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May 3, 2010

Governor Charlie Crist
The Capitol
Tallahassee, Fl. 32399

RE: HB 1565, An Act Relating to Rulemaking and the Administrative Procedures Act, Chapter 120, Florida Statutes

Dear Governor Crist:

The Legislature has approved HB 1565. This bill will soon be on your desk, requiring a decision by you as to whether to approve or veto.

This legislation makes very fundamental changes in the power of agencies to adopt rules to carry out their statutory authority and agency mission. From Audubon's standpoint, we are concerned about the ability of agencies to approve rules that protect water quality, public health, conservation lands, and wildlife.

However, it is important to point out that the changes in the ability of agencies to adopt rules imposed by this legislation will reach to every corner of state government, and also impact matters pertaining to law enforcement, public safety, the prison system, public employees, universities and education, and government procurement of goods and services. Further, these changes will impact entities such as special districts that are required to adopt rules under FS 120.

As a result of our review of, HB 1565, we conclude that it restricts agency rulemaking to such a great extent, and in such an unreasonable manner as to render rulemaking impractical in almost every circumstance where the purpose of rule adoption is to implement a substantive statutory requirement.

There are two features of the legislation which are very problematic.

First, the legislation requires preparation of a detailed "A statement of estimated regulatory costs" upon demand by any "substantially affected person" who files a proposal for a "lower cost regulatory alternative". The preparation of these statements in each instance where a person appears and suggests some "lower cost regulatory alternative", no matter how frivolous that alternative may be, will substantially complicate and increase costs associated with adoption of any rule. Typically, preparation of such economic analysis will require the agency to contract and retain outside consultants at public expense. The automatic triggering of an expensive study process requiring procurement of outside consultants under these circumstances is unreasonable and excessive interference with the ability of executive branch agencies to carry out statutory mandates that are already in place.

The legislation also triggers the requirement for a detailed “statement of estimated regulatory costs” if the agency itself determines that the subject rule is “...likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate within 1 year after the implementation of the rule”.

This is a very low threshold, and will almost certainly result in imposition of the requirement to prepare a “statement of estimated regulatory costs” concerning most rules an agency proposes to adopt. The result will be excessive delay in needed agency rulemaking, and increased costs to agency budgets and the taxpayers.

Finally, HB 1565 will have the effect of requiring almost all substantive rules to be submitted to the Legislature for ratification. At lines 286-291, the bill requires:

“(3) If the adverse impact or regulatory costs of the rule exceed any of the criteria established in paragraph (2)(a), the rule shall be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.”

Paragraph (2) (a) at lines 238 – 252 provides:

(a) An economic analysis showing whether the rule directly or indirectly:

1. Is likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of \$1 million in the aggregate within 5 years after the implementation of the rule;
2. Is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of \$1 million in the aggregate within 5 years after the implementation of the rule; or
3. ***Is likely to increase regulatory costs, including any transactional costs, in excess of \$1 million in the aggregate within 5 years after the implementation of the rule.*** (Emphasis added)

While all of the criteria in HB 1565 requiring legislative ratification are a problem, the final one highlighted above has the indisputable effect of assuring that any substantive rule would in fact require legislative ratification.

The entire body of environmental law in the Florida Statutes is one in which the Legislature has consistently created a general statutory framework, and then directed agencies to engage in administrative rulemaking to provide the detail of regulatory requirements. There is a longstanding and well understood process for affected parties to challenge rules found to be inconsistent with, an enlargement upon, or otherwise outside the agency’s statutory authority. The historical record demonstrates clearly that checks and balances on agency rulemaking are in place to preclude over-reaching administrative rules from being adopted.

HB 1565 completely upends agency rulemaking by requiring that almost all rules be legislatively ratified. Examples of rules and vital environmental programs at risk should HB 1565 become law include:

- Minimum Flows and Levels to protect ground and surface waters from overuse
- Total Maximum Daily Loads (TMDLS) and Water Quality Standard Changes
- Best Management Practices rules to protect the Everglades and Lake Okeechobee
- Water Conservation Rules
- DEP's pending stormwater rule
- DEP's pending rule related to handling of sewage sludge

Under the construct presented by HB 1565, carefully drafted rules approved by the state's Environmental Regulation Commission, or Water Management District Governing Boards after months or even years of public workshops, technical meetings, and hearings could be thwarted by the actions of a single well paid lobbyist hired to block rule ratification in the Legislature.

We have seen the problem with legislative ratification of rules in a number of areas. These include:

- A rule relating to reservation of water for environmental purposes adopted nearly a decade ago, which the Legislature has never ratified due to interference from lobbyists for developers.
- A rule linking federal and state wetlands delineation standards, held hostage by developers for other desired changes in state rules
- The automotive emission standards approved by the ERC in 2009.
- The Renewable Portfolio Standard, which was approved by the PSC but not by the Legislature due to opposition from utilities.

Audubon of Florida strongly urges you to veto HB 1565.

It is our view that this legislation presents the greatest threat to the protection of Florida's natural resources, water quality, public health, and wildlife of any we have seen in the last quarter century. Our very important programs to protect the quality of life for Florida's citizens will be gravely impaired unless this legislation is blocked by your veto.

Sincerely,



Eric Draper
Executive Director