

Administrative Procedures Act, emergency rules

Number: INFORMAL

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The Honorable John Grant
Senator, District 13
610 West Waters Avenue
Suite A
Tampa, Florida 33604

Dear Senator Grant:

This is in response to your recent letter in which you question whether the Department of Agriculture may enact multiple emergency rules regarding the recent Medfly outbreak in Hillsborough County.

Section 120.54(4), Florida Statutes, as amended by section 3, Chapter 97-176, Laws of Florida, provides:

"(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.
2. The agency takes only that action necessary to protect the public interest under the emergency procedure.
3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one or a part of one county, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Weekly and provided to the committee. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

* * *

(c) An emergency rule adopted under this subsection shall not be effective for a period longer than 90 days and *shall not be renewable*, except during the pendency of a challenge to proposed rules addressing the subject of the emergency rule. However, the agency may take identical action by the rulemaking procedures specified in this chapter." (e.s.)

The plain language of the statute states that emergency rules generally are not effective for longer than ninety days and may not be renewed. The statute contemplates that should an agency wish to enact a rule dealing with the same subject as the emergency rule, it is not

precluded from taking identical action pursuant to the rulemaking procedures specified in Chapter 120, Florida Statutes.

The Department of Agriculture has taken the position that it is not renewing existing rules, but rather has adopted new emergency rules in response to individual and unpredictable infestations. In an administrative action challenging the manner in which the department adopted serial emergency rules, an administrative law judge has determined that the Department of Agriculture "materially failed to follow the applicable rulemaking procedures or requirements of Chapter 120[.]" A copy of this decision is enclosed for your review. The department, however, has thirty days in which to appeal the administrative order.

I trust these comments will be of assistance to you.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk