STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID W.R. BROWN,

Petitioner,

vs. Case No. 14-2060RX

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.
______________________________/

FINAL ORDER

The final hearing in this case was held by video-teleconference on June 5, 2014, at locations in Tallahassee and Tampa, Florida, before Bram D. E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: David Wilson-Rine Brown, pro se
1805 Burlington Circle
Sun City Center, Florida 33573

For Respondent: Benjamin M. Melnick, Esquire
Sidney C. Bigham, III, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the proposed amendment to Florida Administrative Code Rule 62-555.360 of the Department of Environmental Protection (“Department”),

pertaining to cross-connection control for public water systems, is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On January 28, 2014, the Department published a Notice of Proposed Rulemaking in the Florida Administrative Register to amend Florida Administrative Code Chapter 62-555, including rule 62-555.360, entitled "Cross-Connection Control for Public Water Systems." No rule challenge was filed within 21 days of the publication of the rule and it became effective on May 5, 2014.

On May 5, 2014, Petitioner filed a petition to challenge rule 62-555.360 which identifies the types of cross-connection control devices that the Department requires for residential service connections with auxiliary water systems and includes required inspection schedules for the devices.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of three Department employees: Geofrey Mansfield,[1/] John Sowerby, and Van Hoofnagle. Petitioner's Exhibits 14, 15 (redacted in part), 16 (redacted in part), 17 (redacted in part), 47, and 76 were accepted into evidence.

The Department presented the testimony of John Sowerby, who was accepted as an expert in water and wastewater systems. Department Exhibits 12, 14, and 15 were accepted into evidence.

The two-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed final orders that were considered by the Administrative Law Judge in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner is a natural person residing at 1805 Burlington Circle, Sun City Center, Hillsborough County, Florida.

2. The Department is the state agency with powers and duties to protect public drinking water as set forth in the Florida Safe Drinking Water Act, section 403.850, et seq., Florida Statutes (2013).

Background

3. The term "cross-connection" is defined in rule 62-550.200(26) as:

> any physical arrangement whereby a public water supply is connected, directly or indirectly, with any other water supply system, sewer, drain, conduit, pool, storage reservoir, plumbing fixture, or other device which contains or may contain contaminated water, sewage or other waste, or liquid of unknown or unsafe quality which may be capable of imparting contamination to the public water supply as the result of backflow.

4. Cross-connections are prohibited unless appropriate backflow protection is provided to prevent backflow through the

cross-connection into the public water system. See Fla. Admin. Code R. 62-550.360(1).

5. There are three types of backflow prevention devices germane to this proceeding: Reduced Pressure Principle Assembly ("RP"), Double Check Valve Assembly ("DC"), and Dual Check Device ("DuC”).

6. Typically, but not in every case, the water customer is responsible for the costs of installation, inspection, and maintenance of a backflow prevention device.

7. It is undisputed that the RP is the most expensive to purchase, install, and maintain; followed by the DC; and then the DuC.[2/]

8. The RP and DC are installed above-ground, usually near a street. Test ports on these assemblies allow them to be tested to determine whether they are still functioning to prevent backflow.

9. The DuC is usually installed underground and has no test ports. The Department asserts that this difference makes the DuC less reliable than the RP and DC.

10. The rule states, and Petitioner did not refute, that the RP and DC offer greater backflow protection than the DuC.

11. Petitioner has an auxiliary water system at his residence, which he uses to pump untreated water from a nearby lake to irrigate his lawn.

12. There is no cross-connection between the plumbing system in Petitioner's residence and his auxiliary water system.

13. Petitioner does not have a backflow prevention device installed at his property.

14. Hillsborough County has an ordinance that requires the installation of an RP device for residential customers who have auxiliary water systems, but the County currently has a moratorium on the enforcement of its ordinance.

15. Petitioner is on a local committee established to investigate and advise the Hillsborough County Board of County Commissioners regarding cross-connection control. He believes the County is likely to modify its ordinance and allow the DuC for residential customers who have auxiliary water systems.

The Department Rule

16. The Department stated its purposes for the rule in the Notice of Proposed Rulemaking:

> These rules are being amended to significantly reduce the overall regulatory burden of cross-connection control requirements on community water systems (CWSs) and their residential customers by: (1) allowing a dual check device to be used as backflow protection at or for residential service connections from CWSs to premises where there is any type of auxiliary or reclaimed water system; and (2) allowing biennial instead of annual testing of backflow preventer assemblies required at or for residential service connections from CWSs.

17. A community water system ("CWS") is a public water system which serves at least 15 service connections or regularly serves at least 25 year-round residents. See § 403.852(3), Fla. Stat.

18. The Department requires each CWS to have a cross-connection control program, and Table 62-555.360-2 in the rule establishes the "Minimum Backflow Protection" that must be provided at or for the service connection from the CWS to various types of water customers. The minimum backflow protection specified in the table for a residential service connection with an auxiliary water system is a DuC. All references hereafter to "residential service connection" shall mean one with an auxiliary water system.

19. There is a footnote for the DuC at the bottom of the table, which explains:

> A DuC may be provided only if there is no known cross-connection between the plumbing system and the auxiliary or reclaimed water system on the customer's premises. Upon discovery of any cross-connection between the plumbing system and any reclaimed water system on the customer's premises, the CWS shall ensure that the cross-connection is eliminated. Upon discovery of any cross-connection between the plumbing system and any auxiliary water system other than a reclaimed water system on the customer's premises, the CWS shall ensure that the cross-connection is eliminated or shall ensure that the backflow protection provided at or for the service connection is equal to

> that required at or for a non-residential service connection.

The SERC

20. As part of the rulemaking process for the proposed amendments to rule 62-555.360, the Department prepared a Statement of Estimated Regulatory Cost ("SERC"). Section 120.541, Florida Statutes (2013), governs the preparation of SERCs and provides that a substantially affected person may submit a "good faith written proposal for a lower cost regulatory alternative that substantially accomplishes the objectives of the law being implemented." See § 120.541(1)(a), Fla. Stat.

21. The parties dispute whether Petitioner challenged the SERC. In his amended petition, Petitioner states no objection to any statement in the SERC. Petitioner did not challenge the SERC.

22. The parties dispute whether Petitioner submitted a lower cost regulatory alternative. The Notice of Proposed Rulemaking stated:

> Any person who wishes to provide information regarding a statement of estimated regulatory costs or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

23. Within 21 days of the notice, the Department received Petitioner's written comments. In his comments, Petitioner cites

section 120.52(8)(f), which provides that a rule is invalid if it imposes regulatory costs which could be reduced by adopting a less costly alternative. Petitioner recommends that the rule be changed to specify that the less costly DuC is the only acceptable backflow prevention device for residential service connections and "A CWS shall not impose a requirement for a more expensive type of backflow prevention valve."

24. The Department contends that Petitioner's comments did not constitute a good faith lower cost regulatory alternative, citing pages 87-98 of the Transcript. Those pages contain some argument on the issue, but do not prove Petitioner did not submit a lower cost regulatory alternative.

25. Petitioner's timely written comments included a citation to the relevant statute and a plainly-worded proposal. As explained in the Conclusions of Law, Petitioner's comments were sufficient to constitute a lower cost regulatory alternative.

<u>Petitioner's Objections</u>

26. Petitioner objects to rule 62-555.360 because (1) it specifies use of the RP and DC, which he contends are unreasonably dangerous to public health and safety; (2) it specifies the DuC for residential service connections as the "minimum" protection, which he contends allows a CWS to require the more expensive RP or DC; (3) it requires testing of backflow

devices “at least biennially” (once every two years), which he believes is too frequent; (4) it makes biennial testing a “minimum” testing interval, which he contends allows a CWS to require more frequent inspection; and (5) it does not require the backflow prevention device to be attached to the CWS’s water meter where Petitioner believes it should always be located.

Unreasonable Danger

27. Petitioner contends that the RP and DC are unreasonably dangerous to public health and safety because a person could intentionally pump contaminants through a test port on one of these assemblies into a public water supply. The Department does not dispute that a person could introduce contaminants into a public water supply in this way.

28. The flaw in Petitioner’s reasoning is his failure to see the danger in proper perspective. Department personnel and other persons with expertise in public water systems throughout the United States are well aware that there are many access points in potable water collection, treatment, and distribution systems and many methods to introduce contaminants into these systems. There are many access points other than RPs and DCs.

29. For example, there are methods available that would allow contaminants to be pumped into a public water system from any building connected to the system that has no backflow prevention device installed.

30. RPs and DCs are primarily designed to prevent accidental introduction of contaminants into a public water system. However, they also prevent a person from intentionally pumping contaminants into the public water system from inside a house or building, hidden from view.

31. The danger described by Petitioner assumes that the criminal who is intentionally pumping contaminants through the RP or DC will do it while standing next to the device, in the open, near a street.

32. It is a well-known fact officially recognized by the Administrative Law Judge that criminals prefer to conduct their criminal activities hidden from sight rather than in plain view. Therefore, a criminal planning to contaminate a public water supply is more likely to choose a means other than introducing contaminants through an RP or DC.

33. RPs and DCs are already in wide use. There is no reported incident of intentional contamination of a public water supply by pumping contaminants through one of these devices.

34. When these factors are taken into account, the rule's specifications for the continued use of RPs and DCs do not create an unreasonable danger to the public health and safety.

Minimum Backflow Protection

35. Petitioner contends that Table 62-555.360-2 is invalid because it violates the Department's duty under section 120.541

to adopt "less costly alternatives." Petitioner asserts that by specifying the DuC as the "minimum" backflow protection required for residential service connections the rule allows a local government to require the more costly RP or DC.

36. The Department cannot dispute that the DuC substantially accomplishes the statutory objectives. The RP and DC provide greater backflow protection than the DuC, but the Department specified the DuC for residential service connections, indicating that the lower protection provided by the DuC did not make it fall short of the statutory objectives.

37. However, as explained in the Conclusions of Law, the rule imposes the least costly regulatory alternative for residential service connections because it only requires the DuC.

Biennial Testing Schedule

38. Petitioner contends that section III.D. of Table 62-555.360-1 also violates the Department's duty to adopt less costly alternatives because the rule requires "backflow assemblies" to be tested biennially, which Petitioner believes is too frequent. The term "backflow preventer assemblies" refers only to the RP and DC. See footnote 1 of Table 62-555.360-1.

39. Section III.E. of Table 62-555.360-1 indicates that the DuC must be refurbished or replaced "at least once every 5 to 10 years." Petitioner did not object to this requirement.

40. The preponderance of the evidence presented shows that biennial testing is reasonable. Furthermore, it is determined in the Conclusions of Law that Petitioner has no standing to object to the testing frequency specified for the RP and DC, because the rule does not require him to have an RP or DC.

Location of the Backflow Preventer

41. Petitioner objects to section III.B. of Table 62-555.360-1, which requires backflow prevention devices to be "installed as close as practical to the CWS's meter or customer's property line." Petitioner contends that this is an unconstitutional interference with private property and is unreasonably dangerous because it provides a means for intentional contamination.

42. Petitioner's private property rights claim is based on his allegation that if he were required by Hillsborough County to have an RP and DC, the device could be placed on his private property. Petitioner did not allege or present evidence to show that placing an RP or DC on his property would deprive him of all reasonable uses of his property so as to cause a taking of his private property for a public purpose without full compensation. See Art. X, § 6(a), Fla. Const. Furthermore, it is determined in the Conclusions of Law that Petitioner has no standing to raise this issue because the rule does not require him to have an RP or DC.

43. Petitioner contends the rule should require that backflow prevention devices always be attached to the water meter because that reduces the opportunity for intentional contamination. Petitioner is not an expert in public water systems, generally, or the installation of backflow prevention devices, in particular. He is not competent to state the relevant factors and constraints associated with installation of the devices. He is not competent to express an opinion whether it is always possible or always appropriate to attach the devices directly to the water meter. Furthermore, Petitioner's claim of unreasonable danger was refuted above.

CONCLUSIONS OF LAW

Standing

44. Any person substantially affected by an existing 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.

45. To demonstrate standing, Petitioner must show a real and sufficiently immediate injury to an interest within the zone of interests to be protected or regulated. See Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995).

46. A less demanding test for standing is applicable in rule challenge cases than in licensing cases. See Fla. Dep't of

Prof. Reg. v. Fla. Dental Hygienists Ass'n., 612 So. 2d 646 (Fla. 1st DCA 1993).

47. A petitioner's standing does not require that he prevail on his allegation of injury; it depends on offering evidence to prove the allegation. See St. Johns Riverkeeper v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011); Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009).

48. Petitioner alleged in his amended petition that rule 62-555.360 creates an unreasonable danger and violates the statutory requirement to impose a less costly regulatory alternative. Petitioner offered evidence at the final hearing to prove that the CWS from which he obtains his drinking water could be contaminated, and that he could be injured by having to pay for an unnecessarily costly regulation. Petitioner's evidence was not sufficient to prove his claims of unreasonable danger and unnecessarily costly regulation, but Petitioner has standing to raise the claims. See Palm Bch. Cnty. Envtl. Coalition v. Dep't of Envtl. Prot., 14 So. 3d 1076 (Fla. 4th DCA 2009)(Prevailing on the merits is not required for standing; otherwise every losing party would lack standing).

49. Because the rule does not require Petitioner to install an RP or DC, he does not have standing to challenge the rule's requirements applicable only to RPs and DCs.

Burden and Standard of Proof

50. The burden is on Petitioner to prove that rule 62-555.360 is an invalid exercise of delegated legislative authority. § 120.56(3)(a), Fla. Stat.

51. The standard of proof in this proceeding is preponderance of the evidence. § 120.56(1)(e), Fla. Stat.

52. Section 120.52(8) defines the term "invalid exercise of delegated legislative authority" as action that goes beyond the powers, functions, and duties delegated by the Legislature and sets forth seven grounds for invalidity. Petitioner invokes sections 120.52(8)(d), (e), and (f).

53. Under section 120.52(8)(d), a rule is invalid if it is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency. This ground requires a determination that the rule forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application. See State Dep't of Fin. Svs. v. Peter R. Brown Const., Inc., 108 So. 3d 723, 728 (Fla. 1st DCA 2013).

54. Under section 120.52(8)(e), a rule is invalid if it 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." § 120.52(8)(e), Fla. Stat.

55. Under section 120.52(8)(f), a rule is invalid if the rule imposes regulatory costs which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

Lower Cost Regulatory Alternative

56. The Department contends that, in order to trigger the Department's statutory duty to respond to or adopt a proposed regulatory alternative, it must, at a minimum, include (1) a clearly articulated alternative to the proposed regulatory scheme; (2) valid and objectively supported economic data showing how the alternative would in fact be less costly than the regulatory scheme provided in the proposed rule; and (3) an explanation of how the alternative would actually be as effective as (or more effective than) the proposed rule in meeting the statutory objectives.

57. Section 120.541(1)(a) says nothing about the required elements of a lower cost regulatory estimate. A proposed alternative must be described with enough detail to be understood and it must have some supporting data, but the amount of explanation and data necessary will vary depending on the nature of the particular alternative that is proposed.

58. In this case, the Department's own economic data in the SERC supports Petitioner's statement that a DuC is less expensive to install, inspect, and maintain than the RP and DC.

Furthermore, the Department's specification of a DuC for use at residential service connections constitutes a Department determination that a DuC substantially accomplishes the statutory objectives.

59. Petitioner's proposal for the Department to amend the rule so it does not allow a local government to require the more costly RP or DC is easy to understand. He did not need to present a more detailed explanation or more data to make his lower cost regulatory alternative understandable.

60. The Department is wrong in suggesting that if an agency disagrees with the explanation or data in a lower cost regulatory alternative the agency does not have to respond. Section 120.541 clearly contemplates that the agency will respond and explain why it disagrees.

61. The comments submitted by Petitioner were sufficient to constitute a good faith lower cost regulatory alternative.

62. Section 120.541(1)(e) states that an agency's failure to respond to a written lower cost regulatory alternative "is a material failure to follow the applicable rulemaking procedures set forth in this chapter." However, Petitioner waived this ground for invalidating the Department's rule when he failed to raise the issue in his amended petition.[3/]

63. The Department's failure to amend the rule as proposed by Petitioner constitutes a rejection of Petitioner's proposed

alternative. Therefore, Petitioner met the prerequisite for challenging the Department's rule under section 120.52(8)(f).

Effect of the Rule

64. Petitioner was misled by his focus on the word "minimum" in the rule. The rule would have the same effect if the word "minimum" was removed. Most Department standards are minimums or maximums, whether labeled as such or not. The fact that the challenged rule is directed to local governments with separate regulatory powers may make this less obvious, but rule 62-555.360 establishes the DuC as the state standard for backflow prevention for residential service connections. The rule does not establish the RP or DC as the state standard.

65. Absent a statutory grant to the Department of exclusive regulatory authority over an activity or subject, local governments are not prevented by a Department standard from exercising their own police powers and imposing more stringent local standards. The Florida Safe Drinking Water Act does not grant exclusive regulatory authority to the Department in the area of cross-connection control.

66. Petitioner objects because the Department's rule "allows" a local government to require him to install an RP or DC. However, the rule grants no authority to a local government that the local government does not already have. The rule only requires a DuC for Petitioner's situation, which he does not

oppose. If Hillsborough County hereafter requires Petitioner to install an RP or DC, the County cannot cite rule 62-555.360 as the source of its authority to do so. The County must look to its own local powers.

67. Petitioner correctly points out that local governments are not subject to the prohibition in section 120.541 against imposing regulatory costs that could be reduced by adopting a less costly alternative. Petitioner’s error is in believing that the Department can fix this “problem” in its rule by taking away the authority of local governments to regulate cross-connections in their own public water systems. Without specific statutory authority, the Department cannot do that.

68. Rule 62-555.360 requires that Petitioner have a DuC, which is the lowest cost backflow prevention device. Therefore, the rule does not impose regulatory costs on Petitioner that could be reduced by adopting a less costly alternative. Petitioner failed to prove the rule is invalid under section 120.52(8)(f).

Vague, Arbitrary, or Capricious

69. Petitioner’s claims of invalidity under sections 120.52(8)(d) and (e) are based on his failure to see that the challenged rule establishes a clear and specific state standard for backflow prevention at residential service connections--the DuC. The fact that the rule does not completely control how

local governments will regulate backflow prevention does not make the rule vague, arbitrary, or capricious.

Other Issues

70. Petitioner claims the Department rule is invalid because it violates section 112.311(6), Florida Statutes (2013), which declares the public policy that public employees should act for the benefit of the public, and violates section 403.851(3), which declares the public policy that safe drinking water should be provided with due regard for economic factors. These statements of legislative policy do not provide a basis for invalidating the Department rule.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is determined that Florida Administrative Code Rule 62-555.360 is a valid exercise of delegated legislative authority.

DONE AND ORDERED this 30th day of July, 2014, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of July, 2014.

ENDNOTES

[1/] Geofrey Mansfield's first name is incorrectly recorded as "Jeffrey" in the Transcript of the final hearing.

[2/] See Department Exhibit 14, p. 64, for an analysis of estimated costs under different installation assumptions.

[3/] Nor was the issue raised in the parties' Joint Pre-Hearing Stipulations. Petitioner raised the issue for the first time in his proposed final order.

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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.