

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JACKSONVILLE BEEKEEPER'S  
ASSOCIATION, A FLORIDA NONPROFIT  
CORPORATION,

Petitioner,

vs.

Case No. 13-3341RP

DEPARTMENT OF AGRICULTURE AND  
CONSUMER SERVICES,

Respondent.

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FINAL ORDER OF DISMISSAL

This case is before the undersigned on the Motion of Respondent, Department of Agriculture and Consumer Services, to Dismiss Petition for Administrative Determination of Invalidity of Proposed Rule (Motion), filed on September 12, 2013. The Motion was heard in a telephonic motion hearing conducted on September 17, 2013, by Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Marilyn S. Young, Esquire  
Mark Young, P.A.  
12086 Ft. Caroline Road  
Jacksonville, Florida 32225

For Respondent: Carol Ann Forthman, Esquire  
Steven Hall, Esquire  
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and Consumer Services  
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STATEMENT OF THE ISSUE

At issue is whether the Petition to Determine Invalidity of Proposed Rule must be dismissed as an untimely challenge to Respondent's proposed rule, and as a premature challenge to a draft notice of change that was posted on Respondent's website, but not published in the Florida Administrative Register.

PRELIMINARY STATEMENT

On September 5, 2013, Petitioner filed a Petition for Administrative Determination of Invalidity of Proposed Rule (Petition) with the Division of Administrative Hearings. The Petition sought to challenge proposed rule 5B-54.0105, and draft changes to the proposed rule that were in a notice posted on Respondent's website. Upon assignment, the undersigned set the matter for final hearing on October 3, 2013, and issued an Order establishing expedited pre-hearing procedures.

Respondent's Motion, filed on September 12, 2013, asserted that the Petition should be dismissed. The Motion asserted that to the extent the Petition sought to challenge the proposed rule as originally noticed, the Petition was untimely; and to the extent the Petition sought to challenge the draft changes posted on Respondent's website, the Petition was premature. Respondent requested an expedited hearing on the Motion to minimize the need to devote resources to discovery and hearing preparation that could prove to be unnecessary. With the cooperation of the parties, a telephonic motion hearing was scheduled and held on

September 17, 2013. Petitioner filed a response in opposition to the Motion on September 16, 2013. The Motion, the response in opposition, and argument of counsel have all been carefully considered in preparing this Final Order of Dismissal.

#### FINDINGS OF FACT

Accepting as true the allegations in the Petition (including its attachments), and considering those allegations in the light most favorable to Petitioner, the following relevant facts are found and are not disputed:

1. On June 27, 2013, Respondent published a Notice of Proposed Rule in the Florida Administrative Register, proposing the adoption of Florida Administrative Code Rule 5B-54.0105 (the Proposed Rule). A document referred to as a "Beekeeper Compliance Agreement" was incorporated by reference in the Proposed Rule.

2. Petitioner timely requested a public hearing on the Proposed Rule, including the document incorporated by reference.

3. On July 18, 2013, Respondent published notice in the Florida Administrative Register that it would hold a public hearing on the Proposed Rule on July 30, 2013.

4. The public hearing record was held open until August 9, 2013, for the public to comment and submit proposed revisions to the Proposed Rule.

5. On August 16, 2013, Respondent posted on its website a Notice of Change document, bearing a "DRAFT" watermark diagonally

across each page (Draft Notice of Change). The Draft Notice of Change made changes to the Proposed Rule, including to the Beekeeper Compliance Agreement incorporated by reference.

6. No Notice of Change to the Proposed Rule has been published in the Florida Administrative Register.

7. On September 5, 2013, Petitioner filed its Petition.

#### CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding.

§ 120.56, Fla. Stat. (2013).<sup>1/</sup>

9. The Petition seeks to challenge the Proposed Rule and changes to the Proposed Rule contained in the Draft Notice of Change. Respondent's Motion raises the threshold question of timeliness, asserting that the Petition is untimely as to former and premature as to the latter.

10. A petition challenging proposed rules must be filed within the time periods set forth in section 120.56(2) (a):

A substantially affected person may seek an administrative determination of the invalidity of a proposed rule by filing a petition seeking such a determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3) (a); within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3) (e)2.; within 20 days after the statement of estimated regulatory costs or revised statement of estimated regulatory costs, if applicable, has been prepared and made available as provided in s. 120.541(1) (d); or within 20

days after the date of publication of the notice required by s. 120.54(3)(d).

11. The first time period is a 21-day window that begins on the date of publication of the notice of the proposed rules, which is the notice required by section 120.54(3)(a). The Petition was not filed within 21 days after the Notice of Proposed Rule was published in the Florida Administrative Register.

12. As to the second time period, the Petition was not filed within 10 days after the conclusion of the only public hearing held on the Proposed Rule.

13. The parties do not contend that the third time period offered by section 120.56(2)(a) is applicable. Instead, it appears that no Statement of Estimated Regulatory Costs was prepared in connection with the Proposed Rule.

14. To defend the timeliness of the Petition, Petitioner relies on the fourth period offered by section 120.56(2)(a). Petitioner contends that its Petition should be deemed timely because it was filed within 20 days after the Draft Notice of Change was published by Respondent on its website.

15. However, the 20-day window offered by this fourth time period is only triggered by, and begins to run from, "the date of publication of the notice required by s. 120.54(3)(d)."

16. In pertinent part, section 120.54(3)(d) provides:

Any change, other than a technical change that does not affect the substance of the

rule, must be supported by the record of public hearings held on the rule, must be in response to written material submitted to the agency within 21 days after the date of publication of the notice of intended agency action or submitted to the agency between the date of publication of the notice and the end of the final public hearing, or must be in response to a proposed objection by the committee. In addition, when any change is made in a proposed rule, other than a technical change, the adopting agency shall provide a copy of a notice of change by certified mail or actual delivery to any person who requests it in writing no later than 21 days after the notice required in paragraph (a). The agency shall file the notice of change with the committee, along with the reasons for the change, and provide the notice of change to persons requesting it, at least 21 days prior to filing the rule for adoption. The notice of change shall be published in the Florida Administrative Register at least 21 days prior to filing the rule for adoption. . . . (emphasis added).

17. The emphasized language is the only provision in section 120.54(3)(d) that requires publication of the notice. Thus, the last 20-day window in section 120.56(2)(a) can only be triggered by publication of a notice of change in the Florida Administrative Register.

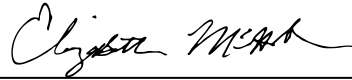
18. Respondent's posting of a Draft Notice of Change on its website has no legal effect insofar as the time periods for challenging proposed rules in section 120.56(2)(a) are concerned. The website posting of a Draft Notice of Change was not "publication of the notice required by s. 120.54(3)(d)." § 120.56(2)(a).

19. Accordingly, Respondent is correct that the Petition is premature to the extent that it purports to challenge the Draft Notice of Change. If Respondent proceeds to publish a notice of change to the Proposed Rule in the Florida Administrative Register, that publication date will trigger the final 20-day window in section 120.56(2) (a).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition for Administrative Determination of Invalidity of Proposed Rule is DISMISSED.

DONE AND ORDERED this 23rd day of September, 2013, in Tallahassee, Leon County, Florida.



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ELIZABETH W. MCARTHUR  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of September, 2013.

ENDNOTE

<sup>1/</sup> All references to the Florida Statutes are to the 2013 codification.

COPIES FURNISHED:

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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.