. That determination is often contextual. If a lawyer is handling a case on an issue that has never been decided in a section 120.57(1) proceeding, but has often been addressed in agency orders entered in connection with settlements, then even what people might characterize as the most important section 120.57(1) case decided by the agency that year, if decided on another issue, is of absolutely no importance to that lawyer. Even if the settlements are not viewed by the agency as significant, they are significant to that lawyer. Because all agency orders, even those entered in settlements, are potentially of critical importance, it is error to confine the indexing requirements to some abstract concept of important cases. It is especially wrong to treat orders in settlements as second-class orders.⁹² In some contexts—such as in professional licensing—those orders may yield vital information concerning how the agency has treated similarly situated individuals. Thus, the decisions to "pare down" the indexing requirement, to limit it to final orders, and to provide second-class treatment to orders entered in connection with settlements may make enforcement of the requirement more palatable, but important information will be lost as a result of those concessions.

The Department of State has adopted rules to implement the new indexing requirements. Chapter 1S-6⁹³ of the *Florida Administrative Code* was adopted by the Department of State, effective January 1, 1992, to establish the minimum requirements that other agencies must follow in indexing final orders. This was done to implement the 1991 legislation requiring indexing of final orders. Rule 1S-6.004 provides:

91. Ch. 91-30, § 1, 1991 Fla. Laws 241, 242 (codified at FLA. STAT. § 119.041(1), (2)).

92. *Id.* § 2, 1991 Fla. Laws at 242-43 (codified at FLA. STAT. § 120.53(2)(a)3.b.). This section provides for indexing in this circumstance only where orders contain a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value. *Id.* Although this may sound quite similar to the indexing requirement for section 120.57(1) final orders, the extent of its difference depends on the selection process used for determining which are the "important" section 120.57(3) orders and who does the selection. As the discussion of the Department of State rules that follows demonstrates, *see infra* text accompanying notes 93-98, latitude in this area can easily become license.

93. FLA. ADMIN. CODE ANN. r. 1S-6.004 (1992).

The following final orders resulting from a proceeding under section 120.54(4), 120.56, 120.565, and 120.57(1), (2) or (3), Florida Statutes, must be indexed:

(1) A final order which discusses a substantial legal issue of first impression which is actually resolved in the case;

(2) A final order which establishes a rule of law, principle, or policy for the first time which the agency will rely upon and apply in similar circumstances;

(3) A final order which alters, modifies, or significantly clarifies a rule of law, principle, or policy previously applied, announced, or relied upon by the agency;

(4) A final order which resolves an apparent conflict in decisions of the agency or harmonizes decisions of appellate courts.⁹⁴

These Department of State rules may be invalid because they appear to conflict with the legislation they purport to implement. The Department's rules require agencies to index only four categories of final orders: (1) a final order that discusses a "substantial legal issue of first impression which is actually resolved in the case";⁹⁵ (2) a final order that "establishes a rule of law, principle, or policy for the first time, which the agency will rely upon and apply in similar circumstances";⁹⁶ (3) a final order that "alters, modifies or significantly clarifies a rule of law, principle or policy previously applied, announced or relied upon";⁹⁷ or (4) a final order that resolves an apparent conflict "in agency decisions or that harmonizes decisions of appellate courts."⁹⁸ This rule takes an extremely narrow view of what must be indexed (only "important" orders) and takes a very narrow view of what kind of orders are "important" (only orders that break new ground).

This is clearly a different indexing standard than the one adopted by the Legislature.⁹⁹ The Legislature mandated the indexing of "each final agency order" in all section 120.57 proceedings. There are two exceptions to this rule. The first is that where section 120.57(3) proceedings are involved, only orders which contain "a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value"¹⁰⁰ must be indexed. The second exception is that the Department of State may

94. *Id.* r. 1S-6.004(1)-(4).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *See supra* notes 88-91 and accompanying text.

100. Ch. 91-30, § 2, 1991 Fla. Laws 241, 242 (codified at FLA. STAT. § 120.53(2)(a)3.b.).

grant exclusions from the Act's broad indexing requirements pursuant to section 120.53(2)(d).¹⁰¹

The Legislature recognized that, in some circumstances, it would be appropriate to grant exclusions from the Act's broad indexing mandate, but it drew the parameters for those exceptions narrowly. The Legislature mandated that "[o]nly agency orders that are of limited or no precedential value, that are of limited or no legal significance, or that are ministerial in nature may be excluded."¹⁰² This "slim to none" exclusion standard in the statute has been transformed by the Department of State into an "only the most significant" inclusion standard. The Department's decision to require indexing only especially significant orders is hard to reconcile with either the language of the statute or the clear legislative intent. If it is followed, this rule may exclude the bulk of final agency orders from the indexing requirement. This cannot be what the Legislature intended. For these reasons, it appears that the rule conflicts with the statute and is, therefore, invalid. The argument can be made that the language in section 120.53(2)(d) that provides for the exception of agency orders of "limited or no precedential value" gave the Department of State the authority to judge what is meant by "limited" precedential value, and that all orders that do not break new ground have "limited" value. The problem with this approach is that it fails to give adequate consideration to the intent of the statute.

The statute intended to make agency decisions available to the Legislature to conduct oversight activities and to substantially affected persons so they can better prepare and argue their cases to agencies. The limitation of indexing to major precedents decreases the amount of information indexing can provide about agency policy. It is one thing to know a precedent has been established. It is another to know whether it is being followed. What makes a precedent major: whether it is delivered with fanfare, or whether it is followed faithfully in a given factual situation? Will the index required by the Department of State allow substantially affected persons to determine whether a major precedent is published with fanfare but conveniently ignored in similar factual circumstances? It does not appear that it will. By allowing an agency to determine the precedents it wants people to think are significant and to keep the rest of its decisions inaccessible, the rule permits an agency to create a fictional version of its policy. That version may play well to the public or the legislators that it is designed to impress, but it may not stand up to the careful scrutiny that a bet-

101. *Id.*, 1991 Fla. Laws at 243 (codified at FLA. STAT. § 120.53(2)(d)).

102. *Id.*

ter index would permit concerning how those allegedly significant precedents have been applied, case by case. If all the new indexing requirement accomplishes is to allow the agency to showcase precedents it is proud of, then it will not really produce the kind of public information about agency policy—the raw material for legislative oversight—that the statutory changes were intended to produce. The Legislature should never have included the phrase “limited or” in the exception section. That language is not consistent with other sections of the statute, which clearly evidence an intent to require the indexing of the great bulk of agency final orders, and it has provided the excuse for creating a rule that, if followed by other agencies, promises to weaken the already weakened indexing requirements of the Act.

The Department of State rule is particularly surprising because it does not appear that the Legislature even intended the Department to restate the legislative standard. The statute seems to charge the Department with devising a *system* for implementing the legislative exclusion standard articulated in the statute—a task that the Department still has apparently not undertaken, at least not through the rule adoption process. The Department should be ensuring that agencies comply with the statute’s requirements, determining where exclusions are appropriate within the narrow limits set by the statute, and assisting agencies with technical and other support so they may more easily comply with the legislative mandate.¹⁰³ The legislation clearly contemplates an exception-drawing process that is individual to each agency. The rules needed here are procedural, not substantive. They should prescribe the procedure to be followed when the Department of State determines (1) which types or categories of agency orders establish precedent for each agency, (2) which agency orders will be approved for exclusion pursuant to section 120.53(2)(c) and (d), and (3) which agency orders entered pursuant to section 120.57(3) will be excluded.¹⁰⁴ Rules could specify the types of materials that must be submitted with the request for an exception to help the Department determine the “types or categories of agency orders”¹⁰⁵ that establish precedent and could specify other information that should be submitted to make the Department’s exception drawing process more accurate and efficient. A more established process could provide a forum for the discussion of which orders should be excluded from the indexing requirements, and which should not. There presently is no clear

103. *Id.* § 9(1)(j), 1991 Fla. Laws at 252 (codified at FLA. STAT. § 120.533(1)(j)) (providing that the Department of State shall adopt rules to administer its duties under this Act).

104. *Id.* § 9(1)(d), 1991 Fla. Laws at 251 (codified at FLA. STAT. § 120.533(1)(d)).

105. *Id.* § 9(1)(e), 1991 Fla. Laws at 251 (codified at FLA. STAT. § 120.533(1)(e)).

point of entry into this decision-making process. It is not clear whether or how the Department of State is viewing each agency's individual circumstances in granting exemptions pursuant to this provision.

The Department of State's approach to indexing could seriously degrade the value of the agency indexes now being developed. If agencies follow the Department's narrow approach to indexing, the indexes that are being developed will contain only orders the agency thinks are important and may not reflect settled law. Subject matter indexes of this quality will prove to be a waste of resources because they will not significantly improve access to agency information.

Assuming the Department of State rules are valid, they present significant interpretive problems. Does the new indexing statute, along with the Department of State rules adopted to implement it, require agencies that have not indexed their rules to index their final orders back to 1975 when the indexing requirement was first enacted? Or is the new requirement prospective only, requiring agencies that have thus far failed to comply with the indexing requirement to do so beginning with final orders rendered after the effective date of the new statute and Department rules?

If only prospective indexing is required, then two points arise. First, if the amendment's requirements are prospective, what is the nature of the compromise? Does the amendment repeal the old, broader indexing requirements or does it leave those old requirements unchanged? If the old requirements remain unchanged, agencies must still index *all* of their orders before the effective date of the amendment. If the amendment has the effect of repealing old indexing requirements, then agencies that have failed to comply with that requirement since 1975 have been pardoned and will never have to make those seventeen years of agency precedent accessible to the public. That pardon is a significant concession because it may remove the agency's failure to comply with the old indexing requirement as a ground for remand of agency action on judicial review.

The failure of an agency to comply with the indexing requirements of section 120.53 has long had the potential for creating error in section 120.57 proceedings. Error can occur in the following way. While a petition for a hearing pursuant to section 120.57 is pending, a substantially affected person can request a subject matter index of agency orders to assist in the preparation for the upcoming hearing. This can either be done through discovery in connection with the section 120.57 hearing or the section 120.57 petition can be joined with a petition pursuant to section 120.54(5) requesting the agency "to provide the

minimum public information required by s. 120.53.¹⁰⁶ If the agency has not compiled a subject matter index, and does not provide one as requested, that failure interferes with the substantially affected person's ability to prepare for the section 120.57 hearing. While this could be prejudicial in almost any case, it is especially prejudicial in cases where the agency policy involved in the hearing is policy that has not been adopted by rule. That increases the prejudice because the agency's rationale for its policy, the uniformity with which it has applied its nonrule policy, and the exceptions that it has recognized to its nonrule policy may all remain unclear unless prior agency precedents detailing these points can be located and analyzed.

An affected person need not demonstrate that the failure to maintain the subject matter index required by section 120.53 is a material error in procedure. "Failure of an agency to comply with s. 120.53 shall be presumed to be a material error in procedure,"¹⁰⁷ and a reviewing court "shall remand the case for further agency action if it finds that either the fairness of the proceeding or the correctness of the action may have been impaired by a material error in procedure."¹⁰⁸ How the new indexing requirements affect a substantially affected person's ability to use these provisions to obtain access to agency precedents remains unclear. If the amendments are found to leave old indexing requirements intact before the effective date of the amendments, then old agency failures may still be raised in this manner. However, if the new provisions are interpreted to excuse agency noncompliance with the old indexing requirement they may not. In that case, the amendment is a major concession to recalcitrant agencies as it insulates them from judicial review for their persistent failure to comply with the Act.

Second, if the Department's rules contemplate a prospective indexing requirement, they do not make clear how agencies are to handle the practical problems that such a requirement would create. Inevitably, agencies will be confronted with the following question: How should we handle the indexing of a final order that does not break new ground in the context of prior, unindexed agency decisions, but is new in the sense that the agency's subject matter index of orders presently does not reflect such a precedent? The Department of State rule seems to exclude such decisions from indexing. If that position is followed and the new case is not included, the law in the area will remain settled but inaccessible. The Department's rule could be read to require that an order that does not create new law must be indexed in

106. FLA. STAT. § 120.54(5) (1991).

107. *Id.* § 120.68(8).

108. *Id.*

circumstances where no similar order has yet been indexed. Even if that construction is adopted, the rule is still problematic because that additional requirement is unstated. If that is the rule's intent, it should be amended to make clear that until the agency's subject matter index accurately reflects existing law, even cases that do not meet the Department of State rule's requirements concerning legal significance must be indexed. If no such additional requirement is found to exist, then the index mandated by the Department's rule will fail to include all the more settled precedent that is currently not indexed, and the indexing requirements may never create an accurate picture of the state of agency orders. That will render the index inherently unreliable and, hence, useless. The irony here is that if new cases must be indexed, not because they are important but because they are new, then indexing may make some of these new cases major cases because they are the first precedents on the point to be widely accessible, not because they are that significant in terms of changes in agency policy.

If the statutory indexing requirement is retroactive, requiring agencies to go back to 1975 and index all final orders, or some more limited categories of final orders as the Department of State rule requires, then the problems outlined above do not arise. However, it is fair to assume, based on the history of this matter, that agencies will resist reading this requirement as retroactive. This issue may ultimately have to be resolved by the courts.

What impact has the Department of State rule had on agencies thus far? A review of recent issues of the Florida Administrative Code reveals the following: Many agencies have ignored the license provided by the Department of State and have elected to propose rules that provide for the indexing of all agency orders, without exception.¹⁰⁹

While some agencies have decided to seek all the leeway the Department of State rules provide,¹¹⁰ others have taken an approach that fol-

109. Ten agencies have proposed rules that require all agency final orders issued pursuant to §§ 120.565 and 120.57(1)-(3) to be indexed. *See* Pub. Serv. Comm'n, 18 Fla. Admin. Weekly 4221 (July 24, 1992); Dep't of State, Florida Elections Comm'n, 18 Fla. Admin. Weekly 3624 (June 26, 1992); Dep't of State, except its Div. of Licensing and the Florida Elections Comm'n, 18 Fla. Admin. Weekly 3333 (June 12, 1992); Dep't of Legal Aff., 18 Fla. Admin. Weekly 2951 (May 22, 1992); Game & Fresh Water Fish Comm'n, 18 Fla. Admin. Weekly 2341 (Apr. 17, 1992); Dep't of Correct., 18 Fla. Admin. Weekly 2157 (Apr. 10, 1992); Dep't of Nat. Resources, 18 Fla. Admin. Weekly 2015 (Apr. 3, 1992); Fla. Land & Water Adjudicatory Comm'n, 18 Fla. Admin. Weekly 1667 (Mar. 13, 1992); Loxahatchee River Envtl. Control Dist., 18 Fla. Admin. Weekly 1664 (Mar. 13, 1992); Dep't of Ins., 18 Fla. Admin. Weekly 1418 (Mar. 6, 1992).

110. Four agencies have proposed rules that essentially adopt the Department of State's approach to indexing orders. *See* Dep't of Envtl. Reg., 18 Fla. Admin. Weekly 3508 (June 19, 1992); Dep't of Comm'y Aff., 18 Fla. Admin. Weekly 1889 (Mar. 27, 1992); State Bd. of Adm'n., 18 Fla. Admin. Weekly 1325 (Feb. 28, 1992); Dep't of Bus. Reg., 18 Fla. Admin. Weekly 1125 (Feb. 21, 1992).

lows the Department of State rules in a somewhat modified fashion.¹¹¹ One agency has created its own standard, paraphrasing the statute rather than the Department of State rule.¹¹² A few agencies have decided, apparently with the Department of State's approval, to adopt rules that attempt to exclude from indexing even orders that the Department of State rule requires to be indexed.¹¹³ One agency, deciding to go beyond subject matter indexes, has established an electronic database of final orders and will use a search and retrieval system to make those orders accessible to the public.¹¹⁴

Perhaps the Legislature has given the Department of State too much responsibility for fine-tuning and executing its revitalized indexing requirement. Should the Legislature have placed so much responsibility there? On the positive side, the choice of the Department of State for this role has historical support. The Secretary of State was first assigned the role of establishing the uniform indexing procedures that agencies must follow in complying with the Act's indexing requirement in the Committee Substitute for House Bill 2672, the legislation that became the 1974 Administrative Procedure Act.¹¹⁵ Also, placing these responsibilities in the Department of State potentially provides a good fit with electronic data storage and retrieval projects that are ongoing within the Department. The Department has also had a long association with the publishing of other public information required by the Act, especially in the rulemaking area.

Despite these qualifications, there is reason to doubt that the Department is the right entity to head the newly revitalized indexing effort. First, the Department has shown little enthusiasm for this job. It has only promulgated one set of rules in this area,¹¹⁶ and those rules

111. See Dep't of Educ., 18 Fla. Admin. Weekly 3632 (June 26, 1992); Dep't of State, Div. of Licensing, 18 Fla. Admin. Weekly 3051 (May 29, 1992); Dep't of HRS, 18 Fla. Admin. Weekly 2952 (May 22, 1992).

112. Dep't of Gen. Servs., 18 Fla. Admin. Weekly 3244 (June 5, 1992).

113. Dep't of Rev., 18 Fla. Admin. Weekly 5106 (Sept. 4, 1992) (asserting that final orders resulting from stipulations, agreed settlements and consent agreements are excluded from indexing); Dep't of Law Enforce., 18 Fla. Admin. Weekly 2955 (May 22, 1992) (asserting final orders resulting from stipulations, agreed settlements and consent agreements will not be indexed); Dep't of Agric. & Consumer Servs., 18 Fla. Admin. Weekly 2128 (Apr. 10, 1992) (asserting that final orders in section 120.57(2)-(3) are not required to be indexed).

114. Dep't of Bank. & Fin., 18 Fla. Admin. Weekly 4097 (July 17, 1992). This alternative approach to indexing was approved in the 1992 amendments. See *infra* notes 221-24 and accompanying text.

115. The Secretary of State was not given this role in either the Law Revision Council's draft, FLA. ADMIN. PRACTICE App. B (Supp. 1992), or the original version of House Bill 2672.

116. See *supra* note 94 and accompanying text.

are problematic at best. Other rules that appear necessary to its role have not been adopted. Second, the Department, as an agency, may have too much sympathy for the logistical problems that agencies face in the implementation of this requirement and not enough sympathy for the access problems faced by those who seek to discover and use this information.

In its legislative oversight role, the Legislature is a user of the agency information that these indexes are designed to generate. Perhaps for this reason, the Legislature has shown considerably less deference to agency resistance to these requirements than has the Department of State.¹¹⁷ Thus, perhaps the Department's lack of enthusiasm and its agency perspective make it unsuited to the role the Legislature has given it in this area.

There are two alternatives to the regulatory scheme the statute has prescribed. First, the responsibility to implement the indexing requirements may be given to another entity, or second, the indexing requirements may be made less flexible so there is less discretion in their implementation and thus less administration to implement them. Making the requirement more inflexible is the only answer unless some more responsible overseer of this effort can be found.

What entity can be trusted with the responsibility to implement the new indexing requirement? The Joint Administrative Procedures Committee (JAPC) is one possibility. On the positive side, the JAPC has a community of interest with the Legislature concerning the need for this information for legislative oversight. It has also done a good, low-key job in the area of rulemaking¹¹⁸ and has shown itself capable of working informally with agencies to move them in the right direction. This informal working relationship could be expanded into the indexing area. On the downside, the JAPC's responsibilities to date have been mainly in the area of rulemaking, and it would take a shift in emphasis and the addition of staff to handle new responsibilities. However, adding responsibilities in this area might be consistent with the 1992 amendments, which place more power in the JAPC's hands.¹¹⁹ Another more serious problem with placing responsibility for implementing the indexing requirements in the JAPC is that the

117. See discussion *supra* notes 88-91 and accompanying text.

118. The JAPC staff routinely reviews agency rules for technical and substantive errors. Most errors are corrected by informal staff contacts, but where agencies have refused, formal objections are voted on by the JAPC and the matter is resolved by modification of either the agency rule or the statute with which it conflicts. In 1991, the JAPC reviewed 4310 rules and its staff found 1193 technical errors and 755 substantive errors. The committee voted 16 formal objections, which were resolved by 14 rule amendments and two statutory changes.

119. For a discussion of these developments, see *infra* notes 250-71 and accompanying text.

JAPC is a legislative committee and has no rulemaking authority. That would present an obstacle if any rulemaking would need to be done as part of the implementation of those requirements, but could be solved by making the details clear by statute.

Another possible approach to implementing the indexing requirements is placement of these responsibilities in the Administration Commission. The Commission, one of the hats worn by the Governor and Cabinet, has rulemaking authority and could be given more. The Commission is more likely to provide executive oversight of this process more truly representative of the interests of the executive branch than is the Department of State, because the Commission includes representatives from more agencies within the executive branch. However, better executive oversight may not be what is needed here. As regulation by the Department of State in this area has already demonstrated, the executive branch bears the burden of the indexing requirements and flexibility may easily become license when exercised by those who bear the burden of the requirements being implemented. Thus, it is difficult to find an ideal entity to administer the indexing requirements, and it may be necessary to permit less flexibility in the implementation of the new indexing requirements if they are to become a real benefit to those seeking access to agency precedent.

2. Section 120.535

Section 120.535 is an attempt to strike a legislatively-defined balance between the requirement of rulemaking and the need for exceptions. The Legislature did this explicitly because it was dissatisfied with the balance struck by the courts in the past. This is clear from the legislative history: "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."¹²⁰ Court decisions that give a restrictive interpretation to the term "general applicability" as used in the definition of the term "rule" are specifically disapproved.¹²¹

The new approach adopted in the amended section 120.535 focuses on agency "statements."¹²² The concept of an agency statement is drawn from the definition of a rule contained in section 120.52(16),

120. 1991 Final Bill Analysis, *supra* note 43, at 4.

121. *Id.* For further discussion of this case law see *supra* notes 32-42 and accompanying text.

122. Ch. 91-30, § 3, 1991 Fla. Laws 241, 244 (codified at FLA. STAT. § 120.535).

Florida Statutes.¹²³ The legislative history to this provision makes clear that, for the purposes of section 120.535, an agency statement "is intended to encompass any form of communication by an agency."¹²⁴ Section 120.535 provides a remedy that permits substantially affected persons to attack agency statements that have not been adopted as rules in a new proceeding that can have the effect of forcing agencies to adopt those statements, or similar statements, as rules.

Section 120.535 neither provides for the invalidation of agency statements not promulgated as rules, as some of the early cases did, nor permits agencies to forever avoid adopting their policies as rules. The balance struck by the Legislature in this area is a compromise, one that attempts to avoid a return to an emphasis on form over substance that was characteristic of pre-*McDonald*¹²⁵ law while providing real rulemaking requirements, not just the incentive to move agencies toward rulemaking that was thought to be provided by the "prove-up" standard imposed by the courts. The flurry of recent rulemaking activity by some agencies that have not traditionally used the rulemaking process as much as they might have suggests that section 120.535 is actually encouraging rulemaking. However, despite the care and study that went into the creation of section 120.535, some ambiguities exist within this provision that will need some administrative and judicial construction.

Section 120.535 makes it clear that agencies are required to adopt their policies as rules when it is feasible and practicable to do so, and further provides that rulemaking shall be presumed to be feasible and practicable.¹²⁶ Agencies, then, have the burden of demonstrating either that rulemaking is not feasible or is impracticable.¹²⁷ The Legislature provided five specific defenses to rulemaking within these categories, three to feasibility and two to practicability.¹²⁸ It is likely that the particulars of these defenses will be litigated.

The first defense to feasibility is that "[t]he agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking."¹²⁹ What is the nature of the dispute that is likely to emerge here? The plain language of this

123. See *supra* note 31 and accompanying text.

124. 1991 Final Bill Analysis, *supra* note 43, at 4.

125. *McDonald v. Department of Banking and Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977). See *supra* note 34 and accompanying text for a discussion of *McDonald* and its effect on agency rulemaking.

126. FLA. STAT. § 120.535 (1991).

127. *Id.* § 120.535(1)(a)-(b).

128. *Id.*

129. *Id.* § 120.535(1)(a)1.

provision does not seem to provide the agency with a defense simply because it does not have the knowledge or experience necessary to make rules. The language of the statute, specifically the use of the word "time," suggests that the proper inquiry is whether the agency had the time reasonably necessary to gain knowledge and experience, not whether the agency used that time to educate itself. The use of the phrase "reasonably necessary" suggests that an objective rather than a subjective standard is intended concerning what amount of time is necessary. This suggests that DOAH and the courts should not necessarily defer to an agency's judgment in this regard.

The legislative history demonstrates that, while the statute talks in terms of time, an agency's actual experience with the policy was also a focus of legislative concern:

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.¹³⁰

Thus, it appears that the expression of the requirement in terms of time rather than actual experience may have been designed to expand the requirement beyond the agency's actual experience. However, it also might be possible to give this provision a narrower reading and, consistent with the plain language, inquire only into whether the agency had the time to get the necessary experience in connection with this defense. If the latter approach is adopted, then the question of the agency's actual experience could be reserved for the inquiry made in connection with the first practicability defense.¹³¹

The plain language of this provision could create a problem to the extent it is read to suggest that an agency can be forced into rulemaking where it does not in fact have the knowledge or experience to make rules, but where it had the time to gain such knowledge and experience but failed to do so.¹³² A reluctance to make a lack of

130. 1991 Final Bill Analysis, *supra* note 43, at 5.

131. See discussion of this point *infra* text accompanying note 138.

132. Courts that find the statute clear and unambiguous refuse to look beyond the Legislative history. See *Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2s 879, 882 (Fla. 1983).

knowledge and experience a defense in all circumstances is understandable. Agencies could avoid rulemaking by staying uninformed, and it would not be desirable to encourage ignorance. On the other hand, the idea of punishing an agency by forcing it into rulemaking, unfettered by knowledge and experience, also seems quite undesirable. The idea of rulemaking as punishment is a concern because rules made by an uninformed agency can do real damage to substantially affected persons. While the idea has something of a parallel in emergency rulemaking,¹³³ it does not sound like a good idea here.

The second defense to non-feasibility is that “[r]elated matters are not sufficiently resolved to enable the agency to address a statement by rulemaking.”¹³⁴ The legislative history here states: “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.”¹³⁵ This provision seems designed to allow the agency to take care of conditions precedent and not to excuse an agency’s noncompliance on the basis that it is too busy with other important, if somewhat tangential, matters. Too broad a construction of this exception could defeat the section.

If either of the first two defenses to a section 120.535 proceeding are resolved in an agency’s favor, that does not end the matter permanently. An agency that has not yet had the time reasonably necessary to gain the knowledge and experience to make rules, at one point in time, may soon find itself in a different position. Related matters may soon be resolved. Therefore, the first two defenses are temporary, and this raises the issue of how litigants who seek to move an agency toward rulemaking should respond to these time-limited defenses. One way is for them to file successive section 120.535 proceedings. Given the time-limited nature of these defenses, such filings should not be barred. Another approach would be to seek relief in the section 120.535 proceeding different from the relief available in a final order. Thus, if an agency raises a time-limited defense, perhaps litigants could respond either by asking the DOAH hearing officer to either abate the action or to set deadlines for beginning rulemaking that would allow the agency time to surmount its time-limited obstacles to

133. Where emergency rulemaking is not permitted to relieve an agency from self-created emergencies, even if the requirement that an agency rely on regular rulemaking in such circumstances, this will result in serious consequences for the agency and the public.

134. FLA. STAT. § 120.535(1)(a)2. (1991).

135. 1991 Final Bill Analysis, *supra* note 43, at 5.

rulemaking. This would provide relief without the need for successive filings. If DOAH presently does not have the power to grant requests of this kind, an amendment to confer such power should be considered.

The third defense to the presumption that rulemaking is feasible is that "[t]he agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement."¹³⁶ On its face, this provision seems to contradict itself. If the agency is using rulemaking to adopt the statement, is it not safe to assume just the opposite of what the statute suggests, that rulemaking is in fact quite feasible? This defense appears to be primarily a "moot out" provision, rather than a defense. It allows the agency that has seen the error of its ways to stop the proceedings and begin rulemaking before a final order is entered.

This provision provides a valuable opportunity to an agency that believes it will ultimately lose the section 120.535 proceeding. Section 120.535(1)(a)3. may permit agencies to terminate section 120.535 proceedings on summary judgment, thus saving the time and other resources that would need to be expended if the matter went to trial. A similar option is available to an agency even after it loses the section 120.535 proceeding after trial. Section 120.535(5) permits the agency to avoid the effect of a loss of a section 120.535 proceeding by beginning the formal adoption of the statement at issue in the section 120.535 proceeding.

Section 120.535(1)(a)3. may have advantages that section 120.535(5) does not. It is likely that agencies will contend that the language of section 120.535(1)(a)3. permits agencies to terminate section 120.535 proceedings on summary judgment based upon rulemaking activity short of actually beginning rulemaking. Agencies may argue that under section 120.535(1)(a)3., which is available to agencies "using rulemaking procedure," even a notice of a rule-development workshop may suffice to satisfy this section and provide a moot out defense. Agencies will likely argue that actual publication of proposed rules is not required. Section 120.535(5) mandates publication of proposed rules pursuant to section 120.54(1) in order to satisfy its requirements. The dissimilarity of the language of the two provisions supports this argument. Thus, this question is likely to be litigated.

The other questions likely to arise here are how late in the section 120.535 proceedings this defense can be raised and what procedure should be followed in raising it. Because it is more like a moot-out

136. FLA. STAT. § 120.535(1)(a)3. (1991).

provision than an actual defense, can the agency wait until after the hearing in the section 120.535 proceeding goes badly, but before the order is entered, and then file a copy of a notice of workshop with the hearing officer together with a suggestion of mootness? Or must this be raised as a defense before or during the hearing and be supported by evidence? Petitioners may argue that because this is a defense, it must be raised as a defense would be. While under the Model Rules and the DOAH rules, an answer is not required,¹³⁷ a petitioner may move for an order requiring an answer. Petitioners might be well-advised to seek such an order in section 120.535 cases because the statute creates so many potential affirmative defenses. If an answer is filed and this defense is not raised, is it waived, thus prohibiting the agency from mooting out the proceedings in this way? These issues will be litigated as well. Given the fact that the purposes of these proceedings are to get rulemaking started, it is unlikely that courts will take too rigid a procedural approach in most cases. However, there may be cases where the entire litigation may focus on this defense. For example, section 120.535 will sometimes be used to test the agency's commitment to rulemaking that it proposed and then apparently abandoned. In that circumstance, the issues in the case would probably focus on the agency's good faith and commitment to its stated intention. Here again, the question of whether hearing officers can set time limits and otherwise get more involved in the rulemaking process might arise.

The next set of defenses is to the idea that rulemaking is practicable. It is possible that the defenses available under these sections might be more permanent defenses to rulemaking than those available under feasibility because rulemaking that is not feasible at one point might become so later, where if rulemaking is not practicable, it might remain so over time. Whether this will prove true depends on how the practicability defenses are interpreted.

The first of the two defenses available under this section provides that rulemaking is not required where the agency proves that "[d]etail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances."¹³⁸ Does "under the circumstances" mean detail is not reasonable because of the nature of the decisions themselves (e.g., they are very fact specific), or does it tie back into the same kinds of concerns raised in the feasibility section—that not enough expertise has yet been gained

137. A respondent or intervenor may file an answer and, if it chooses to do so, the answer shall be filed within 20 days. FLA. ADMIN. CODE ANN. IT. 28-5.203 and 60Q-2.004(5).

138. FLA. STAT. § 120.535(1)(b)1. (1991).

to enable the agency to provide detail in the rule? If the former is intended, then this defense will remain viable over time because, in the example, the decisions are likely to continue to remain fact specific. If the latter is intended, the defense will not remain viable over time because, as the agency gains expertise, its ability to add detail will increase.

While it might appear that the former reading is preferable, there may be a practical reason to support the latter construction to maintain a clearer division between feasibility and practicability. As was noted earlier,¹³⁹ section 120.535(1)(a)1. may be construed to turn on the question of whether the agency has had time to gain the needed expertise, not whether it has actually done so. If this construction is adopted, the danger is that it may be feasible to require rulemaking when the agency does not yet have the competence to do a credible job making rules in the area. The first defense on practicability might provide a response to this dilemma. It could provide a justification for waiting for the agency to gain expertise it should have gained earlier, and rulemaking might not be compelled in such circumstances on the ground of impracticability.

The second defense to practicability is that "[t]he particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances."¹⁴⁰ This section creates defenses to rulemaking in situations where a good case can be made that the agency is in an area where rules would be difficult to draw and would not be particularly helpful even if they were drawn. Thus, section 120.535(1), in most cases, will remove agency discretion from the decision whether or not to adopt agency policy as rules.

How are these substantive provisions implemented? Section 120.535 establishes its own procedure for enforcing its rulemaking requirements. Sections 120.535(2), (3), and (7) prescribe a procedure for enforcing subsection (1) that is similar to the scheme the APA establishes to litigate rule challenges.¹⁴¹ A petition is filed with the DOAH, where it is assigned to a hearing officer within ten days, heard within thirty days of assignment, and decided within thirty days of the hearing.¹⁴² As with rule challenges, the DOAH hearing officer has final order authority.¹⁴³

139. See *supra* text accompanying notes 129-33.

140. FLA. STAT. § 120.535(1)(b)2. (1991).

141. Compare *id.* §§ 120.54(4) (proposed rule challenges) and 120.56 (existing rule challenges) with *id.* § 120.535(2), (3), (7).

142. *Id.* § 120.535(2), (3).

143. *Id.*

As practitioners are just beginning their experience with these subsections, there are some points that bear emphasis. The first relates to the publication of notice of the section 120.535 proceeding. The statute provides that a copy of the petition and the final order should be sent to the Secretary of State and the JAPC, and that notice should be published in the *Florida Administrative Weekly* (FAW). When the petition is filed, the FAW currently publishes just the paragraphs of the petition that describe the nature of the challenged statement. These are taken out of the context of the petition and—out of that context—they may be hard to understand or may even be misleading. A petitioner filing a section 120.535 petition should anticipate that a portion of the petition will be excerpted in this fashion and should attempt to draft a section of the petition that explains the challenged statement in a manner that is clear and self-contained. The Model Rules should be amended to describe requirements for section 120.535 petitions.¹⁴⁴

Some pitfalls exist in the procedure prescribed by the statute, and these should be made clear so they do not become traps for the unwary practitioner. Section 120.535 outlines five affirmative defenses to the requirement of rulemaking.¹⁴⁵ How will someone filing a section 120.535 proceeding find out which affirmative defense the agency is relying on? As has previously been noted, neither the Model Rules nor the DOAH rules require the agency to file an answer in proceedings before DOAH.¹⁴⁶ Thus, unless petitioners file with their petitions a motion to compel an answer and/or seek to discover agency defenses through interrogatories with their petitions, the petitioners are unlikely to find out which affirmative defenses the agency is planning to rely on before the hearing. Even requests for admission that track the petition might be of little help because, in the case of affirmative defenses, the agency is likely to be trying to avoid rather than to deny the petition's allegations. It might make sense to amend the Model Rules to require agencies to file an answer when they will seek to rely on affirmative defenses in the proceeding.

144. It is time to completely overhaul the Model Rules. This call to overhaul the Model Rules is based upon several points. First, it has been about 12 years since the last comprehensive overhaul. Second, the realities of agency practice have deviated far from the ideal of a set of model rules of agency procedure. Third, the Model Rules never were as good as they could be, or comprehensive enough to cover all aspects of agency practice. That is clear from the fact that DOAH adopted a separate set of rules that must be read together with the Model Rules when one practices before DOAH. This situation should be eliminated. There would be no need for special agency rules in most cases if the Model Rules were a better set of rules. We have enough experience under the APA to write a superior set of model rules, and we should do so.

145. FLA. STAT. § 120.535 (1991).

146. See *supra* note 137 and accompanying text.

Sections 120.535(4) and (5) describe what petitioners gain when they win a section 120.535 proceeding.¹⁴⁷ If the DOAH hearing officer finds that all or part of a statement violates section 120.535(1), then “the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.”¹⁴⁸ However, if an agency publishes a proposed rule pursuant to section 120.54(1), which addresses the statement, and if the agency proceeds expeditiously and in good faith to adopt rules, then the agency may rely upon the statement or a substantially similar statement as a basis for agency action.¹⁴⁹ Failure to adopt rules within 180 days, unless the delay is caused by an intervening section 120.54(4) challenge, is presumed not to be expeditious or in good faith.¹⁵⁰

Section 120.535(6) provides for the award of attorneys’ fees and reasonable costs in certain situations.¹⁵¹ If an agency statement has been found to violate subsection (1), and if an agency continues to rely on it or on a substantially similar statement to determine the substantial interests of a person, and if reliance on the statement is not permitted by subsections (4) and (5), then that person may bring an action under section 120.535 or 120.57(1) to collect attorneys’ fees and costs.¹⁵² The section further provides that an award shall be paid from the budget of the secretary, executive director, or equivalent administrative officer of the agency, and the agency shall not be entitled to payment of an award, or reimbursement for payment of an award, under any provision of law.¹⁵³ This attorneys’ fees provision is an attempt to limit occasions for an award so agencies that comply with the law in response to section 120.535 challenges will not be penalized, while those agencies that ignore hearing officer decisions in section 120.535 proceedings will be punished in the place where it is likely to get the most attention: the agency head’s budget.

Section 120.535, subsections (4), (5), and (6) define the nature of the relief provided by section 120.535. They show how much section 120.535 is a compromise between the old, more rigid approach toward requiring rulemaking that prevailed before the *McDonald* case and the more tolerant approach toward agencies that refuse to make rules that the 1991 amendments rejected. The new legislative formula tries to capture the best of both positions. It attempts to harness the power of

147. FLA. STAT. § 120.535(4)-(5) (1991).

148. *Id.* § 120.535(4).

149. *Id.*

150. *Id.* § 120.535(5).

151. *Id.* § 120.535(6).

152. *Id.*

153. *Id.*

challenges filed by individual litigants to move agencies toward rule-making, much as invalidation of unpromulgated rules in section 120.56 proceedings did in the pre-*McDonald* era. Yet, it tries to avoid invalidation of policy simply because it has not been promulgated. Section 120.535 permits an agency to apply policy that has not been promulgated, even though a section 120.535 proceeding directed toward that policy is pending. This is true if the person against whom the policy is being applied has filed a section 120.535 proceeding directed at the policy. Furthermore, this is true even if that person has prevailed in the section 120.535 proceedings, provided the agency has formally begun rulemaking. That much is clear from section 120.57(1)(b)15., added by the 1991 amendments,¹⁵⁴ which attempts to provide procedural safeguards in connection with the application of unpromulgated policy in that situation.

The problem with this approach is that because of the limited availability of the attorneys' fees under subsection (6), the cost of any efforts to reform agencies through the use of section 120.535 is likely to fall heavily on those whose substantial interests are being determined by agencies. Not only will those litigants bear the cost of section 120.535 proceedings, but subsections (4) and (5) and section 120.57(1)(b)15. make it so difficult for a substantially affected person to obtain the full benefit of a section 120.535 proceeding that this new remedy may not prove as popular in practice as it might first appear.

Who will pay to force an agency into rulemaking if they know that, even if they prevail, the agency will be able to use nonrule policy against them in section 120.57 proceedings pursuant to section 120.57(1)(b)15.? Those with the greatest interest in using section 120.535 will be those who have some future stake in the policy or those who can find some way to prevent the agency from applying unpromulgated statements of agency policy against them in section 120.57 proceedings. There are ways litigants can improve their chances of winning something of real value in section 120.535, and to understand how that can best be accomplished requires a discussion of tactics as well as law.

What are the limits on available tactics? While section 120.535(8) provides that "[a]ll proceedings to determine a violation of [section 120.535(1)] shall be brought pursuant to this section,"¹⁵⁵ it is still not clear whether relief is also available to challenge unpromulgated rules through section 120.56. It is possible that section 120.535 is not the

154. Ch. 91-30, § 4, 1991 Fla. Laws 241, 249. For a further discussion of section 120.57(1)(b)15., see *infra* text accompanying note 173.

155. Ch. 91-30, § 3, 1991 Fla. Laws at 246 (codified at FLA. STAT. § 120.535(8)).

exclusive remedy available under the APA to respond to an unpromulgated rule. The section 120.56 rule challenge may still be available to invalidate an unpromulgated rule on the basis that it has not been adopted through the formalities of section 120.54.¹⁵⁶ While the Legislature may have intended to make section 120.535 the exclusive method to deal with this problem, it has not made the legislative adjustments necessary to accomplish that result. Section 120.52(8) still defines an “[i]nvalid exercise of delegated legislative authority,” the operative language in section 120.56, to include situations where “[t]he agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54.”¹⁵⁷ Thus, it appears that in the case of an unpromulgated rule, a remedy still exists under section 120.56 and a substantially affected person can still challenge the rule as unpromulgated and invalidate it on that basis.

Although this logic supports the conclusion that a section 120.56 challenge may be used to invalidate a rule simply on the basis that it has not been promulgated, this may seem out of sync with the balance struck in section 120.535. The difference between these two remedies is significant. Section 120.56 provides a much more powerful remedy than section 120.535. Once a rule is declared invalid in a section 120.56 proceeding, it may not be applied by the agency against the successful challenger.¹⁵⁸ Section 120.535 provides a lesser sanction against an agency for the same challenged policy; even if the substantially affected person prevails in a section 120.535 proceeding, the agency can use the statement against the person who has prevailed if the agency begins rulemaking subject to the protections in section 120.57(1)(b)15. Thus, because the 1991 amendments do not authorize as effective a remedy against unpromulgated rules as section 120.56, it is possible that the failure to amend section 120.52(8) to delete the quoted provision was an oversight.

There may be a way to harmonize the two provisions and give effect to both. Perhaps the section 120.56 rule challenge is still available to invalidate unpromulgated rules, subject to the defense that the challenged policy is not a rule, but rather an incipient policy.¹⁵⁹ Thus, even

156. That is, assuming the policy falls within the Act's definition of a rule and has not been promulgated. Presumably the agency would be able to defend its position on the ground that the policy is incipient, and thus does not fall within the definition of a rule.

157. FLA. STAT. § 120.52(8)(a) (1991).

158. Dore, *supra* note 14, at 437.

159. This “exception” to rulemaking, first recognized in *McDonald*, has already substantially limited the availability of the section 120.56 challenge to invalidate unpromulgated policy. The theory behind the exception is that a policy described as incipient is not a rule, and is thus not subject to challenge on the basis it has not been promulgated. This exception has been ex-

if section 120.56 has vitality in this area, it has a very narrow reach. Section 120.535 may have a broader reach as it is available against all agency policy, even incipient policy. In a section 120.535 proceeding, the agency cannot merely say "incipient policy." The burden is on the agency to prove one of the available defenses to the action. Even if the policy is incipient, it may or may not qualify for one of the exceptions. Section 120.535 was designed to change the status quo, so not all policy that was permitted to exist as nonrule policy by the courts prior to the 1991 amendments will qualify for the exceptions in section 120.535. Thus, the section 120.535 remedy may be weaker but broader, while the section 120.56 remedy may be narrower but more powerful.

Therefore, even if section 120.52(8)(a) is amended by withdrawing the right to file section 120.56 challenges to unpromulgated rules on the ground that they have not been adopted through the procedures outlined in section 120.54, challenges against unpromulgated rules should still be permitted under section 120.56 based upon the other grounds enumerated in section 120.52(8). For example, even if an unpromulgated rule may not be challenged through section 120.56 on the ground that it has not been promulgated, challenge should be permitted on the basis that the unpromulgated rule is beyond the agency's delegated legislative authority.

One problem in permitting broad use of the section 120.56 challenge against unpromulgated rules on a basis other than the fact the rule was not properly promulgated may arise from some of the language contained in section 120.52(8)(b)-(e). This section now defines what is meant by the phrase "invalid exercise of delegated legislative authority." Before the amendment that added this definition, the phrase was undefined and could more easily be applied to unpromulgated rules. Now, two important subsections in 120.52(8) refer to matters that appear only in promulgated rules. Subsections (b) and (c), which define the phrase to include the situations where an agency exceeds its grant of rulemaking authority and where the rule enlarges, modifies, or contravenes the specific provisions of law implemented, both end with the phrase "citation to which is required by s. 120.54(7)."¹⁶⁰ Does this mean to suggest that section 120.56 may not be used to challenge unpromulgated rules on these grounds, or is this

panded by the courts to the point where it has virtually swallowed the rule. See Dore, *Agenda and Report*, *supra* note 5, at 710. Because the 1991 amendments are a clear rejection of that approach, perhaps the courts will be inclined to narrow the incipient policy exception in the future. While this exception has no application in the § 120.535 context, it may still have application in the §§ 120.56 and 120.57(2) contexts. See *infra* text accompanying note 177.

160. FLA. STAT. § 120.52(8)(b), (c) (1991).

just a reminder that when rules are promulgated, the failure to include this information may provide grounds for invalidation? I think that it is clearly the latter, but the question remains unresolved. This is an important question because subsections (b) and (c) would most likely be relied on to challenge an unpromulgated statement on the basis that it exceeds an agency's authority or is contrary to law.

It makes sense to permit section 120.56 rule challenges directly against unpromulgated statements that fit the definition of a rule. The restriction of section 120.56 rule challenges to promulgated rules would conflict with the Act's definition of rules in terms of their effect, rather than the formalities of their adoption.¹⁶¹ Section 120.56 rule challenges have an important role in this area, for reasons that will become clear in the following discussion of tactics.¹⁶² Rule challenges have not been rendered unnecessary by the 1991 amendment of section 120.57 adding section 120.57(1)(b)15.¹⁶³ While that section may guarantee that some of the matters that can be raised in rule challenges can also be raised in the 120.57 context, section 120.57 is not an acceptable substitute for a section 120.56 rule challenge. Even though that section may somehow change the way agencies must treat DOAH hearing officer findings when agencies formulate final orders,¹⁶⁴ a DOAH hearing officer has final order authority only in a section 120.56 rule challenge, not in a section 120.57 proceeding. That difference makes section 120.56 the more powerful remedy.

Litigation tactics may play a more important role in section 120.535 proceedings than in other areas of Florida administrative practice because the remedy provided by the section is so weak. Even if an individual wins a final order in the section 120.535 proceeding, the agency can proceed to use its unpromulgated statement against the successful party in the section 120.57 context, provided it begins the formal rule-making process to adopt the statement as a rule.¹⁶⁵ For this reason, section 120.535 proceedings may not be worthwhile unless they are part of a larger administrative litigation strategy.

Which litigants are most likely to consider bringing a section 120.535 challenge, and when will they consider filing one? Those who have a long-term interest in codifying an area of agency policy, such as those who are subjected to that policy repeatedly over time, and those who have an immediate interest, such as those against whom

161. Because section 120.54(4) proposed rule challenges are only permitted to be filed during rulemaking, that type of challenge is unavailable against unpromulgated rules.

162. See *infra* text accompanying note 165.

163. Ch. 91-30, § 4, 1991 Fla. Laws 241, 249.

164. See *infra* text accompanying note 178.

165. See *supra* text accompanying notes 155-58.

nonrule policy is about to be applied, are most likely to bring section 120.535 proceedings. Those who will be subject to the policy repeatedly in the future may not be that concerned that the policy may be applied after they prevail in the section 120.535 proceeding but before it is adopted through rulemaking, because it will soon be adopted and the promulgated rule will govern future cases. However, this is likely to be quite important to those who are challenging policy which is about to be applied to them, especially where those individuals are not repeat players. Those individuals must use section 120.535 as one part of a larger litigation strategy if they are to get any benefit from their use of the section 120.535 remedy.

The litigants must first determine the likelihood that the agency will attempt to use nonrule policy against them during its determination of their substantial interests. If the substantially affected person makes no attempt to discover whether nonrule policy is being employed, that fact may be discovered at the section 120.57 hearing. That is clearly too late to derive any individual benefit from a section 120.535 proceeding because the section 120.57 proceeding will be decided long before the section 120.535 proceeding. Also, if such a proceeding is filed at that late date, the agency may even argue that the individual no longer has standing to maintain a section 120.535 proceeding.

Even if a litigant discovers the agency's plan to use nonrule policy early in the controversy, either through discovery in the section 120.57 proceeding or even before a clear point of entry into section 120.57 proceedings is provided, how can the individual benefits of section 120.535 be best protected? The strategy involves several steps. First, a substantially affected person should file a section 120.535 proceeding against a statement upon which an agency intends to rely. If successful, this will force rulemaking. Second, once rulemaking proceedings have begun, the substantially affected person has an opportunity to challenge the proposed rule in a section 120.54(4) rule challenge filed within twenty-one days of the publication of the proposed rule. By statute, section 120.535 and section 120.54(4) proceedings must each be concluded within seventy days.¹⁶⁶ If an individual prevails in the section 120.54(4) challenge, the agency should not be permitted to apply the statement in a section 120.57 proceeding decided after that point because the DOAH finding that the statement is an invalid exercise of delegated authority should make future use of the statement by the agency impermissible.

166. Ch. 91-30, § 3, 1991 Fla. Laws 241, 244 (codified at FLA. STAT. § 120.535(2)(b),(3); FLA. STAT. § 120.54 (1991)).

The same result could theoretically be achieved simply by attacking the validity of the statement in the section 120.57 proceeding. Practically speaking however, the result might not be the same. In a section 120.57 proceeding, the agency retains final order authority,¹⁶⁷ and it is much less likely it is that the agency will use that authority to invalidate its own policy than it is that an independent DOAH hearing officer will do so. For that reason, an appeal to the district court might be necessary for the individual to win on the same point in the section 120.57 context. Because of the strict time requirements governing section 120.535 and section 120.54(4) proceedings,¹⁶⁸ even conducting two administrative proceedings in addition to the section 120.57 proceeding would provide a quicker resolution of the issues than would a trip to the district court.

The same result might be achieved even more economically by joining the section 120.535 proceeding with a section 120.56 challenge, and litigating the validity of the statement at the same time the agency is being forced to adopt it. Section 120.535 recognizes the utility of such an approach, and provides that "[a] proceeding pursuant to this section may be brought in conjunction with a proceeding under any other section of this chapter, or consolidated with such a proceeding."¹⁶⁹ In this situation, if the agency loses the section 120.56 challenge, that should end the matter and the agency should not be permitted to either use or adopt the statement as a rule.¹⁷⁰ However, it is not clear whether DOAH and the courts will permit section 120.56 challenges in such a context, although for the reasons discussed earlier, they should do so.¹⁷¹

Another strategy might be to file a section 120.56 rule challenge against the statement at the same time a request for a section 120.57 hearing is filed. The advantages of this approach are that it is even more efficient and economical. The disadvantages are that the statement may not be as clearly in focus as it might be in a section 120.535 proceeding and the section 120.535 proceeding might be broader than the section 120.56 remedy for reasons discussed earlier.¹⁷² This type of joinder is more likely to be permitted if a promulgated rule, rather than an unpromulgated statement, is involved.

167. FLA. STAT. § 120.57(1) (1991).

168. See *supra* text accompanying note 167.

169. FLA. STAT. § 120.535(8) (1991).

170. While the sight of a litigant simultaneously attempting to invalidate and force the adoption of a statement may create cognitive dissonance, there seems to be no reason to prohibit this combination of remedies. The petition joining them could simply request alternative remedies.

171. See *supra* text accompanying notes 161-66.

172. See *supra* text accompanying notes 158-59.

This discussion of possible combinations is not exhaustive. In handling a matter that might benefit from the filing of more than one administrative proceeding, it is important to consider the options ahead of time and to coordinate the different administrative proceedings so they work together effectively.

3. *The Creation of Section 120.57(1)(b)15.*

The 1991 amendments do not forbid all use of agency policy statements that fall within the definition of a rule but that have not been promulgated as rules. Instead, the amendments provide a procedure for using such statements in section 120.57 proceedings, despite the agency's failure to adopt them as rules. The subsection itself provides:

Each agency statement defined as a rule under s. 120.52 and not adopted by the rulemaking procedure provided by s. 120.54 which is relied upon by an agency to determine the substantial interests of a party shall be subject to de novo review by a hearing officer. A statement shall not enlarge, modify, or contravene the specific provision of law implemented or otherwise exceed delegated legislative authority. The statement applied as a result of a proceeding pursuant to this subsection shall be demonstrated to be within the scope of delegated legislative authority. Recommended and final orders pursuant to this subsection shall provide an explanation of the statement that includes the evidentiary basis which supports the statement applied and a general discussion of the justification for the statement applied.¹⁷³

This section does not contain language included in an earlier version which indicated that an agency statement would not be presumed correct when reviewed by the hearing officer, and that provided that any determination shall be based exclusively on evidence of record and matters officially recognized.¹⁷⁴ For this reason, the version as enacted has been called a "greatly weakened" version of the subsection as proposed.¹⁷⁵

This provision was a substantial concession to those who opposed the thrust of the 1991 amendments requiring rulemaking. As discussed earlier,¹⁷⁶ unless a litigant is attuned to the tactical considerations that have been discussed, an agency may, through this provision, proceed to use unpromulgated policy against a litigant in the section 120.57

173. FLA. STAT. § 120.57(1)(b)15. (1991).

174. Fla. SB 1836, § 2 (1991).

175. Dore, *supra* note 14, at 450.

176. See *supra* text accompanying notes 165-72.

context even if that litigant has won a section 120.535 proceeding that required that policy to be promulgated, provided the agency has begun rulemaking. This undercuts the effectiveness of section 120.535 proceedings. A more restrictive approach to the use of unpromulgated rule policy, such as a broad moratorium against use of the unpromulgated policy while a section 120.535 proceeding is pending or, if won by the litigant, until the statement is promulgated as a rule, would have been more powerful. Even a narrower moratorium against the use of a challenged statement against an individual who has filed a section 120.535 proceeding until either that individual loses the section 120.535 proceeding or the statement is adopted as a rule would have made the 1991 rulemaking amendments considerably more powerful.

In addition, questions exist about section 120.57(1)(b)15. itself. The provision is included in section 120.57(1) and refers to "this subsection."¹⁷⁷ DOAH hearing officers are generally available only in section 120.57(1) proceedings. Does section 120.57(1)(b)15. also apply in section 120.57(2) proceedings? Those proceedings generally involve no genuine issue of material fact and no DOAH hearing officer. What happens when an agency attempts to use unpromulgated rule policy in that context? It appears that section 120.57(1)(b)15. may not apply. If not, what constraints on the use of unpromulgated policy exist in section 120.57(2) proceedings? Does the case law superseded by this section—case law that required an agency to prove up its unpromulgated policy—still apply in the section 120.57(2) context?

Perhaps both this question and possible result can be avoided tactically. In cases where an individual suspects that an agency will attempt to use unpromulgated policy, perhaps a section 120.57(1) hearing should be demanded. That demand is in good faith if questions of material fact can be expected to arise in connection with the factual basis or factual applicability of the unpromulgated policy that the agency will try to apply, even if there are no other factual issues. Once a section 120.57(1) hearing is requested, section 120.57(1)(b)15. will apply.

Once a section 120.57(1) proceeding begins, important questions arise: What does the subsection's guarantee of "de novo review" by a hearing officer mean? How is this requirement different from the court-developed requirement that an agency prove up its nonrule policy—the requirement developed in the case law that this section appears designed to replace? Does the concept of de novo review mean that the agency's power to modify a hearing officer's findings of fact

177. FLA. STAT. § 120.57(1)(b)15. (1991).

and/or law on any issue is limited in some way? If so, on which issues is the agency limited in its ability to substitute its views for those of the hearing officer?

If some limitation is intended, perhaps the most logical place to limit the agency's power to substitute its judgment for that of the hearing officer to effectuate the concept of "de novo" review is on the issue of whether the unpromulgated rule policy is within delegated legislative authority. The Act has already given final order authority to DOAH hearing officers on that issue in the rule challenge context.¹⁷⁸ Prohibiting an agency from substituting its judgment on that issue here would make it less necessary to file a rule challenge on the issue of delegated authority to protect substantial interests. Such a construction would create, in effect, a surrogate rule challenge procedure outside the rulemaking context.

Another possible issue for de novo review could be on the nature of the agency's unpromulgated rule. At first blush, this suggestion might seem odd. One might assume that the agency would have expertise in its own policy that would make de novo review inappropriate. However, maybe what this section suggests is that an agency is not allowed to have any better knowledge of its policy than anyone else, and if it fails to make clear its policy to the hearing officer, much as it was required to do under the existing "prove up" case law, then it may not thereafter reveal that policy for the first time in its final order. Other issues may warrant de novo review as well. What they are, and what de novo review means, will be questions for the courts.

4. 1991 Amendments to Section 120.68

Chapter 91-30 amended section 120.68 to add a new section 120.68(3)(b):

The filing of a petition appealing an order issued by a hearing officer under s. 120.535, whether filed by the agency or any other party, does not stay enforcement of the hearing officer's order, unless the court, upon petition of the agency or other party, determines that a stay is necessary to avoid a probable danger to the public health, safety, or welfare. A stay order shall specify the conditions, if any, upon which the stay is granted.¹⁷⁹

This section is important, as discussed earlier, because of the substantial difficulty of successfully employing section 120.535.¹⁸⁰ If an

178. *Id.* § 120.56(5).

179. Ch. 91-30, § 6, 1991 Fla. Laws 241, 250 (codified at FLA. STAT. § 120.68(3)(a)).

180. *See supra* text accompanying notes 161-72.

agency can delay for months or years after losing before the hearing officer by filing an appeal, then the remedy's value is further diminished. This problem is recognized in the legislative history as the basis for this change.¹⁸¹ However, the constitutionality of this provision has been questioned.¹⁸² If this provision is found unconstitutional and agencies can drag out section 120.535 proceedings and delay adopting their policies as rules for years, then the value of the 1991 rulemaking amendments as a whole is called into question.

III. THE GOVERNOR'S AGENDA

Governor Lawton Chiles threatened to veto the 1991 amendments, but withdrew from that position after the effective date of those revisions was changed to March 1, 1992.¹⁸³ That delay was designed to give the Governor an opportunity to seek any legislative changes he thought necessary before the effective date.¹⁸⁴ Even though section 120.535 was the result of years of debate, there was concern in the executive branch that this new requirement might place a significant additional burden on state agencies. This burden could come from both the cost of compliance and the consequences of noncompliance. The costs of compliance would come from the anticipated increase in the volume of agency rulemaking that section 120.535 would create. The consequences of noncompliance would come from the problems noncompliance with the new requirements could cause. Possible adverse consequences included the expenditure of resources to defend the failure to promulgate policies as rules, prohibitions against the implementation of unpromulgated agency policies, and the award of attorneys' fees against agencies for repeated noncompliance with the requirements.

The Governor was interested in softening the effect that the new rulemaking requirements would have on the executive branch by making a variety of changes in the rulemaking procedure prescribed by the Act.¹⁸⁵ This position was an alternative to his original plan to simply veto the 1991 amendments. Thus, as the 1991 legislative session ended, it became clear that some of the changes made during the 1991 session would continue to be a focus of attention in early 1992.

181. 1991 Final Bill Analysis, *supra* note 43, at 9.

182. Dore, *supra* note 14, at 446 n.70.

183. See ch. 91-191, 1991 Fla. Laws 1604.

184. Due to the press of other matters, such as reapportionment and the budget, this deadline did not afford much time for the consideration of changes to the APA. The 1992 amendments were adopted at the end of the session.

185. See Letter from Buddy MacKay, Lt. Gov. of Fla., to Mary Figg, Chair, Fla. H.R. Comm. on Govtl. Ops. (Aug. 14, 1991) (on file with Fla. H.R. Comm. on Govtl. Ops.).

That the Governor had concerns about the effects of required rule-making came as no surprise to those familiar with this issue. The Florida APA has always provided substantially affected persons with more procedural protection against agency overreaching than any other administrative procedure act in the nation.¹⁸⁶ In fact, in March 1990, the Seventh Administrative Law Conference focused on the required rulemaking issue and the likely consequences if such a requirement were adopted.¹⁸⁷

If procedures for rulemaking and judicial review of agency rules are not up to the task when increased rulemaking activity occurs, we risk problems on both sides of the regulatory fence. If procedures are too cumbersome, we risk encouraging agencies to look for ways to avoid the new rulemaking requirements and, in the extreme, we risk hampering the effectiveness of administrative government in Florida. On the other hand, if the rulemaking process does not include adequate protection for substantial interests, individuals whose substantial interests are affected by rulemaking may prefer case by case adjudication of policy matters to rulemaking of that kind.¹⁸⁸

The specifics of the Governor's response to the enactment of section 120.535 first emerged for general discussion at the Eighth Administrative Law Conference. Participants there heard an address from Lieutenant Governor Buddy MacKay, whom the Governor had designated to lead the administration's efforts to "streamline" rulemaking procedure. At that Conference, specific revisions proposed by the Governor were announced. They were earlier memorialized in a letter from Lieutenant Governor MacKay to House and Senate leaders.¹⁸⁹ In that letter, Lieutenant Governor MacKay proposed the following changes to the APA:

1. Repeal § 120.54(4), Florida Statutes
2. Repeal the requirement for an economic impact statement as provided in § 120.54(1)
3. Provide for application of the harmless error doctrine with regard to rule challenges
4. Limit standing to challenge a rule, which challenge is based upon

186. See Stephen T. Maher, *Rulemaking in Florida: An Opportunity for Reflection*, FLA. B.J., Jan. 1990, at 49.

187. "Requiring more agency rulemaking will increase the volume of rulemaking and hence the demands on existing procedures. The increase in activity will dramatize existing weaknesses and drive issues of rulemaking procedure and judicial review of rules to the fore." Stephen T. Maher, *The Seventh Administrative Law Conference Chairman's Introduction to the Symposium Issue*, 18 FLA. ST. U. L. REV. 607, 613-14 (1991).

188. *Id.* at 614.

189. See *supra* note 185.

the supporting documents (minority and small business impact statement, statement of facts and circumstances, federal comparison statement, summary of the rule, or, if its [sic] exists, economic impact statement), to any party that can demonstrate it is substantially affected by the adequacy of the document upon which it is basing its challenge

5. Except prisoners as "parties" entitled to challenge rules

6. The Joint Administrative Procedures Committee (JAPC) should be precluded from filing an objection if its objection was first raised after six months from the time the rule became effective. It is requested that the JAPC work with the agencies to develop standards of review

7. Refine the definition of a "rule" to clarify that agency statements that do not create legal rights or require compliance in their own right are not rules

8. When a rule references a specific state statute or federal statute, rule or guideline, it should be deemed to include the most current version of that law.¹⁹⁰

Professor Dore, who was the leading authority in the state on this issue, responded to the Governor's proposals by noting that "the Governor will have to carry the burden of persuading the Legislature that any specific reforms of the rulemaking process designed to enhance administrative efficiency do not unacceptably abridge citizen participation."¹⁹¹

Before each proposal is separately reviewed, some general comments are appropriate. It is important to emphasize what the list did not contain. The list did not ask for any changes in the 1991 legislation. That is surprising in light of the large number of concerns about the 1991 amendments raised in this Article. The list also did not offer any alternative to required rulemaking that could arguably remedy the widespread agency failure to adopt policy by rule that the 1991 amendments were designed to address. Instead of offering an alternative approach to the 1991 amendments that would make them less necessary, the Governor's proposal focused on improving agency efficiency by weakening existing protections against unwarranted agency encroachment on substantial interests and by making it more difficult to enforce the protections that would remain intact.

Granted, less protection of substantial interests will make an agency's job in rulemaking easier, but only at the cost of making the agency more likely to encroach on interests that it should respect. Is

190. *Id.*

191. Dore, *supra* note 14, at 454-55.

that an acceptable cost? Even if less procedural protection is a good idea, should it be done by chipping away at certain protections and making it harder to enforce others? Or is it more logical, if the present balance among accuracy, acceptability, and efficiency is unacceptable, to simply adopt a new administrative procedure act, one that strikes a different balance among these competing values? The 1981 MSAPA is an act that strikes a more pro-agency balance.¹⁹²

The problem with this more logical alternative is political. Given the history of administrative procedure in Florida, and the mood in the 1992 Legislature, it seems unlikely that any wholesale revision of the Act that proposes to create a less rigorous administrative process would be well received. Even if it were, it is hard to believe that revisions to the Act that make it possible for agencies to make rules with less care, and with less accountability for violations of established law that occur in the process, would be in the long-term best interests of the people of Florida.

It appears that those within the executive branch have never squarely faced the real issue: Why have Florida agencies been so remiss in failing to promulgate their policies as rules? If the executive branch can solve this problem by identifying and remedying the causes of this regulatory paralysis, it need not worry about section 120.535. If agencies can put their own houses in order, they can render section 120.535 superfluous.

Has the Governor's list identified the real obstacles to agency compliance with the Act's rulemaking requirements? Concerns about efficiency are obviously credible in the abstract,¹⁹³ but when this agenda for reform is carefully scrutinized, is it attacking the real obstacles? Or is the letter merely calling for a roundup of the "usual suspects?" A careful review of the items on this list suggests that the letter largely does the latter.

1. *Repeal Section 120.54(4)*

The section 120.54(4) rule challenge is an easy target for critics concerned about the inefficiencies in Florida rulemaking. Undoubtedly, this challenge is a powerful procedural hurdle that a substantially affected person can place in the way of an agency seeking to adopt a policy as a rule. Similarly, there is no question that other jurisdictions have not put such a powerful remedy in the hands of the people during the rulemaking process.¹⁹⁴ While the available evidence suggests

192. Maher, *supra* note 32, at 825.

193. See Maher, *supra* note 186, at 48.

194. See Dore, *Agenda and Report*, *supra* note 5, at 725.

that this remedy is unique and powerful, it also suggests that the remedy did not cause the widespread agency failure to adopt policy as rules that led to the 1991 amendments.¹⁹⁵ Also, the available evidence suggests that abolishing this remedy will do little to make rulemaking more efficient.¹⁹⁶

These conclusions find support in the history of the section 120.54(4) remedy and in the scholarship. Section 120.54(4) has been invoked only about two to three times a week since 1985.¹⁹⁷ Further, restrictive decisions in the area of the jurisdictional nature of the filing deadline and standing to invoke the remedy have prevented it from becoming more available.¹⁹⁸

These conclusions are also supported by Professor Dore's work.¹⁹⁹ At the Seventh Administrative Law Conference, one topic for small group discussion by the participants was whether the rule challenge remedy should be retained, or perhaps should be replaced with another form of check on agency overreaching. There were ten small groups. Professor Dore reported that:

With only one exception, the small group leaders reported consensus that the validity challenge to proposed rules should be retained. The one dissenting group apparently did not reach consensus, but the group leader reported some sentiment to abolish the validity challenge to proposed rules as a way to simplify the rulemaking process and perhaps to encourage rulemaking.²⁰⁰

This response is significant because of the large number of agency lawyers who participated in the discussion and the fact that each small group was organized to assure balance between "government sector people and private sector people."²⁰¹ After reporting various suggestions for modifying the remedy, Professor Dore concluded: "On balance, it appears that most people working with this unusual mechanism want to keep it in place."²⁰²

If the existence of the section 120.54(4) remedy is having a chilling effect on an agency's willingness to put its policy through rulemaking, perhaps that agency is concerned because its policies are invalid exercises of delegated legislative authority. A remedy that prevents agen-

195. *See id.* at 725-27.

196. *See id.*

197. While no hard data exists, the best estimate available is that slightly more than 1000 120.54(4) rule challenges had been filed from January 1, 1985, through the end of 1992. Letter from F. Scott Boyd to Stephen Maher (Nov. 25, 1992) (on file with author).

198. *See, e.g.,* Département of HRS v. Alice P., 367 So. 2d 1045 (Fla. 1st DCA 1979).

199. *See Dore, Agenda and Report, supra* note 5, at 725.

200. *Id.*

201. *Id.* at 722.

202. *Id.* at 726.

cies from adopting rules that are in fact invalid is not inefficient, it is both efficient and beneficial.

Finally, even if section 120.54(4) were to be repealed as the Governor requested, the same relief—invalidation of a rule found to be an invalid exercise of the agency's delegated authority—would continue to be available pursuant to section 120.56, but not until after the rule became effective. The repeal of section 120.54(4) while section 120.56 remains effective would make it easier to adopt invalid rules, but no easier to maintain them. While the same relief would be available later through section 120.56, the repeal of section 120.54(4) could be expected to change the dynamics of the rulemaking process in several ways. First, section 120.54(4) challenges can delay rulemaking because an agency must win such a challenge before it can adopt a proposed rule. While the fast disposition of these challenges mandated by statute²⁰³ can limit the delay, agencies sometimes agree to continuances in these matters because of the difficulties that the statute's short time frames can present. Second, the availability of an invalidity challenge during rulemaking facilitates settlement of the challenge by making changes in the proposed rule. Changing the rule to settle a challenge is still possible in the section 120.56 context, but it is more difficult to make changes if challenges are not available until after the rule is adopted.²⁰⁴

2. Repeal the Requirement for an Economic Impact Statement as Provided in Section 120.54(1)

Challenges to the adequacy of economic impact statements have been used by opponents of proposed rules to stop or slow the adoption of rules, or to exact changes in rules during the rulemaking process. This is usually done by raising the agency's noncompliance with the economic impact statement requirement as a ground for a section 120.54(4) challenge. There is no denying that, when used this way, the economic impact statement requirement, like the section 120.54(4) remedy itself, puts power in the hands of regulated persons. As with the section 120.54(4) remedy, it is not clear that this is such a bad thing.

However, whatever a person's position on the desirability of giving regulated persons more leverage in the rulemaking process, it is hard

203. Section 120.54(4), *Florida Statutes* (1991), provides that challenges must be assigned to a hearing officer in 10 days, heard in 30 days, and decided in 30 days, unless the agency agrees to a waiver of these time limits.

204. Changes are easier to make during rulemaking because changes to existing rules require the agency to institute rulemaking, where changes to proposed rules will not necessarily require the agency to begin again.

to deny that the economic impact statement requirement, as followed by many agencies, has often proven to be a waste of effort. Agencies have sometimes assigned the task of preparing economic impact statements to unqualified individuals and the quality, and hence the value, of many economic impact statements is suspect. For that reason, the requirement has made some proposed rules easy prey for those challenging their validity and has not been of much use as a policy-making tool. Thus, the proposal to repeal the requirement has merit on the basis that the requirement should be taken seriously, narrowed, or eliminated.

The desirability of maintaining the economic impact statement requirement was another topic of discussion at the Seventh Administrative Law Conference. Professor Dore reported that "there is widespread dissatisfaction with the current state of affairs relating to the economic impact statement requirement."²⁰⁵ However, the participants at the Conference expressed no clear consensus for any single alternative, although several possible alternatives were discussed. While this requirement was not a clear cause of the rulemaking paralysis that the 1991 amendments were designed to address, concern about the requirement is reasonable, and the Governor's proposal to repeal the requirement appears sound.

3. Provide for Application of the Harmless Error Doctrine with Regard to Rule Challenges

It is not clear what the harmless error proposal was designed to add. A harmless error doctrine already exists in connection with judicial review. Section 120.68(8) provides for remand only where a *material* error in procedure may have impaired either the fairness of the proceeding or the correctness of the action. A harmless error rule also already exists in rule challenges by virtue of the section 120.52(8)(a) provision for invalidation of rules only where an agency has *materially* failed to follow applicable rulemaking procedures. Have these provisions proven inadequate? Has DOAH been invalidating rules based upon harmless errors? Or is this proposal merely an attempt to permit agencies to get sloppy and avoid the consequences?

4. Limit Standing To Challenge a Rule, Which Standing Is Based upon the Supporting Documents (e.g., Minority and Small Business Impact Statement, or Economic Impact Statement), to Any Party Demonstrating It Is Substantially Affected by the Adequacy of Those Documents

To which problem is this proposal responding? Is the problem that agencies often do a bad job of complying with these paperwork re-

205. Dore, *Agenda and Report*, *supra* note 5, at 724.

quirements in rulemaking, and that this failure therefore makes proposed rules easy prey for rule challengers? If so, why is the proposed response to help excuse this noncompliance rather than to assure that agencies do a better job of complying with these requirements? If there is a consensus that particular paperwork requirements are really a waste of effort, why not repeal them?

How serious a problem is this? How many rules are successfully challenged because they have technical defects in the rulemaking materials? Even if the number of successful challenges on this basis is large, an assumption that seems unlikely, what are the consequences of these successful challenges? Could not most, if not all, of the rules successfully challenged on this basis be successfully adopted after correction of the poorly-drafted rulemaking materials? While current law may provide challengers with a bit more leverage in the rule challenge process, it also provides agencies with more incentive to comply with legal requirements. It seems that, on balance, neither is such a bad thing.

The theme of limiting standing is consistent with how the courts have dealt with requirements or parties they do not like. Nevertheless, it is inconsistent with the concept of access to the administrative process that is so central to the design of the Act. Professor Dore suggested that the concept of standing should be abolished under the Act and that administrative remedies should be even more accessible than they now are.²⁰⁶ While some rule challengers may rely on technicalities not designed to protect them, agencies that do their homework have nothing to fear. Even those agencies that begin rulemaking unprepared are not doomed. Once they determine what they have forgotten to do, they can withdraw their proposed rule and begin again. Why take the Act farther from Professor Dore's ideal of an Act without standing to prevent this minor inconvenience? Also, it is difficult to prove how a particular weakness in a document prepared in connection with a proposed rule will affect a challenger's substantial interests. If agencies are encouraged to shirk their statutory rulemaking responsibilities in reliance on those difficulties of proof, then the process itself will gradually break down as compliance becomes less enforceable.

The reference in this section to excusing failures in the statement of facts and circumstances is the closest this proposal comes to addressing what I saw as the biggest threat to efficient agency rulemaking existing at the time the list was written: the First District Court of Appeal's opinion in *Adam Smith Enterprises v. Department of Envi-*

206. See generally Dore, *Access*, *supra* note 5.

*ronmental Regulation.*²⁰⁷ In *Adam Smith*, the court created new requirements for rulemaking. It not only added paperwork requirements absent from the Act, but also advocated a form of judicial review of rules that, if widely adopted, could have posed a significant threat to efficiency in rulemaking and even to agency control over the substantive judgments made in rulemaking.²⁰⁸ Efficiency was threatened by the specter of "hard look" review, review that threatened to delay rulemaking through successive appeals and remands. An agency's control over its own policy was threatened by the possibility that courts could remand on the basis of amorphous procedural deficiencies to disguise their opposition to the substantive policy judgments contained in the rule. As is more fully described elsewhere,²⁰⁹ these dangers are not just hypothetical. They are based on the experiences of other jurisdictions that have adopted the type of approach advocated in *Adam Smith*. This kind of approach to judicial review of rules is particularly inappropriate in Florida because our APA specifically rejects that approach in favor of an approach that places significantly more restraint on the courts' ability to review agency policy.²¹⁰

As will be discussed later,²¹¹ the 1992 amendments address the problems created by *Adam Smith*, although the Governor's initial proposals did not. The adopted solution is problematic because it takes a meat cleaver to the Act to remove the problem created by *Adam Smith*. However, the amendment that was adopted demonstrates an awareness of the importance of preventing the *Adam Smith* approach to the judicial review of rules from becoming widespread.

5. Except Prisoners As "Parties" Entitled To Challenge Rules

The Governor's agenda took a shot at one particularly easy target: prisoners. Prisoner litigation has established some interesting law in the rulemaking area because prisoners have been excluded from section 120.57 proceedings and have attempted to make rulemaking proceedings do double duty.²¹² The wisdom of excluding prisoners from

207. 553 So. 2d 1260 (Fla. 1st DCA 1989). For an extended discussion of the *Adam Smith* opinion, see Maher, *supra* note 32, at 815-28.

208. See *Adam Smith*, 553 So. 2d 1260.

209. Maher, *supra* note 32, at 815-28.

210. *Id.*

211. See discussion *infra* notes 275-91.

212. For example, in *Diaz v. Department of Correct.*, 519 So. 2d 41 (Fla. 1st DCA), *appeal dismissed*, 525 So. 2d 877 (Fla. 1988), the First District Court found that it was proper to raise the constitutionality of a rule on appeal from a § 120.56 proceeding, even though constitutionality cannot be determined by the hearing officer. In attempting to have the appeal dismissed, the Department had unsuccessfully argued that the petitioner "never had any intention of success-

so much of the administrative process is debatable, but the political strength of the proposal was never in doubt. It was an easy win from the day it was proposed.

6. The Joint Administrative Procedures Committee (JAPC) Should Be Precluded From Filing an Objection Six Months After the Rule's Effective Date

This proposal recognizes that the JAPC often takes some time to file objections to rules it reviews. This proposal's "use it or lose it" approach is presumably designed to make the JAPC lose it rather than use it. As can be seen from a review of the 1992 amendments, this proposal is somewhat out of step with the direction the Legislature is taking in the area of legislative review of rules. The trend seems to be toward increasing legislative review of rules, rather than limiting it.

7. Refine the Definition of a "Rule" To Clarify That Agency Statements That Do Not Create Legal Rights or Require Compliance in Their Own Right Are Not Rules

The proposal to limit the definition of a rule to agency statements that create legal rights or require compliance in their own right would presumably be used to limit the reach of section 120.535, which requires agency adoption of its policy statements as rules unless the agency can prove that one of the statutory exceptions to rulemaking exists. Again presumably, it would do this by providing agencies with the defense to rulemaking that a policy need not be adopted as a rule because it falls outside the definition of a rule within the APA, a defense not now included in section 120.535.

If the definition of the term "rule" is limited, what would the policy that is no longer a "rule" be called? It would not be an "order," but a "nonrule policy"—the very category of policy that the 1991 amendments set out to abolish. Thus, this proposal, if adopted, would simply recreate the problems with nonrule policy that have been identified and denounced over recent years.²¹³ In addition, by defining rules in terms of legal rights, the proposal threatens to reintroduce the rights/privileges distinction into Florida's administrative law, a distinction that the Act tried to eliminate from administrative practice in 1974.²¹⁴

fully challenging the rule in the administrative proceedings but did so solely for circumventing the trial court so that he could challenge the constitutionality of the statute in the district court." *Id.* at 670. The court was unimpressed with this argument, and this novel use of § 120.56 was permitted.

213. See Arthur E. Bonfield, *Mandating State Agency Lawmaking by Rule*, 2 B.Y.U. J.

8. *When a Rule References a Specific State or Federal Statute, Rule or Guideline, It Should Be Deemed To Include the Most Recent Version of the Law*

The 1992 amendments codified a somewhat similar, problematic concept.²¹⁵ This is another area where the question is: Why is this needed? It seems that there is a salutary purpose in requiring agencies to look at the ever-changing materials their rules are implementing to see that their rules remain sensible in light of the changes in the law implemented.

IV. THE 1992 SESSION AND THE LEGISLATION THAT EMERGED

A. *The Mood*

Frustration pervaded the 1992 legislative session. The Legislature faced many difficult and divisive issues, such as reapportionment and the budget. Also, some legislators were frustrated by an inability to address growth management issues directly. The result of this frustration seemed to be an increased level of agency bashing. The general theme seemed to be that every branch of government but ours is the problem. The Legislature saw bureaucrats as part of the problem and itself as part of the solution. The 1991 theme of making the Act work better was replaced by a growing dissatisfaction with the whole concept of giving agencies responsibilities for making rules.

There was a groundswell of support for greater legislative involvement in rulemaking to prevent agency encroachment on legislative prerogatives. This was surprising in light of the fact that the Act has section 120.54(4), probably the strongest protection against encroachment on legislative prerogatives that can be found in any administrative procedure act in the United States. It is also surprising that legislators view the Legislature as a better watchdog against agency encroachment on legislative prerogatives than the citizens whose interests are being encroached.

The Act has traditionally addressed concerns about agency overreaching by combining powerful citizen participation remedies in the rulemaking process with legislative oversight by the JAPC. The problem with checking agency overreaching through the use of rulemaking remedies has not been that the system does not work when it is used. The problem is that rulemaking remedies cannot always be used because the courts have created restrictive definitions of the level of in-

PUB. L. 161 (1988); Johnny C. Burris, *The Failure of the Florida Judicial Review Process To Provide Effective Incentives for Agency Rulemaking*, 18 FLA. ST. U. L. REV. 662 (1991); Dore, *Agenda and Report*, *supra* note 5; L. Harold Levinson, *The Florida Administrative Procedure Act After 15 Years*, 18 FLA. ST. U. L. REV. 749 (1991).

214. Levinson, *supra* note 213, at 762-73.

215. See *infra* notes 294-305 and accompanying text.

terest required in order to invoke those remedies²¹⁶ and the courts have not remained faithful to legislative intent in the construction of those remedies.²¹⁷ If these problems were corrected legislatively by removing standing requirements as Professor Dore has recommended²¹⁸ and by revitalizing the draw-out remedy as I have recommended,²¹⁹ then the administrative process could be more confidently relied upon to be self-correcting in this regard.

B. *The Legislation*

At the end of the session, one bill containing amendments to the APA passed.²²⁰ Each section of the legislation will be reviewed separately.

1. *Section 1:²²¹ Changes Relating to Indexing Orders*

The indexing requirement established in 1991 was amended in 1992 in one significant respect. The 1992 amendment provides:

In lieu of the requirement for making available for public inspection and copying a hierarchical subject-matter index of its orders, an agency may maintain, and make available for public use, an electronic data base of its orders that allows users to research and retrieve the full texts of agency orders by devising an ad hoc indexing system employing any logical search terms in common usage which

216. Dore, *Access*, *supra* note 5, at 989-1117.

217. This has been particularly true in connection with the draw-out remedy, which the courts have made virtually unavailable. For further discussion of this point, see generally Maher, *supra* note 32.

218. Dore, *Access*, *supra* note 5, at 967-68 (proposing to "banish the word standing from the discussion of the right to initiate any executive branch proceeding").

219. Maher, *supra* note 32, at 829-30. The draw-out provision, located at § 120.54(17), *Florida Statutes*, reads as follows:

Rulemaking proceedings shall be governed solely by the provisions of this section unless a person timely asserts that his substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests. If the agency determines that the rulemaking proceeding is not adequate to protect his interests, it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of s. 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

For a further discussion of the draw-out's application and effect, see Dore, *Agenda and Report*, *supra* note 5, at 727-32.

220. Ch. 92-166, 1992 Fla. Laws 1670 (to be codified at FLA. STAT. §§ 11.60, 120.52, 120.53, 120.535, 120.54, 120.543, 120.545, 120.68).

221. *Id.* § 1, 1992 Fla. Laws at 1671 (to be codified at FLA. STAT. § 120.53).

are composed by the user and which are contained in the orders of the agency.²²²

This amendment permits an agency to avoid the indexing requirement altogether if it makes orders available in an electronic form that can be searched by key words. It is a creative response to the cost and inherent limitations of paper subject matter indexes. If this solution to the indexing problem were widely used, the Legislature would not have to limit the types of orders that the agencies must maintain and index. Where orders are kept and retrieved electronically, the paper bulk of the material involved is almost irrelevant. Volumes and volumes of orders could easily fit on a single compact disc. Once agency orders are kept this way, it will be only a small additional burden to require that all agency orders, whether final or not, whether they involve settlements or not, or whether they are "precedential" or "ministerial," be kept and made accessible. Then, the focus will shift to defining standards for creating, maintaining, and retrieving data in electronic form. The Legislature should take control of determining these standards itself.

Possibly, the Legislature will soon require agencies to keep not only agency orders, but other agency information, in an electronic form that would make it possible to search and retrieve information at will. If adopted, such a system would save money and improve access. It would save the money that now must be expended in generating paper copies and in creating paper indexes that must be constantly updated to be useful. It would provide more reliable access to the information than indexes because indexes are more subject to human error than a system of direct electronic access. The choice to stay with paper has been one cause of the problems with access within this area.

When it is achieved, electronic access to all agency information will have several benefits. First, such a system will make it possible for the agency to truly know its own policy. While it might sound strange to say it, under the present system, there is a danger that agencies may not know their own policy. The realities of state government place barriers in the way of even the most dedicated administrators really knowing the nuances of the agency policy they administer. Agency policy is not created out of whole cloth. It is the product of people working together over time, solving the problems that arise. Changes in administration cause changes in focus and in emphasis. Changes in personnel cause lapses in institutional memory. Variations in the si-

222. *Id.* (to be codified at FLA. STAT. § 120.53(2)(a)3.).

tuations that arise change the opportunities for policy development. It is quite possible under the current system to see lawyers who regularly litigate against an agency have a better understanding of the agency's options in handling what are recurring agency problems than the agency itself, because those inside the agency may not have been present the last time the problem occurred. If agencies had electronic access to their own information, they would benefit by institutional memory equal to that of their agency specialists/adversaries.

Better access to agency information might weaken the grasp agency specialists now have over practice before some agencies. That might make it possible to finally achieve the APA's drafters' vision of taking the Act away from agency specialists whose real value is what they know about the agency and giving it back to the people. While no system can eliminate the value of agency insiders, a system that provides access to all agency precedents makes it easier for those who are not specialists to learn what they need to know about the agency and its policies. A system that provides access to all agency orders will make it impossible for the agency to shape public impression of its policy by indexing and publishing only the decisions that it would like the public to view as significant. The new indexing system adopted by the 1991 amendments, especially as it is described by the Department of State rules in this area, is particularly subject to this type of manipulation.²²³

Finally, this section also included a technical correction. It added orders entered pursuant to section 120.535 to the list of agency orders that must be indexed.²²⁴

2. Section 2²²⁵

Section 2 made small changes to the requirement that agencies consider the impact of rules on small business. The amendment provides that an agency may define "small business" to include more than fifty persons, as opposed to twenty-five under the old statute, if it finds such a definition is necessary to adapt any rule to the needs and problems of small business.

3. Section 3²²⁶

This amendment stated that the official reporters used complied with section 120.53(2)(a)'s indexing and availability requirements. It

223. For a further discussion of this point, see *supra* notes 88-119 and accompanying text.

224. Ch. 92-166, § 1, 1992 Fla. Laws 1670, 1671 (to be codified at FLA. STAT. § 120.53(2)(a)3.d.).

225. *Id.* § 2, 1992 Fla. Laws at 1671-72 (to be codified at FLA. STAT. § 120.54(2)(a)-(d)).

226. *Id.* § 3, 1992 Fla. Laws at 1672-73.

was necessary because the Public Employees Relations Commission (PERC) reporter did not meet the form prescribed in Department of State standards, but was thought by many to be acceptable in substance under legislative standards.

4. Section 4: The Economic Impact Revision²²⁷

This revision is difficult to understand not only because it adds a new level of complexity to an already complex process, but also because it was a compromise between those who would abolish the economic impact statement requirement altogether and those who would strengthen it considerably. Nonetheless, one thing is clear: This revision will be a focus of litigation for years to come.

This revision not only changes the law relating to economic impact statements, but also creates a "rule development" procedure that can occur before rulemaking is formally commenced.²²⁸ This procedure is available at the agency's option, but if it is used, the agency must conform with the requirements established in section 120.54(1)(c)-(e). Notice of rule development must be published in the *Florida Administrative Weekly* at least fourteen days before the rule development workshop's scheduled date,²²⁹ and notice of rule development "shall indicate the subject area which will be addressed by rule development, provide a short plain explanation of the purpose and effect of the rule development, the specific legal authority for rule development, and the preliminary text of proposed rules if available."²³⁰

Also, if an agency provides notice of rule development and prepares an economic impact statement, the agency must make a draft copy of the economic impact statement available to any person who requests a copy.²³¹

Although this new rule development procedure formalizes another layer of procedure in rulemaking, it is hard to see why it was necessary. Agencies could always hold workshops before proposing rules, and many agencies have used this approach to get public input early in the rulemaking process. While this new procedure requires longer notice than is required for workshops as well as more information in the required notice, the rule development process essentially formalizes a procedure that has been available to agencies for years. How-

227. *Id.* § 4, 1992 Fla. Laws at 1673-76 (to be codified at FLA. STAT. § 120.54(1), (2), (12)).

228. *Id.* (to be codified at FLA. STAT. § 120.54(1)(c)-(e)).

229. *Id.* (to be codified at FLA. STAT. § 120.54(1)(d)).

230. *Id.* (to be codified at FLA. STAT. § 120.54(1)(c)).

231. *Id.* (to be codified at FLA. STAT. § 120.54(1)(e)).

ever, it has a special role to play in the new economic impact requirements.

This revision significantly changed the economic impact statement requirement. It deleted the requirement that a summary of the estimate of the economic impact of the proposed rule on all persons affected by it be provided before the adoption, amendment, or repeal of a rule.²³² While an economic impact statement need not be prepared in connection with every rule, the requirement is retained when:

1. The agency determines that the proposed action would result in a substantial increase in costs or prices paid by consumers, individual industries, or state or local government agencies, or would result in significant adverse effects on competition, employment, investment, productivity, or innovation, and alternative approaches to the regulatory objective exist and are not precluded by law; or
2. Within 14 days after the date of publication of the notice provided pursuant to paragraph (1)(c) [notice of rule development] or, if no notice of rule development is provided, within 21 days after the notice required by paragraphs (1)(a) and (b) [notice of rulemaking], a written request for preparation of an economic impact statement is filed with the appropriate agency by the Governor, a body corporate and politic, at least 100 people signing a request, or an organization representing at least 100 persons, or any domestic nonprofit corporation or association.²³³

The section also provides that “[a]n agency’s determination regarding preparation of an economic impact statement pursuant to subparagraph (2)(b)1. shall not be subject to challenge.”²³⁴ Thus, the old system of requiring an economic impact statement in all cases has been replaced by one where it is only prepared when the agency believes it is necessary under the legislative standards or when it is requested.

This change will save the agency from preparing an economic impact statement in connection with rules in which no one has a particular interest. However, it seems likely that, given the ease of requesting preparation of an economic impact statement,²³⁵ a statement will be requested in connection with most actively-opposed rules.

232. *Id.* (to be codified at FLA. STAT. § 120.54(2)(b)).

233. *Id.*

234. *Id.*

235. *Id.* (to be codified at FLA. STAT. § 120.54(2)(b)2.).

Also, the ease of requesting preparation of an economic impact statement belittles the statute's declaration that the agency's determination not to prepare an economic impact statement pursuant to subsection (2)(b)1. is not subject to challenge. This is true because it seems likely that the agency's failure to voluntarily prepare an economic impact statement will be used against it, but in a different way than the drafters expect. The agency's failure to voluntarily prepare an economic impact statement suggests the circumstances enumerated in subparagraph (2)(b)1. do not exist. If an economic statement is then requested and prepared pursuant to subparagraph (2)(b)2., and it shows that the enumerated circumstances do indeed exist, the requesting party may argue that the agency drafted its proposed rule based upon faulty premises and should redraft it in light of the insights gained from the economic impact statement. A proposed rule drafted based upon faulty premises could be challenged and thus invalid under section 120.52(8)(e).

There are also unanswered questions concerning whether the individuals enumerated in subparagraph (2)(b)2. must also have standing as "affected persons" under section 120.54(3), or whether this section empowers those without standing to request a section 120.54(3) rule-making hearing to request preparation of an economic impact statement. The latter construction appears correct.

The revision also increased the information an agency must consider when preparing an economic impact statement. The agency must not only consider the cost of the proposed rule to the agency, but must now also consider the cost of the rule "to any other state or local government entities, of implementing and enforcing the proposed action, including the estimated amount of paperwork, and any anticipated effect on state or local revenues."²³⁶ The revision also required the agency to make:

5. A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of not adopting the rule;
6. A determination of whether less costly methods or less intrusive methods exist for achieving the purpose of the proposed rule where reasonable alternative methods exist which are not precluded by law;
7. A description of any reasonable alternative methods, where applicable, for achieving the purpose of the proposed rule which were considered by the agency, and a statement of the reasons for rejecting those alternatives in favor of the proposed rule.²³⁷

These new requirements are very similar to the 1981 MSAPA's provisions governing the preparation of a Regulatory Analysis in

236. *Id.* (to be codified at FLA. STAT. § 120.54(2)(c)).

237. *Id.* (to be codified at FLA. STAT. § 120.54(2)(c)5.-7.).

connection with rulemaking.²³⁸ These requirements were apparently added to force agencies to be more introspective about their alternatives. It is difficult to predict whether requiring the agency to go through these exercises will actually change agency policy judgments. If these portions of the economic impact statement are written after policy judgments have been made, they are likely to be written defensively to protect the agency's position in litigation rather than introspectively to help the agency fairly consider alternatives, thereby raising the question of how deficiencies in the economic impact statement may be used in the rule challenges likely to result. The revision limits the grounds that may be raised in rule challenges by first limiting what agency failures concerning economic impact statements are subject to challenge or review in rule challenge proceedings, and second by limiting standing to challenge shortcomings that may exist.

a. Challenging an Agency's Economic Impact Statement

Some agency failures are specifically made unreviewable by the statute. As was noted earlier,²³⁹ an agency's determination regarding preparation of an economic impact statement pursuant to section 120.54(2)(b)1. "shall not be subject to challenge."²⁴⁰ The revision also limits the grounds for invalidation of the rule based upon problems with the economic impact statement:

The grounds for invalidation of a rule based upon a challenge to the economic impact statement for the rule, are limited to an agency's failure to adhere to the procedure for preparation of an economic impact statement provided by this section, or an agency's failure to consider information submitted to the agency regarding specific concerns about the economic impact of a proposed rule when such failure substantially impairs the fairness of the rulemaking proceeding.²⁴¹

Though this section greatly limits the nature of the challenge that can be made, it leaves the possibility of a challenge based upon the inadequacy of the economic impact statement for failure to adhere to

238. 1981 MSAPA § 3-105(b)(3)-(6). There are minor changes in wording in all these sections. The decision to make changes in the language of model provisions is problematic because it casts doubt on the utility of the out-of-state case law that has developed to interpret the model provisions.

239. See *supra* note 234 and accompanying text.

240. See *supra* note 234 and accompanying text.

241. Ch. 92-166, § 4, 1992 Fla. Laws 1670, 1675-76 (amending FLA. STAT. § 120.54(2)(d)).

the procedure for preparation or for failure to consider information submitted. The latter point raises the question of how much the agency must demonstrate its consideration of the submitted information to satisfy the requirement. Will consideration be presumed, or is it enough for the agency to write a polite "Thank you for submitting . . ." letter in response? Or must a person in a policy-making position within the agency view and consider the information at a time relevant to the preparation of the economic impact statement? Or must the agency respond in writing to information submitted in connection with this provision in order to prove its consideration? The history of federal rulemaking requirements, and the willingness shown by the court in the *Adam Smith* opinion to draw on those precedents in interpreting our Act, should give the Legislature pause in throwing in such ambiguous requirements.²⁴² Also, how will the agency's failure to consider be proven in a rule challenge? It is fair to assume that interrogatories asking which agency officials considered the submitted information will now be filed with the complaint in a proposed rule challenge, and that those officials will be deposed to determine just how intelligently they considered the information? And when it is shown there were others in the agency who may have been better qualified to consider the information, there will be charges of insufficient consideration. When grounds for challenge are limited, it is a safe bet that lawyers will make those limited grounds do double duty.

b. Standing To Challenge

The Act also limited standing to make challenges based on problems with the economic impact statement.²⁴³ This means that even though grounds for challenge exist, not every substantially affected person will be permitted to challenge. This new provision states:

No person shall have standing to challenge an agency rule, based upon an economic impact statement or lack thereof, unless that person requested preparation of an economic impact statement under [section 120.54](2)(b)2. and provided the agency with information sufficient to make the agency aware of specific concerns regarding the economic impact of the proposed rule, by either participation in a public workshop, public hearing, or by submission of written comments, regarding the rule.²⁴⁴

242. For a more extended discussion of this point, see Maher, *supra* note 32, at 815-28.

243. Ch. 92-166, § 4, 1992 Fla. Laws 1670, 1675 (to be codified at FLA. STAT. § 120.54(2)(d)).

244. *Id.* (amending FLA. STAT. § 120.54(2)(d)).

Limitations on standing to challenge the economic impact statement in a section 120.54(4) rule challenge were apparently included to make the strengthened provision more acceptable to those who opposed strengthening those provisions. These limitations have certain disadvantages. First, the decision limiting standing by statute moves the Act farther away from its desired destination: the abolition of standing altogether.²⁴⁵ This is particularly disturbing because it is not the only place in the 1992 amendments that contains statutory limits on standing.²⁴⁶

Second, this is further evidence of another undesirable trend—the trend toward excusing agency violation of procedural requirements by making it more difficult for those who are affected by that failure to challenge it. Rather than make provisions more rigorous but less enforceable, it would be fairer to all concerned to judge the value of the requirements in question. If the requirements are valuable, they should be uniformly enforceable. If they are worthless, they should be removed. The current approach is designed to help only those who can afford the lawyers necessary to figure it out and employ it without mistake. The irony is that in section 8, these same amendments admonish agencies to find ways to make their rules less complex and more accessible to the general public.²⁴⁷ That is one test the economic impact statement revision does not pass.

5. Section 5²⁴⁸

This section created the first exception to section 120.535, *Florida Statutes*,²⁴⁹ and as more agencies flex their political muscle in the Legislature in coming years, we can expect this list to grow.

6. Sections 6, 7, and 8:²⁵⁰ *Increasing the Power of JAPC*

Sections 6, 7, and 8 of the 1992 amendments relate to the Joint Administrative Procedures Committee (JAPC). The JAPC is a standing committee of the Legislature that has been in existence since the

245. See *supra* text accompanying notes 206-07.

246. See *supra* text accompanying notes 206-07.

247. Ch. 92-166, § 8, 1992 Fla. Laws 1670, 1677 (to be codified at FLA. STAT. § 120.545(1)(j)).

248. *Id.* § 5, 1992 Fla. Laws at 1676 (to be codified at FLA. STAT. § 120.535(10)).

249. Agency statements that relate to cost-recovery clauses, factors, or mechanisms implemented pursuant to chapter 366 are exempt from the requirements of section 120.535, *Florida Statutes*.

250. Ch. 92-166, §§ 6-8, 1992 Fla. Laws 1670, 1676-78 (to be codified at FLA. STAT. §§ 11.60(2)(k), 120.54(9)(a), 120.545(1)).

fall of 1974.²⁵¹ The Committee has the power to object to rules and to seek their invalidation, but does not have the power to declare agency rules invalid on its own.²⁵² The JAPC reviewed between 3600 and 4900 rules per year between 1985 and 1990.²⁵³

Section 6 of the 1992 amendments increased the standing of the JAPC. The JAPC has traditionally had standing to seek judicial review of rules it believed were in excess of delegated authority in the courts of the state. That was expanded in the 1992 amendments to provide the JAPC with standing to seek both administrative and judicial review of objectionable rules and the JAPC has standing to sue on behalf of the Legislature or the citizens of the state.²⁵⁴ While this is an expansion of the JAPC's power, it must be viewed in context. First, given the amendments elsewhere in these revisions that may preclude direct judicial review of rules,²⁵⁵ this amendment may be necessary just to preserve the status quo. Second, the JAPC has had the power to seek judicial review of rules for many years, but it has never needed to exercise that authority. Given the power of the Legislature in this process, the JAPC has been able to resolve its objections without the help of the courts.

Section 7 of the amendments adds the requirement that the agency provide the JAPC with materials prepared by the agency in connection with emergency rulemaking.²⁵⁶ This is part of the changes necessary in connection with the expansion of the JAPC's authority to include the review of emergency rules.²⁵⁷

Section 8, amending section 120.545, not only expands the JAPC's role to include reviewing emergency rules, it also expands the type of review that the JAPC must do in connection with proposed rules.²⁵⁸ The JAPC must now review each rule to determine: (1) if it "is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements";²⁵⁹ (2) if it "is necessary to accomplish the apparent or expressed objectives of the specific provi-

251. See Levinson, *supra* note 213, at 756.

252. For a list of the duties of the Committee, see §§ 11.60, 120.545, *Florida Statutes*, (1991).

253. Memorandum from the Joint Administrative Procedures Committee 5 (Dec. 11, 1990) (on file with comm.).

254. Ch. 92-166, § 6, 1992 Fla. Laws 1670, 1676 (to be codified at FLA. STAT. § 11.60(2)(k)).

255. See *infra* notes 275-92 and accompanying text.

256. Ch. 92-166, § 7, 1992 Fla. Laws 1670, 1676-77 (to be codified at FLA. STAT. § 120.54).

257. *Id.* (to be codified at FLA. STAT. § 120.54(9)(a)3.).

258. *Id.* § 8, 1992 Fla. Laws at 1677-78 (to be codified at FLA. STAT. § 120.545).

259. *Id.*

sion of law which the rule implements”;²⁶⁰ (3) if it “is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule”;²⁶¹ (4) if it “could be made less complex or more easily comprehensible to the general public”;²⁶² (5) if it “reflects the approach to the regulatory objective involving the lowest net cost to society to the degree consistent with the provisions of law which the rule implements”;²⁶³ (6) if it “will require additional appropriations”;²⁶⁴ and (7) if the rule is an emergency rule, that “there exists an emergency justifying the promulgation of such rule, whether the agency has exceeded the scope of its statutory authority, and whether the rule was promulgated in compliance with the requirements and limitations of s. 120.54(9).”²⁶⁵

The amendments also give the JAPC authority to request that agencies provide it with information reasonably necessary to conduct its review.²⁶⁶ The JAPC is required to consult with legislative standing committees that have jurisdiction over the subject areas pertinent to any rule examined regarding legislative authority for the rule.²⁶⁷ The amendments also provide for additional notice where an objection is made. The JAPC must notify the Speaker of the House of Representatives and the President of the Senate of any objection to an agency rule concurrent with certification of the objection to the agency.²⁶⁸ Also, that notice must include a copy of the rule and the statement detailing the JAPC’s objection to the rule.²⁶⁹

It is not clear whether these changes to the JAPC’s authority will result in more aggressive action by the JAPC or whether they will further bog down the JAPC in its rule review activities. Professor L. Harold Levinson, author of *The Florida Administrative Procedure Act After 15 Years*,²⁷⁰ was concerned that the increased volume of rule review that would result from required rulemaking would tax the JAPC’s resources, even before the 1992 amendments placed new demands on the Committee and its staff.²⁷¹

260. *Id.* (to be codified at FLA. STAT. § 120.545(h)).

261. *Id.* (to be codified at FLA. STAT. § 120.545(i)).

262. *Id.* (to be codified at FLA. STAT. § 120.545(j)).

263. *Id.* (to be codified at FLA. STAT. § 120.545(k)).

264. *Id.* (to be codified at FLA. STAT. § 120.545(l)).

265. *Id.* (to be codified at FLA. STAT. § 120.545(m)).

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. Levinson, *supra* note 213.

271. *Id.* at 757.

The Legislature seems to want more involvement by the JAPC in the rulemaking process. These amendments were foreshadowed by some of the agency-bashing that occurred during the session, and they were a much milder attempt at greater legislative control of rulemaking than some of the other proposals made during the session.²⁷² The danger the amendments pose is that they threaten to change the JAPC in significant ways. Presently, the JAPC keeps a very low profile. Much of its work is done behind the scenes and focuses on technical and substantive errors. The new review could be read to inject the committee into reviewing a host of value judgments that traditionally have been left to the agencies and have not been reviewed by the JAPC. Those judgments are more likely to be the subject of legislative debate than staff action. Thus, the amendments could change the nature of the JAPC's review from staff-driven error correction to committee-member-driven policy oversight. Policy oversight will politicize JAPC's role. If such politicization of the JAPC occurs, it could draw the Legislature and executive branches into serious confrontations. It could also weaken the credibility of the JAPC, which has earned agency respect over the years by limiting its oversight to an objective review of technical and legal requirements.

7. Section 9²⁷³

Section 9 further limits the opportunities available to prisoners to participate in the rulemaking process. Specifically, their right to participate in section 120.54(4) or section 120.56 challenges was withdrawn.²⁷⁴ These amendments are consistent with the trend of earlier amendments that have steadily narrowed the availability of administrative remedies to prisoners. While there are some who wonder whether this litigation is better channelled out of the administrative process and into the courts, the wisdom that prevailed is that the denial of access to administrative process achieved here is a blow for administrative efficiency.

8. Section 10:²⁷⁵ Adam Smith's Revenge

The Governor was slow to respond to the serious threat to efficiency in rulemaking posed by the *Adam Smith* case.²⁷⁶ His list of

272. See *supra* notes 11-13 and accompanying text.

273. Ch. 92-166, § 9, 1992 Fla. Laws 1670, 1678 (to be codified at FLA. STAT. § 120.52(12)).

274. *Id.* (to be codified at FLA. STAT. § 120.52(12)(d)).

275. *Id.* § 10, 1992 Fla. Laws at 1679 (to be codified at FLA. STAT. § 120.68(15)).

276. See *Adam Smith Enters. v. Department of Env'tl. Regulation*, 553 So. 2d 1260 (Fla. 1st DCA 1989) (which added new paperwork requirements in rulemaking while advocating a "hard look" judicial review of rulemaking). See *supra* notes 207-10 and *infra* notes 279-91 and accompanying text for a more complete discussion of the problems associated with this "hard look" approach.

legislative proposals addressed the problem only obliquely,²⁷⁷ and the solution to the *Adam Smith* problem that was eventually developed and adopted in this section has serious flaws.

The 1992 amendments add a subsection 15 to section 120.68 that provides:

(15) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.54(4) or s. 120.56, unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.²⁷⁸

This provision appears to be an attempt to deal with the problems *Adam Smith* created by assuring that the courts can no longer provide direct judicial review of rules except in one narrow circumstance, where the rule's constitutionality is at issue and there are no factual questions. The problems with this approach are legion.

The first of several perhaps unintended consequences of this section is that the amendment can be read to preclude direct judicial review of emergency rules. Before this amendment, a substantially affected person could seek immediate and direct review of any emergency rule in the district court of appeal. This was true because an emergency rule was a final order subject to judicial review under both section 120.68 and the Florida Rules of Appellate Procedure.

Section 120.68(15) has an unclear effect on emergency rulemaking because it can be read to preclude all direct judicial review of emergency rules except where the emergency rule's constitutionality is at issue and there are no factual questions. However, with respect to emergency rulemaking, section 120.54(9)(a)3. guarantees that "[t]he agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable."²⁷⁹ When read with section 120.68(15), does this language preserve the right to immediate judicial review, at least as to the listed findings, if not to the question of substantive validity of the rule? Or is the section 120.54(9)(a)3. guarantee of judicial review satisfied by the opportunity to challenge the emergency rule pursuant to section 120.56(3) and then to seek judicial review of that determination?

That substantially affected persons may challenge invalid emergency rules through the proceeding authorized by section 120.56(3) may, on some occasions at least, give little comfort if the right to seek

277. See *supra* notes 189-90 and accompanying text.

278. Ch. 92-166, § 10, 1992 Fla. Laws 1670, 1679 (to be codified at FLA. STAT. § 120.68(15)).

279. FLA. STAT. § 120.54(9)(a)3. (1991).

immediate judicial review is withdrawn. Even though section 120.56(3) proceedings are expedited, with a hearing officer to be assigned no later than ten days from filing, a hearing within fourteen days of the officer's assignment and a decision within fourteen days after that,²⁸⁰ DOAH cannot grant immediate relief as the district court can in an appropriate case.²⁸¹ Because emergency rules last only ninety days,²⁸² this means that for a significant percentage of the rule's life, if not during its whole life, it will continue to operate, even though it may be clearly invalid and even though a person has followed the procedures that the Act prescribes to protect his substantial interests from that type of violation. For these reasons, section 120.68(15) may withdraw all or part of the direct review of emergency rulemaking that was previously guaranteed by section 120.54(9)(a)3. and section 120.68. If that is the case, the amendment may give substantially affected persons the opportunity to argue that, in some circumstances, the APA does not provide them with an adequate remedy and that, therefore, some other kind of immediate court intervention is appropriate under some other principles recognized under the case law interpreting the Act. In other words, we may now begin seeing challenges to emergency rules brought in circuit court.

The second unintended consequence of this amendment is that it may cause the rulemaking hearing authorized by section 120.54(3) to wither and die. Without court supervision, the section 120.54(3) remedy would never have become the opportunity to "present evidence and argument" that the drafters intended. Early in the Act's history, there was a move to preclude the introduction of evidence at section 120.54(3) hearings and to permit only comment. Because the rule, as adopted, was appealable in those days, the First District Court of Appeal was able to review that denial and breathe life back into this rulemaking proceeding.²⁸³ Agency hostility to section 120.54(3) rulemaking hearings continues today. The hostility is clearly shown where, even now, some agencies take literally the Court's admonition in *Balino* that they must listen.²⁸⁴ They will listen at section 120.54(3) hearings, but will not speak.

If no appeal can be taken from the rule, what is to prevent agencies from taking further liberties with the requirements of section

280. *Id.* § 120.56(3). Perhaps if there were no factual issues DOAH could grant relief earlier than that on motion for summary judgment.

281. *Id.* § 120.68.

282. *Id.* § 120.54(9)(c).

283. See *Balino v. Department of HRS*, 362 So. 2d 21 (Fla. 1st DCA), *cert. denied*, 370 So. 2d 458 (Fla. 1978).

284. See *id.* at 24-25 (stating that an agency has, pursuant to section 120.54(3), "an affirmative duty to inform itself to the fullest extent possible of the interest and problems of those who seek to present evidence and argument"). See also discussion in Maher, *supra* note 32, at 800.

120.54(3)? For example, agencies may take the position that, while it is proper to call agency employees who will work with the proposed rule as witnesses to demonstrate that the proposed rule is unworkable, it will not issue subpoenas to compel the attendance of those agency employees at the section 120.54(3) hearings. This refusal may prove significant, especially when the employees work in Miami and the hearing is held, as it usually is, in Tallahassee, because section 120.58 provides that any public employee subpoenaed to appear at an agency proceeding shall be entitled to per diem and travel expenses at the same rate as provided for state employees under section 112.061 if travel away from such public employee's headquarters is required.²⁸⁵

What good is the right to present evidence through the examination of witnesses if they cannot be compelled to attend the hearing where they are needed to testify? How can a section 120.54(3) hearing continue to be valuable if the courts cannot be called upon to require the statute's procedural requirements in that context to be met? The section 120.54(4) remedy may be hard to employ to challenge agency abuses in the section 120.54(3) context because the section 120.54(3) hearing is customarily held after the deadline for filing a section 120.54(4) petition has passed. Unless some other way to challenge agency attacks on section 120.54(3) proceedings is found, that valuable source of citizen input into agency rulemaking will wither and die. Two possibilities exist. First, a rule adopted without providing an adequate section 120.54(3) hearing could be invalidated in a section 120.56 rule challenge for violation of section 120.52(8)(a). Second, the letter denying subpoenas might be a nonfinal order appealable under section 120.68.

The third unintended consequence of this revision is that it excludes a class of persons—those who are affected, but not substantially affected—from ever seeking judicial review of a rule. A person need only be “affected” by a proposed rule to request a section 120.54(3) hearing.²⁸⁶ A person must be substantially affected in order to challenge a rule pursuant to section 120.54(4) or section 120.56.²⁸⁷ Under previous law, even affected persons could seek judicial review by participating in the section 120.54(3) hearing and then appealing the rule. In fact, even persons without standing could appeal, provided the agency allowed them to participate as parties in the section 120.54(3) hearing.²⁸⁸ If the 1992 amendment is construed to prevent all direct judicial review of rules, then affected persons will have no way to seek

285. FLA. STAT. § 120.58 (1991).

286. *Id.* § 120.54(3).

287. *Id.* §§ 120.54(4), 120.56.

288. *City of Key West v. Askew*, 324 So. 2d 655 (Fla. 1st DCA 1975).

judicial review because they do not have the standing required to file rule challenges.²⁸⁹

The legislative attempt to cut off review is an extreme reaction to the real problem of judicial encroachment in rulemaking as in *Adam Smith*. The concern is real. Courts that follow the *Adam Smith* approach should be reigned in, but all judicial review of rulemaking should not be cut off. The Legislature needs the courts to assure that agencies remain true to legislative judgments. A better legislative response would be to reaffirm the limited nature of judicial review, not to abolish review entirely.

The Legislature does not need to make up a remedy that constrains the courts while permitting the courts to keep agencies in line. The Act already contains the solution: sections 120.54(17) and 120.68. The problem is that the courts have refused to give proper effect to either of these provisions.²⁹⁰ The draw out, when used as I have argued it is intended to be used, will solve the problem of inadequate records on appeal in rulemaking. That will make the inventions of *Adam Smith* unnecessary. It will provide a limited, yet adequate, record for judicial review of rulemaking. Section 120.68, properly construed, provides the specific legal standards that, if followed faithfully, will compartmentalize and constrain court review. These remedies should be clarified and strengthened, because they have never been widely understood or properly used to accomplish their potential. New remedies are not needed.

This amendment is misguided and should be repealed. However, even now, without legislative action to undo this attempted bar on appeals from the final rule or to revitalize the draw out, there may be ways to interpret the amendment to avoid a complete bar to judicial review of rulemaking. Some have assumed that the amendment precludes virtually all review in rulemaking, except from orders entered in rule challenges. However, that is not what the statute says. It provides that “[n]o petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section.”²⁹¹ Reading this literally, it does not seem to preclude either an appeal of a non-final order in rulemaking, such as an order denying the issuance of a subpoena, and it does not seem to preclude an appeal of an order denying a draw out. An appeal in neither case seeks a determination that the rule is an invalid exercise of delegated authority. It merely seeks review of an incorrect ruling on a proce-

289. That is not to suggest that this is necessarily a bad thing. The same limitations would apply in the regime I advocate—the use of the draw out to create a record for judicial review—as only substantially affected persons can request a draw out. See Maher, *supra* note 32, at 829-30.

290. For an extended discussion of these points, see *id.* at 805.

291. Ch. 92-166, § 10, 1992 Fla. Laws 1670, 1679 (to be codified at FLA. STAT. § 120.58(15)).

dural point that may have impaired the fairness of the proceedings or the correctness of the action.²⁹² How the courts might respond to such an appeal is unclear.

9. Section 11²⁹³

This section adds a new type of rule adoption proceeding for the adoption of federal standards.²⁹⁴ It is problematic precisely because it creates a new type of rulemaking procedure outside the traditional rulemaking procedure established by section 120.54. Why was this amendment necessary? Did agencies have difficulty adopting federal standards as rules? If so, what was so difficult about following section 120.54 procedures to adopt federal standards as rules? Section 120.54 is a very flexible procedure. If no one has a problem with proposed rules, their adoption is quite simple. If a substantially affected person has a problem with a rule, there are powerful remedies available to challenge that rule. But unless the rule is substantively invalid or adopted without following proper procedure, the rule will be sustained in that process. In the case of a state rule adopting federal standards, it is reasonable to assume that the rule will usually be found substantively valid, assuming it faithfully replicates the federal standard. Thus, the concern that drove the adoption of this amendment appears to be a concern about compliance with procedural requirements.

The amendment relieves the agency of the duty to prepare an economic impact statement and other rulemaking documents. It is unclear why it is not a good idea for agencies to think about the effects of standards mandated by the Congress the same way that they are required to consider the effects of standards mandated by the state Legislature. However, even assuming there is wisdom in excepting agencies from these requirements, the procedure adopted in lieu of the familiar section 120.54 procedures is a disaster waiting to happen.

The new procedure mandated for use in adopting federal standards begins by requiring publication of notice of intent to adopt a rule in the *Florida Administrative Weekly* twenty-one days before filing the rule with the Secretary of State.²⁹⁵ A copy must be provided to the JAPC at the same time.²⁹⁶ The agency head is required to consider any written comments received within fourteen days after the date of

292. Maher, *supra* note 32, at 811.

293. Ch. 92-166, § 11, 1992 Fla. Laws 1670, 1679-80 (to be codified at FLA. STAT. § 120.543(1)-(5)).

294. *Id.*

295. *Id.* (to be codified at FLA. STAT. § 120.543(1)).

296. *Id.*

publication, but the statute provides no method for assuring that such consideration occurs, and no response to the comments is required.²⁹⁷ If substantive changes are made, those changes must be republished.²⁹⁸

The rules adopted pursuant to this section are not subject to challenge pursuant to section 120.54(4). However, there is an "objection" procedure in the new provision.²⁹⁹ An objection may be filed within fourteen days of publication.³⁰⁰ It is not clear how an objection differs from a written comment. In fact, it appears that it is a type of written comment:

The objection shall specify the portions of the proposed rule to which the person objects and the specific reasons for the objection. The agency shall not proceed pursuant to this section, to adopt those portions of the proposed rule specified in an objection, unless the agency deems the objection to be frivolous, but may proceed pursuant to s. 120.54. An objection to a proposed rule, which in no material respect differs from the requirements of the federal regulation upon which it is based, is deemed to be frivolous.³⁰¹

What form must an objection take? Must it allege sufficient facts to demonstrate a person's standing to object? What if it does not? Or what if it does and the agency finds the allegations insufficient to demonstrate standing? Can the agency deem the objection frivolous on this basis? If not, is the fact that an objection is deemed frivolous the only basis upon which an agency may refuse to honor an objection? What if a person alleges their standing, or some other fact, in their objection and the agency disputes that fact? Must the agency give the person a section 120.57(1) hearing? If not, what type of hearing must be granted to resolve factual disputes? Is there any way to challenge the factual predicate of a rule adopted under this section?³⁰²

The procedure established in the statute, if an objection is made and not deemed frivolous, is that, as to those portions of the rule that are objected to, the agency may not proceed pursuant to section 120.543, but may proceed pursuant to section 120.54.³⁰³ The result is that, with regard to the objected-to sections, the agency will have to prepare rulemaking documents, publish and proceed pursuant to

297. *Id.*

298. *Id.*

299. *Id.* (to be codified at FLA. STAT. § 120.543(3)).

300. *Id.*

301. *Id.*

302. See Maher, *supra* note 32, at 811.

303. Ch. 92-166, § 11, 1992 Fla. Laws 1670, 1679 (to be codified at FLA. STAT. § 120.543(3)).

section 120.54, and those portions of the rules will be subject to a proposed rule challenge.³⁰⁴ This means that portions of the rules may become effective while others are still in adoption. It also suggests that agencies will have an incentive to deem objections frivolous. How are those determinations reviewed?

The recent addition of section 120.68(15)³⁰⁵ to the Act could be read to preclude all review of the determination that an objection under section 120.543 was frivolous. A more liberal reading of section 120.68(15) could permit review of such determinations under the same rationale advanced earlier.³⁰⁶ Because section 120.54(4) challenges are not available against rules adopted under this section, there is no review available from a final order in that proceeding. Section 120.56 challenges do not appear to be precluded, and it may be possible to argue that a rule adopted under this section is invalid because it has been improperly adopted if an objection under this section has been incorrectly overruled. As was discussed earlier, there is an argument that a rule is not subject to a section 120.56 challenge on these grounds, but the alternative remedy discussed earlier—a section 120.535 proceeding to force adoption of a rule—has more appeal in contexts where the rule has not already been formally adopted.

The assumptions that underlie section 11 are flawed. It assumes that once federal standards are adopted, there is nothing more to do than adopt them at the state level. This may or may not be true. Application of this section is not limited to those situations where the federal standards involved are mandated. Even suggested federal standards may be adopted this way. When a state agency follows this procedure where it has options, it cuts off the kind of input that would otherwise be available through section 120.54(3) and exercises its discretion in a vacuum. As long as it does exactly what is suggested, even if other options are open to it, it may close its ears to the helpful suggestions of those who could suggest another permissible, and perhaps more beneficial, approach.

This section also seems to suggest that substantially affected persons have already had one bite at the apple through their opportunity to participate in federal rulemaking. This may or may not be true. It is certainly true that the federal government may not be as sensitive to matters of local concern as might the state. The opportunity to hear those concerns should not be relegated to this problematic procedure.

304. *Id.*

305. *Id.* § 10, 1992 Fla. Laws 1670, 1679 (to be codified at FLA. STAT. § 120.68(15)). *See also supra* text accompanying note 278 for the language of § 120.68(15).

306. *See supra* notes 298-303 and accompanying text.

V. CONCLUSIONS

The 1991 amendments may have already succeeded in forcing agencies into greater use of the rulemaking process, solving what many commentators identified as a significant failing in the administrative process. However, just as this legislative solution has begun to work, some are beginning to argue that the large number of agency rules being adopted is proof that agencies are out of control and more legislative control of the rulemaking process is needed. Before further changes are made, we should decide whether more agency rules are a sign of a success or failure, of a solution that is working, or a problem that is brewing. Given the strong remedies against agency encroachment on legislative prerogatives that are already included in the Act, it seems reasonable to conclude, at least at this point, that more rules are a sign of success, not failure.

The concern that agencies are usurping the Legislature's lawmaking prerogatives is surprising, in light of the stringent protections against encroachment that the Act provides. The rule challenge remedy is the strongest weapon against agency encroachment of legislative prerogatives placed in the hands of the public in any jurisdiction in the United States. It was designed by former Florida Senator Dempsey Barron,³⁰⁷ whose concerns about what he called "phantom government" by neglected agencies sounded very similar to the concerns about agency rulemaking expressed several years later in the 1992 legislative session. The stringent nature of this remedy was not lost on the Governor, who at the same time some legislators were concerned about agency encroachment on legislative prerogatives, was attempting to repeal the proposed rule challenge remedy.

Many significant changes have been made to the Act in the last two sessions. Others may be in store next session. The best way to assure that one amendment does not work at cross-purposes to the next is to keep focused on broad policies that underlie the Act, such as the balance of power between branches of government the Act attempts to establish and the public access to government the Act attempts to guarantee. Are the traditional legislative judgments on those policies, some of which have started to erode, sound? If so, it is reasonable to try to fix the erosion, rather than change the basic balance or retreat from access. Many of the amendments discussed here were designed to do just that: restore the Act's basic balance. Although some of the amendments have weak points and areas of ambiguity, it is too early

307. Dem., Panama City, 1961-1988.

to judge whether they will succeed in correcting the imbalances they were designed to remedy. Some of the new remedies that have been created can be helped along by practitioners who take full advantage of tactics to cover the weaknesses of remedies or take full advantage of the strength that remedies provide.

It is always fashionable to bash agencies, but the evidence does not suggest that the system we have established for regulating agencies in Florida is ready for the scrap heap. There are significant costs in changing from one regulatory scheme to another. It is easier to change the law than to change the system. Thousands of people must relearn the system, basic issues must be relitigated and, if the new system is created ad lib, many flaws will surface and that will cause additional difficulties.

I outlined the issues that I see as most in need of legislative attention in *We're No Angels*.³⁰⁸ I stated there that if they cannot or will not be fixed, and if there is a consensus that a new system is needed, then the Florida Legislature should adopt the 1981 MSAPA rather than try to create a new act on its own. I do not favor the balance of power struck in the 1981 MSAPA over the one adopted in our APA. I believe that the 1981 MSAPA has a pro-agency bias and does not reflect the proper balance for Florida. I recognize, however, that significant problems can occur if we make up a new system of administrative procedures as we go along. Some of the changes that were "ad-libbed" during the 1992 session give graphic examples of the kinds of problems that can be created if new procedures are made up without adequate thought and study. Big changes, such as adoption of a legislative veto of rules, were proposed last year and may reemerge this year. The desire to make great changes in the administrative process should be tempered by these concerns.

308. See *supra* note 32.

