STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASSOCIATED INDUSTRIES OF FLORIDA, INC.; FLORIDA FARM BUREAU FEDERATION; FLORIDA RETAIL FEDERATION, INC.; FLORIDA TRUCKING ASSOCIATION, INC.; AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INC.,

Petitioners,

vs. Case No. 16-6889RP

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.
_____/

FINAL ORDER

At the request of the parties, the scheduled final hearing was canceled and the case was submitted to Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings, for summary final order pursuant to section 120.57(1)(h), Florida Statutes (2016). Oral argument on the parties' motions for summary final order was heard on December 20, 2016, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether proposed Florida Administrative Code Rule 62-4.161 of the Department of Environmental Protection ("DEP") is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On September 28, 2016, DEP caused to be published in the Florida Administrative Register a notice of its intent to adopt rule 62-4.161. On November 15, 2016, DEP caused to be published in the Register a Notice of Change to the proposed rule. Petitioners filed a timely petition to challenge the proposed rule.

FINDINGS OF FACT

The Parties

1. DEP is the state agency granted regulatory and enforcement powers in chapter 403, Florida Statutes, to control air and water pollution.

2. Associated Industries of Florida, Inc., is a non-profit corporation. It is the largest association of business, trade,

commercial, and professional organizations, partnerships, and proprietorships in Florida.

3. Florida Farm Bureau Federation is a not-for-profit agricultural organization. It is the State's largest general-interest agricultural association with about 145,000 members.

4. Florida Retail Federation, Inc., is a non-profit corporation with over 4,000 members, which are retail companies operating in Florida. The Florida Petroleum Marketers and Convenience Store Association is a division of the Federation.

5. Florida Trucking Association, Inc., is a non-profit corporation whose members include about 26,000 trucking companies.

6. National Federation of Independent Business, Inc., is the Nation's leading small business association. It has about 10,500 members operating in Florida.

7. A principal purpose of each Petitioner is to represent the interests of its members before elected and appointed officials of state government.

8. For each Petitioner, a substantial number of its members are owners and operators of installations or otherwise engaged in activities capable of having "reportable releases" as that term is defined in the proposed rule.

The Proposed Rule

9. Proposed rule 62-4.161, entitled "Public Notice of Pollution," is lengthy and does not need to be set out here in its entirety to understand the objections raised by Petitioners or the defenses advanced by DEP. In summary, the proposed rule requires a person who has a reportable release of a regulated substance to inform DEP, the general public (via television and newspaper), and the local government within 24 hours after the release occurs. Within 48 hours of the release, additional information must be provided to the same entities. If the release goes beyond the property of the owner/operator, the adjacent property owner must be notified within 24 hours, as well as DEP and the local government. The proposed rule describes the information that must be included in the notices and the penalty for non-compliance with the rule's requirements.

Rulemaking Authority

10. The proposed rule identifies seven statutes as authority for the rule.

(a) Section 377.22(2). This provision grants authority to DEP to adopt rules to implement and enforce the provisions of chapter 377, which regulates oil and gas resources.

(b) Section 403.061(7). This provision grants authority to DEP to adopt rules to implement the provisions of the Florida Air and Water Pollution Control Act, which is a part of chapter 403.

(c) Section 403.061(8). This provision grants authority to DEP to issue orders "necessary to effectuate the control of air and water pollution."

(d) Section 403.061(28). This provision authorizes DEP to "Perform any other act necessary to control and prohibit air and water pollution."

(e) Section 403.062. This provision grants DEP general control over surface and ground waters under the jurisdiction of the state insofar as their pollution may affect public health or the public interest.

(f) Section 403.855(1). This provision authorizes DEP to adopt emergency rules to protect the public health when DEP has information that a contaminant may present an imminent hazard or substantial danger to public or private water supplies.

(g) Section 403.861(9). This provision authorizes DEP to adopt rules to implement the provisions of the Florida Safe Drinking Water Act, which is a part of chapter 403.

Law Implemented

11. The proposed rule identifies eight statutes as the law implemented by the rule. Two of these statutes, sections 403.62 and 403.861(9), have already been described above. The other six statutes are described below.

(a) Section 377.21. This provision, in pertinent part, authorizes DEP to collect data, make inspections, and "[p]rovide

for the keeping of records and making of reports" related to oil, gas, and other petroleum products.

(b) Section 403.061(16). This provision requires DEP to encourage voluntary cooperation to achieve the purposes of the Florida Air and Water Pollution Control Act.

(c) Section 403.061(17). This provision requires DEP to encourage local governments to handle pollution problems on a cooperative basis.

(d) Section 403.061(18). This provision requires DEP to conduct investigations and research related to pollution and its causes, prevention, abatement, and control.

(e) Section 403.061(28). This provision empowers DEP to perform any act necessary to control and prohibit air and water pollution.

(f) 403.855(3). This provision authorizes DEP to establish a program designed to prevent contamination or to minimize the danger of contamination to potable water supplies.

12. Within chapters 377 and 403, the only provisions that specifically address reporting of spills or contamination require that the report be made to DEP only. For example, section 377.371(2), Florida Statutes, requires that a spill or leak of oil, gas, other petroleum product, or waste material be reported to the Division of Resource Management within DEP.

13. Upon review of the proposed rule by the staff of the Joint Administrative Procedures Committee ("JAPC"), DEP was asked why the proposed rule was not an unlawful modification or enlargement of section 377.371(2), which only requires notice to DEP in the event of a spill or leak.

14. Section 376.30702, entitled "Contamination notification," requires notice only to DEP for several scenarios where contamination is discovered:

> The Legislature finds and declares that when contamination is discovered by any person as a result of site rehabilitation activities [pursuant to statutes dealing with dry-cleaning, petroleum storage, brownfields, and other contamination], it is in the public's best interest that potentially affected persons be notified of the existence of such contamination. Therefore, persons discovering such contamination shall notify the department . . . and the department shall be responsible for notifying the general public.

§ 376.30702(1), Fla. Stat.

15. There are two other statutes that require notice to DEP for actions which are somewhat analogous to a release of pollution. Section 403.862(1)(b) provides that county health departments must notify DEP of potential violations of standards at any public water system. Section 403.93345(5) requires a vessel owner or operator to notify DEP within 24 hours if the vessel has struck or damaged a coral reef.

16. For comparison, section 376.707(11) requires an applicant for a DEP solid waste facility permit to notify the local government and the general public by newspaper that it has applied for the permit. This statute shows the Legislature has required broader notice when it wanted.

Lower Cost Regulatory Alternative

17. DEP prepared a Statement of Estimated Regulatory Costs ("SERC") for the proposed rule and published notice of its availability as required by section 120.541. In the SERC, it is estimated that the total increased regulatory costs are $182,000 per year.

18. On October 19, 2016, 27 regulated entities, including Petitioners, submitted a Lower Cost Regulatory Alternative ("LCRA") to DEP. Florida Electric Power Coordinating Group, Inc., also submitted a LCRA. Both LCRAs proposed that DEP be responsible for notice to the general public, local governments and adjacent property owners, which would result in lower costs to the regulated community.

19. In the SERC made available to the public in November 2016, DEP stated that it rejected the LCRA because (1) the party who caused an unauthorized release of contaminants is the more appropriate party to incur the reporting costs imposed by the proposed rule, and (2) the party who releases contaminants is in a better position to know details about the

substances that were released which must be included in the report.

CONCLUSIONS OF LAW

20. A party may move for summary final order when there is no genuine issue as to any material fact. § 120.57(1)(h), Fla. Stat. Petitioners and DEP moved for summary final order and the Administrative Law Judge determined from the pleadings and stipulated facts that there is no genuine issue of material fact and the parties are entitled as a matter of law to a final order.

Standing

21. Any person substantially affected by a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority. § 120.56(1)(a), Fla. Stat.

22. Generally, to establish standing a party must show that the challenged agency action would result in real and immediate injury in fact. See Jacob v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005). However, a less demanding test for standing is applicable in rule challenge cases than in licensing cases. In a rule challenge, the alleged injury does have to be immediate. See NAACP v. Fla. Bd. of Regents, 863 So. 2d 294, 300 (Fla. 2003).

23. For association standing under chapter 120, it must be shown that a substantial number of an association's members, but

not necessarily a majority, have a substantial interest that would be affected, that the subject matter of the proposed rule is within the general scope of interests and activities for which the association was created, and the relief requested is of the type appropriate for the organization to receive on behalf of its members. Fla. Home Builders Ass'n v. Dep't of Labor and Emp't Servs., 412 So. 2d 351, 352-354 (Fla. 1982)(Refusing to allow a trade or professional association to represent the interests of its members in a rule challenge proceeding defeats the legislative purpose of chapter 120 to expand access to the activities of governmental agencies because it significantly limits the public's ability to contest the validity of agency rules).

24. DEP argues that Petitioners lack association standing to challenge the proposed rule because Petitioners' members lack individual standing. DEP contends that, because Petitioners' members do not know whether they will ever have a reportable release that will require compliance with the proposed rule, their alleged injury is speculative.

25. DEP's argument is inconsistent with the law of standing applied to quasi-legislative actions such as agency rules. Proposed rule 62-4.161 is directed to identifiable persons who handle the kinds of substances that are regulated by DEP. With the proposed rule, DEP is pointing its finger directly at these

persons and telling them what they must do and the penalty for noncompliance. They have standing to point back and object. If they lack standing, then no one would have standing. And because Petitioners represent a substantial number of these members, Petitioners have association standing to challenge the proposed rule.

26. DEP attempted to distinguish the NAACP case, but it is strong support for Petitioners' standing. In NAACP, the Florida Supreme Court held that the NAACP had association standing to challenge a proposed rule related to university student admissions because a substantial number of its members were prospective applicants for admission to a Florida university and each of them had individual standing to challenge the admissions rule. The Supreme Court rejected the lower court's opinion that the impact to the prospective applicants was not a "real and sufficiently immediate injury in fact" because they had not applied for and been denied admission as a result of the challenged rule. The Supreme Court did not interpret the term "substantially affected" in section 120.56(1)(a) as requiring more than being a person to whom the rule was directed and who would be subject to the rule's requirements if they applied for admission. See also Ward v. Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237-8 (Fla. 4th DCA 1995)(A real and sufficiently immediate injury in fact arises when a

challenged rule directly regulates the challenger's occupational field). Here, it is sufficient that a substantial number of Petitioners' members are persons to whom proposed rule 62-4.161 is directed and who would have to comply with the rule's requirements if they have a reportable release.

Burden and Standard of Proof

27. A challenger has the burden of going forward with its case for the invalidity of a proposed rule. § 120.56(2)(a), Fla. Stat. Petitioners met this burden.

28. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objection raised. Id.

29. The proposed rule is not presumed to be valid or invalid. § 120.56(2)(c), Fla. Stat.

Petitioners' Claims of Invalidity

30. Whether a proposed rule serves a useful purpose is only relevant when a challenger claims the rule is invalid because it is arbitrary or capricious. Petitioners do not claim proposed rule 62-4.161 is arbitrary or capricious. Therefore, whether the proposed rule serves a useful purpose is irrelevant in this case.

31. Petitioners invoke four of the grounds for invalidity that are outlined in section 120.52(8). Petitioners contend DEP has "materially failed to follow the applicable rulemaking

procedures or requirements" (section 120.52(8)(a)), DEP has "exceeded its grant of rulemaking authority" (section 120.52(8)(b)), the proposed rule "enlarges, modifies, or contravenes the specific provisions of law implemented" (section 120.52(8)(c)), and the proposed rule "imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives" (section 120.52(8)(f)).

Failure to Follow Rulemaking Procedures or Requirements

32. Petitioners' argument in support of their claim that DEP materially failed to follow applicable rulemaking procedures or requirements arises from their claim that DEP wrongfully rejected their LCRA. It is addressed later in the Final Order in the discussion of the LCRA.

Exceeds Rulemaking Authority

33. The seven statutes cited in the proposed rule as rulemaking authority are general grants of authority. They are inadequate authority for the proposed rule. Section 120.52(8) states:

> Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

In other words, only the specific powers and duties conferred by statute reveal the allowable subjects of rulemaking. There is no statute that specifically authorizes DEP to adopt a rule which requires persons to notify entities other than DEP when there is a release of a contaminant.

34. DEP argues that the requirement to report pollution is so integral to DEP's ability to control pollution that DEP's authority under section 403.061(7) to control pollution is specific enough to authorize the proposed rule. However, as explained in Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000), "[t]he question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific *enough*. Either the enabling statute authorizes the rule or not." Id. at 599. See also Dep't of Health v. Bayfront Med. Ctr., Inc., 134 So. 3d 1017 (Fla. 1st DCA 2013); Fla. Dep't of High. Saf. & Motor Veh. v. JM Auto, Inc., 977 So. 2d 733 (Fla. 1st DCA 2008); State Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001).

35. Furthermore, because the statutes which address the reporting of contamination require only DEP to be notified, the statutes which do not address reporting cannot reasonably be interpreted to authorize a rule with broader notice requirements.

36. DEP argues that its authority under section 403.061(8) to "issue such orders as are necessary to effectuate the control of air and water pollution" is sufficient authority for the proposed rule, based on a theory that orders may evolve into policies of general applicability and, thus, become rules. It suffices to repeat that section 403.061(8) is a general grant of authority and, therefore, insufficient to authorize the proposed rule.

37. DEP argues that the Administrative Law Judge must give deference to DEP's interpretation of the statutes it administers as granting authority for the proposed rule. However, deference to an agency's interpretation is a judicial principle. It is not required by any provision of the Administrative Procedure Act, chapter 120, Florida Statutes. Deference to an agency's interpretation of law would be inconsistent with chapter 120's emphasis on *de novo* proceedings and its prohibition against an agency's rejection of an Administrative Law Judge's conclusion of law unless the agency makes a specific finding that its own interpretation of law is "as or more reasonable" than the rejected interpretation. See § 120.57(1)(l), Fla. Stat. (There would be no occasion to reject an Administrative Law Judge's interpretation of a statute or rule if the ALJ was compelled to defer to the interpretation advanced by the agency). In the context of a challenge to a proposed rule, deference to an

agency's interpretation would conflict with chapter 120's directive not to presume the validity of a proposed rule. Deference to an agency is inappropriate when determining whether there is specific authority for a rule. "Either the enabling statute authorizes the rule or not." Save the Manatee Club, Inc., 773 So. 2d at 599.

38. There is no rulemaking authority for proposed rule 62-4.161. Therefore, the proposed rule is an invalid exercise of delegated legislative authority under section 120.52(8)(b).

Enlarges the Specific Provisions of Law Implemented

39. The eight statutes cited in proposed rule 62-4.161 as implemented by the rule do not contain specific language regarding reporting requirements for the release of contaminants. Therefore, the proposed rule is an invalid exercise of delegated legislative authority under section 120.52(8)(c) because it enlarges the provisions of law implemented.

Imposes Unnecessary Regulatory Costs

40. Petitioners contend that their LCRA proposal, which calls for DEP to take responsibility for and incur the costs of notifying the general public, local government, and adjacent property owners, would reduce regulatory costs and, therefore, DEP should have adopted the proposal. Petitioners also contend that, because DEP's basis for rejecting the LCRA is not a valid

basis under section 120.541, DEP materially failed to follow applicable rulemaking procedures and requirements.

41. Petitioners argue that DEP could only reject the LCRA if DEP did not agree that the LCRA would lower regulatory costs, or because the LCRA would not substantially accomplish the statutory objectives. DEP argues that no "magic language" is required to reject a LCRA. However, it appears that section 120.541 requires an agency's stated reasons for rejecting a LCRA to amount to one or both of the propositions stated above.

42. It is reasonable inference that the phrase "substantially accomplish the statutory objectives" in section 120.52(8)(f) refers to the objectives in the rulemaking authority for the proposed rule and in the law implemented by the rule.

43. DEP's reasons for rejecting the LCRA, that (1) the person who releases contaminants is the more appropriate party to incur the associated costs since the release is unauthorized, and (2) the person who releases contaminants is in a better position to know details associated with the release that must be included in the report, amount to a determination by DEP that the LCRA would not substantially accomplish the statutory objectives.

44. The analysis of whether a LCRA was properly rejected is a straightforward matter when the proposed rule is otherwise valid. However, when, as in this case, it is determined there is no rulemaking authority for a proposed rule and the rule

improperly enlarges the provisions of law implemented, a SERC versus LCRA analysis is pointless because the regulatory costs of the proposed rule cannot be imposed. The proposed rule is an invalid exercise of delegated legislative authority under section 120.52(8)(f) because it would impose unauthorized regulatory costs that could have been reduced by the alternative of withdrawing the rule.

45. DEP materially failed to follow applicable rulemaking procedures or requirements when it rejected the LCRA because the LCRA proposed the only reporting requirement and associated cost to the regulated community for which there is some statutory authority. Therefore, the proposed rule is an invalid exercise of delegated legislative authority under section 120.52(8)(a).

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is concluded that proposed Florida Administrative Code Rule 62-4.161 is an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 30th day of December, 2016, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.