STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COMBS OIL COMPANY, Petitioner, vs. DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF STATE FIRE MARSHAL, Respondent.	)	Case No. 11-3627RP

FINAL ORDER

Pursuant to notice, on January 6, 2012, a formal hearing in this cause was held in Tallahassee, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan.

APPEARANCES

For Petitioner: Robert D. Fingar, Esquire
Guilday, Tucker, Schwartz
and Simpson, P.A.
1983 Centre Pointe Boulevard, Suite 200
Tallahassee, Florida 32308-7823

For Respondent: Michael H. Davidson, Esquire
Linje Rivers, Esquire
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

STATEMENT OF THE ISSUE

Whether a proposed amendment to Florida Administrative Code Rule 69A-6.005(2) constitutes an invalid exercise of delegated legislative authority in violation of section 120.52(8)(e), Florida Statutes (2011).[1/]

PRELIMINARY STATEMENT

Petitioner, Combs Oil Company (Combs Oil/Petitioner), alleges that a proposed amendment to rule 69A-6.005(2) (Proposed Rule), to the extent that it adopts National Fire Protection Association (NFPA) 30, section 22.11.4.1 (2008), is arbitrary or capricious and is, therefore, an invalid exercise of delegated legislative authority within the meaning of section 120.52(8)(e). Combs Oil sets forth two theories for why the proposed rule is arbitrary or capricious. First, Combs Oil contends that the Proposed Rule, "to the extent it adopts NFPA 30, section 22.11.4.1 (2008), would not allow [the company] to install tanks of greater capacity than 12,000 gallons without spill control." As set forth in the Amended Petition for Determination of Invalidity of Proposed Rule 69A-60.005(2) (Petition), the 12,000-gallon limitation found in NFPA 30 is allegedly arbitrary or capricious, because the stated tank capacity was chosen by the NFPA "to correlate with maximum capacities allowed by NFPA 30A, Code for Motor Fuel Dispensing Facilities and Repair Garages." According to the Petition,

NFPA 30A applies to aboveground tanks at service stations, and since Petitioner's facility is not a service station, it is either arbitrary or capricious, or both, for the NFPA 30 standard to use NFPA 30A as a basis for the 12,000-gallon limitation.

Second, Combs Oil alleges that the Proposed Rule is arbitrary or capricious because it is in direct conflict with Florida Administrative Code Rule 62-762.501(2)(c)1.b. Rule 62-762.501(2)(c)1.b., which was promulgated by the Department of Environmental Protection (DEP), places no capacity limitation on aboveground storage tanks and allows for the installation of tanks, such as those at issue in the instant proceeding, if the tanks are approved in accordance with rule 62-762.851(2). There is no dispute in the instant proceeding that DEP approved Petitioner's three tanks for installation.

During the final hearing held on January 6, 2012, Combs Oil offered the testimony of Dennis Combs and Charles Frank. The Department offered the testimony of one witness, Charles Frank. Combs Oil offered into evidence its Exhibits 1, 2A through 2M, and 3 through 7. The Department offered into evidence its Exhibits 1 through 5. On February 23, 2012, Combs Oil submitted a Proposed Final Order, and on February 24, 2012, the Department submitted its Proposed Final Order. The proposed final orders

submitted by the parties have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Combs Oil is engaged in the distribution and storage of petroleum products in southwest Florida. The distribution and storage facility (facility) operated by Combs Oil, which is located at 76 Industrial Boulevard in Collier County, Florida, contains both underground and aboveground petroleum storage tanks and is considered a bulk petroleum storage facility. As a bulk petroleum storage facility, the operation does not directly dispense fuel to cars, boats, planes, and the like.

2. Through its operations, Combs Oil distributes petroleum products to retail locations and to entities, such as governmental agencies, golf courses, and the commercial fishing, cattle, and citrus industries.

3. Several years ago, Combs Oil purchased three 29,000-gallon aboveground, double-walled storage tanks and currently desires to utilize the tanks at its facility to store Class I petroleum products. These tanks are considered secondary containment-type tanks. Regulatory officials in Collier County have advised Combs Oil that the company will not be able to store petroleum in the 29,000 gallon aboveground tanks because to do so would be in violation of the 12,000-gallon capacity limit established by NFPA 30.

4. NFPA 30, section 22.11.4.1 (2008), is included within NFPA Standard 1, as referenced in section 633.0215(2), Florida Statutes. NFPA 30, section 22.11.4.1 (2008), provides that where a secondary containment-type tank is used to provide spill control, the capacity of the tank shall not exceed 12,000 gallons. The 2008 version of NFPA 30 made no change to the existing prohibition against the use of secondary containment-type, aboveground tanks in excess of 12,000 gallons. Substantively, NFPA 30, section 22.11.4.1 (2008), is the same as the 2000 and 2003 versions; however, the 2008 version, according to Combs Oil, includes commentary from NFPA's technical committee that was not in previous versions of the rule.

5. The commentary from NFPA's technical committee reads, in material part, as follows,

> Subsection 22.11.4 was initially added, in 1993, as an exception to the spill control provisions of NFPA 30. The exception addressed the growing use of factory-built aboveground tanks that incorporated some form of secondary containment. The secondary containment is primarily an environmental protection measure and usually takes the form of a double shell with an annular (interstitial) space or an integral spill pan. In developing this exception, the NFPA 30 Technical Committee on Tank Storage and Piping Systems considered many issues and determined that a double shell alone would not provide the level of spill control originally intended.
>
> First, the technical committee recognized that secondary containment and spill control

are not synonymous. Secondary containment is a term that was originally applied to double shell underground tanks; such tanks have been in use for many years and are now the choice for underground installations, as a result of stricter environmental regulations. The outer shell contains any release of product if the inner primary tank develops a leak. The concept has now been applied to aboveground tanks. However, almost all product releases from aboveground tanks result from overfilling or a break in a pipe connected to the tank. Rarely does an aboveground tank release product because of a leak in its shell. In a sense, secondary containment, when applied to an aboveground tank, is a solution in search of a problem.

Second, the technical committee was not convinced that the bare steel outer shell would not fail prematurely from an exposure fire. Their concern arose from the fact that the contained liquid is not in contact with the outer shell and, therefore, cannot absorb the thermal energy impinging on it. Third, for smaller tanks, the outer shell offered virtually no impact protection. Piercing the outer shell would likely result in piercing the primary tank as well. Even if the primary tank were not damaged, secondary containment would have been compromised.

Nevertheless, the technical committee determined that an aboveground secondary containment-type tank could be installed without meeting the original spill control provisions of NFPA 30, if the protective features enumerated here are provided. <u>The maximum capacity of 12,000 gal for Class 1 liquids and 20,000 gal for Class II and III liquids was chosen to correlate with the maximum capacities allowed by NFPA 30A, Code for Motor Fuel Dispensing Facilities and Repair Garages, for aboveground tanks at service stations</u>. Piping connections below

> the liquid level are not allowed and an anti-siphon device is required to prevent release of liquid should there be a break in the pipeline.

The emphasized portion of the quoted material provides the basis for Petitioner's assertion that "NFPA has done no study to warrant the application of this standard to terminal or bulk facilities."

6. Combs Oil did not offer any testimony from any person affiliated with NFPA's technical committee. Combs Oil did not call any witness who has served on NFPA's technical committee. Combs Oil did not offer any documentary evidence showing the workings of NFPA's technical committee as the committee contemplated the inclusion of the newly inserted notes into the technical committee's commentary.

7. Per the requirements of section 633.0215, the Department, as part of its three-year update to the Florida Fire Prevention Code, seeks to amend rule 69A-6.005(2) to reflect the adoption of the 2008 version of NFPA 30. It is undisputed that NFPA 30 governs the facility operated by Combs Oil. It is also undisputed that NFPA 30A, when considered in isolation, does not apply to the facility at issue.

8. Mr. Charles Frank works as an operations review specialist for the State Fire Marshall's Office, Bureau of Fire Prevention. In this capacity, Mr. Frank offers "informal

interpretation for various agencies that are looking for code interpretations." Mr. Frank does not serve in a policy-making position with the State Fire Marshall's Office.

9. From 2005 until 2009, Mr. Frank was a member of the NFPA. Mr. Frank is familiar with how NFPA develops and compiles its fire code, but he has personally never participated in NFPA's code development process. Mr. Frank is neither qualified, nor authorized to speak on behalf of NFPA with respect to technical matters related to NFPA's rules.

10. Prior to filing the instant challenge, Combs Oil, pursuant to section 120.542, filed with the Department on or about August 3, 2007, a "Petition for Variance From, or Waiver of, Rule 69A-3[.]012(1), Florida Administrative Code [Waiver]." Petitioner's Waiver application requested that the Department waive the requirements of the applicable rule and allow Petitioner to install the three 29,000-gallon tanks. On or about November 2, 2007, the Department denied Petitioner's Waiver request. In response to the denial, Petitioner filed a Petition for Formal Administrative Hearing, which was assigned DOAH Case No. 08-1714. On July 8, 2008, pursuant to a Joint Motion to Dismiss, the Division of Administrative Hearings issued an Order closing its file and relinquishing jurisdiction to the Department.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.56(1) & (2), 120.569(1), and 120.57(1), Fla. Stat.

12. Section 120.56(1)(a) provides that "[a]ny person substantially affected by a rule or 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." Combs Oil is substantially affected by the proposed rule and, therefore, has standing.

13. Under section 120.56(2)(c), a "proposed rule is not presumed to be valid or invalid." In a proceeding challenging a proposed rule, "[t]he petitioner has the burden of going forward [with] [t]he agency then [having] 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 objections raised." § 120.56(2)(a).

14. A petitioner satisfies its burden of going forward by "establishing a factual basis for the objections to the [proposed] rule." St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 77 (Fla. 1st DCA 1998), rev. den., 727 So. 2d 904 (Fla. 1999)(superseded on other grounds by Chap. 99-379, §§ 2 and 3, Laws of Fla.). Petitioner

is required to offer more than mere conclusions in order to sustain its initial burden of going forward. It is not enough to simply allege that a rule is arbitrary or capricious without providing a factual basis to support the allegation. Petitioner can satisfy its initial burden of going forward by offering expert testimony, documentary evidence, or other competent evidence. In the absence of a factual basis for a challenge to a proposed rule, a challenger's objection amounts to nothing more than conjecture and supposition.

15. Section 120.52(8) provides, in part, as follows:

> 'Invalid exercise of delegated legislative authority' means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational[.]

16. Section 633.0215 provides, in part, as follows:

> (1) The State Fire Marshal shall adopt, by rule pursuant to ss. 120.536(1) and 120.54, the Florida Fire Prevention Code which shall contain or incorporate by reference all firesafety laws and rules that pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities and

the enforcement of such firesafety laws and rules. The State Fire Marshal shall adopt a new edition of the Florida Fire Prevention Code every third year.

(2) The State Fire Marshal shall adopt the National Fire Protection Association's Standard 1, Fire Prevention Code but shall not adopt a building, mechanical, or plumbing code. The State Fire Marshal shall adopt the Life Safety Code, Pamphlet 101, current editions, by reference. The State Fire Marshal may modify the selected codes and standards as needed to accommodate the specific needs of the state. Standards or criteria in the selected codes shall be similarly incorporated by reference. The State Fire Marshal shall incorporate within sections of the Florida Fire Prevention Code provisions that address uniform firesafety standards as established in s. 633.022. The State Fire Marshal shall incorporate within sections of the Florida Fire Prevention Code provisions addressing regional and local concerns and variations.

* * *

(9) The State Fire Marshal shall make rules that implement this section and ss. 633.01 and 633.025 for the purpose of accomplishing the objectives set forth in those sections. (emphasis added.)

17. Paragraphs 8 and 9 of the Petition provide that

NFPA 30A, Section 4.3.2.3, limits the capacity of any aboveground tank, i.e., single-or double-walled, to 12,000 gallons at the motor fuel dispensing facilities and other facilities described in NFPA 30A, Section 1.1.1 (2008). The capacity limit 'was deliberately chosen on the basis of typical underground systems in use . . . .' This limitation was not meant to apply to bulk plants or terminals.

> Based on the foregoing, it is clear that the 12,000 gallon limit (without spill control) on any aboveground tanks was chosen to reflect the size of tanks at typical motor fuel dispensing facilities. Applying the capacity limitation to other facilities, including bulk plants, is arbitrary and capricious, as NFPA has done no study to warrant the application of this standard to terminal or bulk facilities. In contrast, DEP has determined that any double-walled tank does not require separate spill control.

18. The first predicate upon which Petitioner's instant challenge to the Proposed Rule rests is found in a note from the NFPA technical committee. According to Combs Oil, NFPA 30, section 22.11.4 (2008), provides, in part, that "[t]he maximum capacity of 12,000 gal[lons] for Class I liquids . . . was chosen to correlate with the maximum capacities allowed by NPFA 30A, Code for Motor Fuel Dispensing Facilities and Repair Garages, for aboveground tanks at service stations."

19. A committee note for a rule that references a standard contained in a second rule is not presumptively arbitrary or capricious simply because the second rule, when viewed in isolation, pertains to subject matter not covered by the first rule.

20. As previously noted, Combs Oil argues that "[a]pplying the capacity limitation to other facilities, including bulk plants, is arbitrary and capricious, as NFPA has done no study to warrant the application of this standard to terminal or bulk

facilities." Although Combs Oil argues that "NFPA had done no study," it has failed to produce any evidence that provides a factual basis for this assertion.

21. On cross-examination by Petitioner, Charles Frank was asked to explain the basis for NFPA placing the 12,000 gallon limitation on aboveground petroleum storage tanks. In response to Petitioner's inquiry, Mr. Frank advised that he could not answer the question asked of him, because he did not have authority to speak on behalf of NFPA. Petitioner then asked Mr. Frank the following,

> Q: Do you know the scientific basis for the 12,000 gallon capacity limit?
>
> A: No.
>
> Q: Do you know of any data that support the 12,000 gallon capacity limit?
>
> A: No.
>
> Q: Are you aware of any scientific studies that demonstrated that the capacity limit should be limited to 12,000 gallons?
>
> A: No, sir.

(Hearing transcript, pgs. 160, 161)

22. Combs Oil failed to establish that Mr. Frank, in his capacity as an operations review specialist for the State Fire Marshall's Office, Bureau of Fire Prevention, is qualified to render an opinion or testify factually about what NFPA did or did not do as it relates to correlating the standards of NFPA 30

to those contained in NFPA 30A. Petitioner offered no other evidence regarding this issue and, accordingly, has failed to prove a factual basis for its contention that the Proposed Rule is arbitrary or capricious because "NFPA has done no study to warrant the application of this standard to terminal or bulk facilities."[2/]

23. Combs Oil also challenges the Proposed Rule as being arbitrary or capricious on the grounds that the Proposed Rule prohibits the installation of aboveground petroleum tanks exceeding 12,000 gallons, whereas Florida DEP rule 62-762.501(2)(c)1.b. (DEP Rule) allows for the installation of such tanks. Legal argument notwithstanding, Petitioner must, nevertheless, meet its initial burden of going forward as to this issue by offering a factual basis to support its assertion.

24. The DEP Rule was promulgated pursuant to section 376.303, Florida Statutes (2003). Chapter 376, Laws of Florida, deals, in general, with pollutant discharge prevention and removal. The Legislature, in enacting sections 376.30 through 376.317, Florida Statutes (2003), expressed its intent to confer upon DEP certain police powers related to protecting the State's surface and ground waters.

25. By comparison, section 633.01(2) provides, in part, that "it is the intent of the Legislature that the State Fire Marshal shall have the responsibility to minimize the loss of

life and property in this state due to fire." DEP's legislative charge of protecting the State's surface and ground waters is very different from the State Fire Marshall's charge of minimizing the loss of life and property due to fire. Given that the State Fire Marshall and DEP have very different legislative missions, the undersigned will not infer, as suggested by Petitioner, that the Proposed Rule is arbitrary or capricious simply because it prohibits an activity that is otherwise allowed by DEP's Rule. To embrace such an inference, when the instant record is devoid of a factual basis for doing so, would be unreasonable and contrary to the language of section 120.56(2)(c), which expressly provides that a "proposed rule is not presumed to be valid or invalid." As for this issue, like the first, Combs Oil has also failed to establish a factual basis for the objection to the Proposed Rule.[3/]

26. Because Combs Oil has failed to meet its initial burden of establishing a factual basis for its objections to the Proposed Rule, the Department is relieved of its burden of proving that the Proposed Rule is not an invalid exercise of delegated legislative authority. Id.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is, therefore,

ORDERED that the Amended Petition for Determination of Invalidity of Proposed Rule 69A-60.005(2) is denied.

DONE AND ORDERED this 9th day of March, 2012, in Tallahassee, Leon County, Florida.

LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of March, 2012.

ENDNOTES

1/ All future references to Florida Statutes will be to 2011, unless otherwise indicated.

2/ In considering the entirety of the comments from the technical committee as noted in Findings of Fact, paragraph 5, it plainly appears that the committee was quite deliberate and thorough in the process utilized and rationale articulated when correlating the 12,000 gallon limitation in NFPA 30 to that of NFPA 30A.

3/ The absence of a factual basis for Petitioner's challenge is further illustrated by the following colloquy:

> Mr. Fingar: Your Honor, I've got the burden of going forward trying to demonstrate that the rule is arbitrary or capricious. My intent would be to move to Section 4.3.2.3., because that's the rule that demonstrates arbitrary and capricious.

I don't know, other than through argument, of any artful way to get the rule--well, the rule is in the record. I don't know of any artful way to highlight it. So we can ask Mr. Combs about it or we can deal with it in argument, but I think I've got to highlight the portion of the rule that's--that I'm alleging is invalid.

Mr. Davidson: Your Honor, that's what closing argument and PRO's are for.

COPIES FURNISHED:

Ken Plante, Coordinator
Joint Administrative
Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400
plante.ken@leg.state.fl.us

Liz Cloud, Program Administration
Administrative Code
Department of State
R.A. Gray Building, Suite 101
Tallahassee, Florida 32399
lcloud@dos.state.fl.us

P.K. Jameson, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0307
pk.jameson@myfloridacfo.com

Julie Jones, CP, FRP, Agency Clerk
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, Florida 32399-0390

Robert D. Fingar, Esquire
Guilday, Tucker, Schwartz
and Simpson, P.A.
1983 Centre Pointe Boulevard, Suite 200
Tallahassee, Florida 32308-7823

Michael H. Davidson, Esquire
Linje Rivers, Esquire
Department of Financial Services
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333

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 Administrative 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.