STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT RACKLEFF; FRIENDS OF LLOYD, INC.; COUNCIL OF NEIGHBORHOOD ASSOCIATION OF TALLAHASSEE/LEON COUNTY, INC. (CONA); and THE THOMASVILLE ROAD ASSOCIATION,	)	
Petitioners,	)	
vs.	)	CASE NO. 89-6100RU
DEPARTMENT OF COMMUNITY AFFAIRS,	)	
Respondent,	)	
and	)	
COLONIAL PIPELINE COMPANY and TEXACO TRADING AND TRANSPORTATION, INC.,	)	
Intervenors.	)	

FINAL ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, J. Stephen Menton, on December 4, 1989, in Tallahassee, Florida.

APPEARANCES

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PRELIMINARY STATEMENT

On November 6, 1989, Petitioners filed a Petition for Administrative Determination of Invalidity of an Unpromulgated Rule pursuant to Section 120.56, Florida Statutes ("F.S.") and Chapter 221-6, Florida Administrative Code ("F.A.C."). The Petitioners challenge Respondent's interpretation of Rule 28-24.014, F.A.C., contending that the interpretation is an invalid rule because it has not been adopted as a rule in accordance with the Administrative Procedures Act and because it constitutes an invalid exercise of delegated legislative authority.

This matter was assigned to the undersigned hearing officer on November 7, 1989 and by Notice of Hearing dated November 8, 1989 was set for final hearing on December 4, 1989 in Tallahassee, Florida. On November 27, 1989, Respondent filed a Motion to Dismiss the Petition. A telephone conference hearing and scheduling conference was held on November 28, 1989 at which time it was decided that the Motion would be heard at the Final Hearing and addressed as part of the Conclusions of Law in this Final Order.

At the commencement of the final hearing, a written Motion to Intervene was presented to the hearing officer by Colonial Pipeline Company ("Colonial"). After argument, the motion was granted on the condition that Colonial's participation as a party not delay the final hearing. An oral Motion to Intervene was then made by Texaco Trading and Transportation, Inc. ("Texaco"). While ruling on Texaco's Motion to Intervene was withheld pending submittal of a written motion, Texaco was allowed to participate in the Final Hearing under the same conditions as Colonial. Texaco's written Motion to Intervene was filed on the day after the Final Hearing (December 5, 1989) and that Motion is hereby granted.

The Petitioner and Respondent filed a Prehearing Stipulation on December 1, 1989. The Intervenors were not parties to this proceeding at the time the Stipulation was prepared. At the hearing, Colonial pointed out certain factual clarifications that were necessary in paragraphs (e)(6) and (e)(7) of the Stipulation and the parties orally agreed to those modifications. In addition, Respondent withdrew its challenge to Petitioner's standing under Section 120.56, Florida Statutes. However, Respondent did not stipulate to standing under Chapter 380.

At the hearing, Petitioners called one witness, Mr. Tom Beck, Chief, Bureau of State Planning, Department of community Affairs. Mr. Beck was qualified as an expert on the Development of Regional Impact ("DRI") process. By agreement of the parties, three joint exhibits were admitted into evidence. In addition, Petitioner offered eight exhibits, all of which were admitted except number six,

which was deemed irrelevant. Petitioner's exhibit 8 was admitted for standing purposes only, and a ruling on a relevancy objection to Petitioner's Exhibit 5 was overruled. Respondent called no witnesses and submitted no exhibits other than the three joint exhibits. Likewise, the Intervenors cross-examined Petitioner's witness, but presented no witnesses and submitted no exhibits of their own.

On December 18, 1989, Colonial filed a Motion to Strike certain portions of Petitioner's Proposed Final Order. That Motion is hereby denied. However, as set forth in paragraph 5 of the Findings of Fact in this Final Order, the allegations in the Petition regarding the environmental hazards of the proposed tank farm and pipeline were admitted for standing purposes only. No factual evidence was presented regarding those hazards and no Findings of Fact are made with respect thereto.

No transcript of the hearing was ordered. Each of the parties timely filed Proposed Findings of Fact and Conclusions of Law (except Texaco which adopted the proposal submitted by Colonial.) Those proposals have been reviewed and considered in the preparation of this Final Order. A ruling on each of the parties' Proposed Findings of Fact is included in the Appendix to this Order.

FINDINGS OF FACT

1. Friends of Lloyd, Inc. is a Florida non-profit corporation formed for the purpose of protecting Jefferson County from harmful development. The Council of Neighborhood Associations of Tallahassee/Leon County (CONA) is a non-profit Florida corporation whose members are the neighborhood associations in Leon county; members of those associations reside in 42 Leon County neighborhoods dispersed throughout Leon County. CONA's purposes and goals include protection of the quality of life and environment in Leon County. The Thomasville Road Association's members are principally residents of Leon County. The Association was formed to promote responsible growth management in northern Leon County. None of the Petitioners are owners or "developers" of a Development of Regional Impact within the terms or scope of Chapter 380, Florida Statutes. Rather, Petitioners are members of non-profit organizations interested in the environment and growth management of Leon County.

2. The Department of Community Affairs (the "Department") is the state land planning agency with the power and duty to administer and enforce Chapter 380, Florida Statutes, and the rules and regulations promulgated thereunder. Sections 380.031(18), and 380.032(1), Florida Statutes (1987).

3. Texaco is a business entity that proposes to develop a "tank farm" near the community of Lloyd in Jefferson County, Florida. The Texaco tank farm is a "petroleum storage facility" as that term is used in Rule 28-24.021, F.A.C.

4. Colonial is a business entity that proposes to develop a petroleum pipeline that will connect to the Texaco tank farm. The pipeline is designed to carry and contain petroleum products

5. For purposes of standing, the parties have stipulated that certain environmental hazards can reasonably be expected to occur as a result of the existence of the pipeline/tank farm. No competent evidence was submitted regarding those hazards.

6. As a result of the stipulation, Petitioners have each established injury-in-fact so that they are "adversely affected" by the challenged rule to

an extent sufficient to confer upon them standing to maintain this action under Section 120.56, Florida Statutes.

7. On September 7, 1989, one of the Petitioners sent Respondent a letter suggesting that the proposed tank farm development to be built in Jefferson County should be required to undergo review as a DRI. Enclosed with the letter was a proposed circuit court complaint pursuant to Section 403.412(2)(c), Florida Statutes. Petitioner expressed its intention of filing this circuit court action, but first provided Respondent a copy of the proposed complaint in accordance with the provisions of Section 403.412, Florida Statutes.

8. In two letters dated September 8 and 25, 1989, Petitioner supplied additional information to Respondent concerning the tank farm project and contended that in making its determination as to whether the development must undergo DRI review, Respondent should consider the storage capacity of both the tank farm and the pipeline.

9. On October 9, 1989, Respondent answered Petitioner's first letter, and stated that the proposed project was not required to undergo DRI review because the total storage capacity of the tanks was only seventy-eight percent (78%) of the threshold set out in Chapter 28-24, F.A.C.

10. On October 13, 1989, Respondent answered Petitioner's second and third letters, stating that with respect to the pipeline, it has been long standing departmental policy to interpret "storage facilities" as meaning only the tanks, not the pipeline, when determining whether petroleum storage facilities meet the DRI thresholds set out in Chapter 28-24.

11. The proposed tank farm would have nine tanks with a total capacity of 155,964 barrels, which is, as Respondent determined in its letters, approximately seventy-eight percent (78%) of the applicable DRI threshold for "petroleum storage facilities" set forth in Chapter 28-24, F.A.C.

12. The proposed pipeline's capacity over its approximate forty-five mile length from Bainbridge, Georgia to the tank farm is approximately 34,000 barrels. The proposed pipeline's volume flow capacity from the Florida/Georgia state line to the site of the prosed tank farm is approximately 13,500 barrels over approximately 18 miles.

13. If the pipeline's volume capacity from Bainbridge, Georgia is added to the tank farm's volume capacity, the resulting project would be approximately ninety-five percent (95%) of the applicable DRI threshold in Chapter 28-24. If the pipeline's volume capacity from the state line is added to the tank farm's volume capacity, the resulting project would be approximately eighty-five percent (85%) of the threshold. In either instance, the project would exceed the eighty percent (80%) threshold that may require it to undergo DRI review although the project would be Presumed not to be a DRI under the Statute.

14. The Department does not require developments outside Chapter 28-24's enumeration to undergo DRI review. The Department has never treated petroleum Pipelines as "petroleum storage facilities," or as otherwise subject to DRI review. On Several occasions, the Department has applied the petroleum storage facility guideline and standard to petroleum tank farms without determining whether a pipeline was attached to the tank farm. On one prior occasion, the Department has explicitly stated that Petroleum Pipelines are not subject to DRI review.

15. The Petitioners contend that Department's Position that pipelines are not "petroleum storage facilities" is an invalid policy because it has not been adopted as a rule. There is no dispute the Department's Position on this issue has not been promulgated as a rule.

16. If a facility were represented to be a Petroleum pipeline, but was actually designed as and operating as a petroleum storage facility, the Department would apply the Petroleum storage facility DRI guideline and standard to that facility.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. Section 120.56, Florida Statutes (1987).

18. Intervenors Colonial and Texaco have standing to participate in this proceeding as their substantial interests may be determined hereby.

19. In its Motion to Dismiss, Respondent challenged the Petitioner's standing to maintain this action under both Chapter 380 and Section 120.56, Florida Statutes (1987). At the hearing, the parties stipulated that Petitioners have standing under Section 120.56, Florida Statutes. However, Respondent continues to challenge the Petitioner's standing under Chapter 380, Florida Statutes.

20. Respondent argues that Petitioners do not have standing pursuant to Section 380.06 Florida Statutes because they do not possess the requisite status within the terms of Section 380.06, Florida Statutes, i.e., none of the Petitioners is an owner or a developer of a development of regional impact and hence are not within the zone of interest, or "regulatory statutory purpose" of Section 380.06, Florida Statutes. However, Respondent fails to recognize the distinction between a rule challenge proceeding under Section 120.56, Florida Statutes and a proceeding challenging the issuance of a DRI under Section 380.06, Florida Statutes.

Each of the cases cited by Respondent to support its contention that Petitioners lack standing arise in the context of a Section 120.57 proceeding. E.g., Peterson v. Department of Community Affairs, 386 So.2d 879 (Fla. 1st DCA 1980); Suwannee River Area Council Boy Scouts of America v. DCA, 384 So.2d 1369 (Fla. 1st DCA 1980); Caloosa Property Owners, Inc. v. Palm Beach County Board of County Commissioners, 429 So.2d 1266 (Fla. 1st DCA 1983). While that case law does limit participation of persons who are not developers or landowners in certain 120.57 proceedings arising under Chapter 380, Respondent has failed to cite any case that limits the standing of a petitioner in a rule challenge proceeding.

21. Issues surrounding standing in a section 120.57 case may be different than those in a Section 120.56 rule challenge. As explained in Society of Opthomology v. Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988):

> [S]tanding in a [Section 120.57) licensing proceeding may well have to be predicated on a somewhat different basis than standing in a rule challenge proceeding because there can be . . . a difference between the concept of

> "substantially affected" under Section 120.56(1) and "substantial interests" under Section 120.57(1). Id. at 1287-88.

Although the court held that the petitioner lacked standing in the Section 120.57 case of Society of Opthomology, supra, the court distinguished the earlier rule challenge case of Florida Medical Association v. Department of Professional Regulation, 426 So.2d 1112 (Fla. 1st DCA 1983). In Florida Medical Association, the court held that the basis for standing in a rule challenge case need not be found within the particular statute being implemented by the agency action. Id. at 1117. Quoting from Florida Medical Association, the Society Opthomology court explained:

> We note Appellee's contention that Appellants must suffer an injury solely within the "zone of interest" protected by Chapter 463. This is incorrect. Since the crux of the controversy involves a claim that Chapter 463 does not authorize the rule, it is obvious that the effect of other statutes must be considered in determining standing. Neither [of the cases] upon which Appellee relies is authority for the proposition that the basis for standing must be found within the particular statutes being implemented by agency action.

Society of Opthomology at 1287, quoting Florida Medical Association, 426 So.2d at 1117-18.

22. In sum, there is no independent requirement that a petitioner in a rule challenge proceeding have standing under an agency's enabling legislation in addition to the requirement of standing set out in Section 120.56, Florida Statutes. Thus, while Chapter 380 may leave to the Department of Community Affairs the responsibility to enforce the statute, Petitioners have an interest in seeing that the responsibility is carried out through valid rules and procedures. Accordingly, Respondent's motion to dismiss for lack of standing under Chapter 380 (Motion to Dismiss, Issue I) is denied.

23. Section 380.06(2)(d) provides the following concerning application of the development of regional impact guidelines and standards:

> (d) The guidelines and standards shall be applied as follows:
> 1. Fixed thresholds.-
> a. A development that is at or below 80 percent of all numerical thresholds in the guidelines and standards shall not be required to undergo development-of-regional-impact review.
> b. A development that is at or above 120 percent of any numerical threshold shall be required to undergo development-of-regional-impact review.

> 2. Rebuttable presumptions.
> a. It shall be presumed that a development that is between 80 and 100 percent of a numerical threshold shall not be required to undergo development of-regional-impact review.
> b. It shall be presumed that a development that is at 100 and 120 percent of a numerical threshold shall be required to undergo development-of-regional-impact reviews. (e.s.)

24. The development of regional impact guidelines and standards appear in Section 380.0651, Florida Statutes, and in Rule Chapter 28-24, Florida Administrative Code. Chapter 28-24, Florida Administrative Code, is a rule promulgated by the Administration Commission, and approved by the legislature. (House Concurrent Resolution No. 73-1039, Laws of Florida, 1973) Rule 28-24.021 states that:

> Petroleum Storage Facilities
> (1) Subject to Section 380.06(2)(d), F.S., the following developments shall be developments of regional impact and subject to the requirements of Chapter 380, Florida Statutes.
> (b) Any other proposed facility or combination of facilities for the storage of any petroleum product, with a storage capacity of over two hundred thousand (200,000) barrels.

25. In applying the petroleum storage facility DRI threshold to the Texaco tank farm and Colonial pipeline, the Department did not include the volume of petroleum potentially found in the pipeline because the pipeline was not deemed by the Department to be a "facility or combination of facilities for the storage of any petroleum product." As explained in DCA's October 13, 1989 letter to Petitioners, the reason that DCA applied the petroleum storage facility DRI threshold in this fashion is that, "A pipeline is obviously designed to transport petroleum products to the storage tanks from another storage source." In other words, a petroleum products pipeline is deemed by the Department to be a petroleum transportation facility, not a petroleum storage facility.

26. While Petitioners challenge this interpretation as constituting an unpromulgated rule, this application of the petroleum storage facility DRI threshold is consistent with the plain and unambiguous meaning of the word "storage."

27. Even if the Department's statements in the letters of October 9 and 13, 1989 can be properly termed a "policy," the Department has no duty to promulgate such a policy through Section 120.54 rulemaking procedures.

28. There is no requirement that an agency definition or application of the plain meaning of a statutory or rule term must be formally adopted as a definitional rule it may be employed in an administrative action. Islands Harbor v. Department of Natural Resources, 495 So.2d 209, 221 (Fla. 1st DCA 1986). The alleged unadopted rule that Petitioners challenge is merely the Department's application of Rule 28-24.021's plain meaning to a particular

project which the Petitioners find objectionable. It is not the October, 1989 letters that establish that policy, but rather the plain meaning of the Administration Commission's rule which is an exclusive enumeration of the categories of projects or developments considered to be encompassed by Section 380.06, Florida Statutes. The Department's administrative construction of a statute committed to its jurisdiction for administration is entitled to great weight and should not be overturned unless clearly erroneous. Department of Administration v. Moore 524 So.2d 704 (Fla. 1st DCA 1988).

29. Petitioners contend that the "only real difference between the pipeline and the tank farm is their respective shapes and that one is located above the ground while the other is located below the ground." However, this view ignores the obvious difference in purpose between a tank farm, (which is intended mainly to "store" the product) and a pipeline (which is intended primarily to transport the product.) If the legislature had intended to include petroleum transportation facilities or devices under the DRI statute, it could have Specifically so provided. The Department has drawn a logical distinction between the two.

30. The language of the rule is clear on its face - the threshold applies only to facilities for the storage of petroleum. Both statutes and rules must be given their plain meaning. State v. Egan, 287 So.2d 1 (Fla. 1973); Boca Raton Artificial Kidney Center v. Department of Health and Rehabilitative Services, 493 So.2d 1055 (Fla. 1st DCA 1986).

> "The legislature must be understood to mean what is has plainly expressed, and this excludes construction. The legislative intent being plainly expressed, so that the act read by itself or in connecting with other statutes pertaining to the same subject is clear, certain, and unambiguous, the courts have only the simply and obvious duty to enforce the law according to its terms. Cases cannot be included or excluded merely because there is intrinsically no reasons against it. Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of justice, propriety, and policy of its passage. Courts have been no power to set it aside or evade its operation by forced and unreasonable construction. If it has been passed improvidently the responsibility is with the Legislature and not the courts. Whether the law be expressed in general or limited terms, the Legislature should

> be held to mean what they have plainly expressed and consequently no room is left for construction, ...

Van Pelt v. Hilliard, 78 So. 693 (Fla. 1918).

31. The alleged unpromulgated "rule" is merely the Department's use of the commonly understood definition of the word "storage" in its application of the phrase "petroleum storage facilities" to the proposed pipeline. A pipeline, by design and function, and common understanding and dictionary definition is not a "storage facility." Webster's Dictionary defines "storage" as "the safekeeping of goods in a depository (as a warehouse)." While pipelines contain petroleum products, the pipelines main purpose is not to serve as a depository from those products.

32. Chapter 28-24 is a "statutory" rule bearing the ratification of the Legislature. See, House Concurrent Resolution No. 73-1039, Laws of Florida, Vol. 1, p. 1337. The Department does not possess Section 120.54(7) rulemaking authority to adopt or amend a rule in Chapter 28-24, and any attempt to change those guidelines and standards would amount to a usurpation of the rulemaking authority delegated by the legislature to the Administration Commission.

33. Essentially, Petitioners seek to require the Department to add pipelines to the categories of projects subject to DRI review. While such inclusion may be consistent with the stated legislative goals of the DRI statute, the Department is simply not at liberty to unilaterally add to or expand the categories of developments in the Guidelines and Standards. An interpretation of Section 380.06 that would allow the Department to add types of development to the guidelines and standards of Chapter 28-24, Florida Administrative Code, would be invalid. See e.g., Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985); Cross Keys Waterways v. Askew, 351 So.2d 1062 (Fla. 1st DCA 1977), aff'd, Askew v. Cross Keys Waterways, 372 So.2d 913 (Fla. 1978).

34. Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioners have failed to carry their burden of proving that the Department's application of Rule 28-24.021 is a policy invalid for lack of formal adoption under Section 120.54, Florida Statutes, or that the Department's "policy" is an invalid exercise of delegated legislative authority.

For these reasons, it is

ORDERED:

That the Petition for Administrative Determination of Invalidity of an Unpromulgated Rule filed by Petitioners is DISMISSED.

DONE and ORDERED this 4th day of January, 1990, in Tallahassee, Florida.

J. STEPHEN MENTON
Hearing Officer
Division of Administrative Hearings
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(904) 488-9675

Filed with the Clerk of the
Division Administrative Hearings
this 4th day of January, 1990.

APPENDIX Case Number 89-6100RU

The parties have submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Recommended Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

The Petitioner's Proposed Findings of Fact

Proposed Finding of Fact Number	Paragraph Number in Recommended Order of Acceptance or Reason for Rejection
1.	Adopted in substance in Findings of Fact
2.	Adopted in substance in Findings of Fact
3.	Adopted in substance in Findings of Fact 1.
4.	Subordinate to Findings of Fact 5.
5.	Subordinate to Findings of Fact 6.
6.	Adopted in substance in Findings of Fact
7.	Adopted in substance in Findings of Fact 8.
8.	Adopted in substance in Findings of Fact 9.
9.	Adopted in substance in Findings of Fact 10.
10.	Adopted in substance in Findings of Fact 11.
11.	Adopted in substance in Findings of Fact 12.
12.	Adopted in substance in Findings of Fact 13.
13.	Rejected as not supported by competent substantial evidence.
14.	Subordinate to Findings of Fact 14 and 16.
15.	Subordinate to Findings of Fact 14 and 16.
16.	Subordinate to Findings of Fact 14 and 16.
17.	Rejected as constituting legal argument rather than a finding of fact.
18.	Adopted in substance in Findings of Fact 15.

The Respondent's Proposed Findings of Fact

Proposed Finding of Fact Number	Paragraph Number in Recommended Order of Acceptance or Reason for Rejection
1.	Adopted in substance in Findings of Fact 1.
2.	Adopted in substance in Findings of Fact 2.
3.	Adopted in substance in Findings of Fact 3.
4.	Adopted in substance in Findings of Fact 4.
5.	Rejected as constituting legal argument rather that a finding of fact.
6.	Rejected as constituting legal argument rather that a finding of fact.
7.	Adopted in substance in Findings of Fact 7 and 8.
8.	Adopted in substance in Findings of Fact 9 and 10.
9.	Adopted in substance in Findings of Fact 15.
10.	Adopted in substance Fin Findings of Fact 11.
11.	Adopted in substance in Findings of Fact 12 and 13.
12.	Adopted in substance in Findings of Fact 14.
13.	Rejected as constituting legal argument rather than a proposed finding of fact.
14.	Adopted in substance in Findings of Fact 16.
15.	Adopted in substance in Findings of Fact 14.
16.	Rejected as irrelevant and as constituting a legal conclusion rather than a finding of fact.

The Intervenor's Proposed Findings of Fact. The Intervenor Colonial Pipe Line Company submitted a proposed final order which has been adopted by the Intervenor Texaco Trading and Transportation Company. The following rulings are directed towards the findings of fact contained in the proposed final order submitted by Colonial.

Proposed Finding of Acceptance or Reason for Rejection	Paragraph Number in Recommended Order of Fact Number
1.	Adopted in substance in Findings of Fact 9 and 10.
2.	Adopted in substance in Findings of Fact 4, 9 and 10.
3.	Rejected as constituting legal argument rather than a finding of fact.
4.	Adopted in substance in Findings of Fact 10.
5.	Rejected as constituting legal argument rather than a finding of fact.
6.	Rejected as constituting legal argument rather than a finding of fact.

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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 ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE

DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.