

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MAJIC EARTH, INC., A FLORIDA  
SUBCHAPTER S CORPORATION DAVID  
W. WEYCHERT,

Petitioner,

vs.

Case No. 15-5817RU

FLORIDA DEPARTMENT OF  
AGRICULTURE,

Respondent.

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FINAL ORDER OF DISMISSAL

This cause came before the Administrative Law Judge on Respondent's motion to dismiss. A response in opposition to the motion was filed by Petitioner. The motion was denied, but the parties were informed that the case might be resolved if the parties could stipulate to a material fact that was not made clear in the petition for hearing. The parties then filed a joint stipulation. A telephonic hearing was held on November 18, 2015.

Petitioner filed a Petition for Challenge of Rule. In the petition, Petitioner did not state under what statutory authority it was filing the challenge. The Clerk of the Division of Administrative Hearings determined from a review of the petition that it was intended to be a challenge to an agency statement defined as a rule, which is authorized by section 120.56(4), Florida Statutes (2015). The Clerk assigned the suffix "RU" to the case, short for "Rule Unpromulgated." The allegations of the petition are ambiguous, but Petitioner is clearly not challenging the rule which is the focus of its argument, Florida Administrative Code Rule 5E-1.002(1), because Petitioner likes this rule and believes it grants Petitioner a regulatory exemption.

Petitioner's claims and arguments demonstrate that it is actually claiming that rule 5E-1.002(1) was misapplied by Respondent. Such a claim is not a rule challenge and, on that

basis alone, the petition can be dismissed. However, it is also explained below why the petition must be dismissed because Respondent's statement is not an unpromulgated rule.

Petitioner sells a product it calls Majic Earth, which consists of earthworm castings. The agency statement that Petitioner objects to is Respondent's statement that his product is a fertilizer and cannot be sold without complying with the registering and labeling requirements for fertilizers. Petitioner contends this agency statement is inconsistent with rule 5E-1.002(1), which Petitioner believes makes his product exempt from the registering and labeling requirements of chapter 576, Florida Statutes.

Rule 5E-1.002(1) provides an exemption from fertilizer registering and labeling requirements for unmanipulated manures (such as worm castings):

Exemptions. Unmanipulated manures, by Section 576.011(12), F.S., are exempted from the provisions of Chapter 576, F.S., and therefore, are not required to be registered, labeled or meet any requirements of this chapter.

Section 576.011(12), Florida Statutes, which is cited in the rule, is the definition of "fertilizer":

"Fertilizer" means any substance which:

- (a) Contains one or more recognized plant nutrients and promotes plant growth; or
- (b) Controls soil acidity or alkalinity; or
- (c) Provides other soil enrichment; or
- (d) Provides other corrective measures to the soil.

For the purpose of this chapter, the term "fertilizer" does not include unmanipulated animal or vegetable manures, peat or compost which makes no claims as described in paragraphs (a) - (d).

Under this definition, an unmanipulated manure is a fertilizer and is subject to registering and labeling requirements if it makes any of the listed claims.

By joint stipulation, it was established that Petitioner uses a product label that claims Majic Earth promotes soil

aeration and drainage, plant and root growth, seed germination, reintroduction of vital microbes killed by chemicals, growth with natural plant hormones, and water retention. By making these claims, Petitioner has made Majic Earth meet the definition of fertilizer in section 576.011(12) and has made the product ineligible for the exemption stated in rule 5E-1.002(1).

The issue is not whether Majic Earth is a good product or whether the law should be changed. Respondent's statement that Majic Earth is a fertilizer that must comply with registering and labeling requirements is consistent with the plain meaning of section 576.011(12) and rule 5E-1.002(1). An agency statement of how a statute or rule applies, which adds nothing to the plain meaning of the statute or rule, is not a rule because such a statement does not have any effect of its own on regulated persons. See Amerisure Mutual Ins. Co. v. Dep't of Fin. Servs., 156 So. 3rd 520, 532 (Fla. 1st DCA 2015). It is rule 5E-1.002(1), itself, that has the effect Petitioner objects to.

The deficiency in the petition cannot be cured by amendment. Accordingly, it is

ORDERED that the petition for hearing is DISMISSED with prejudice.

DONE AND ORDERED this 19th day of November, 2015, in Tallahassee, Leon County, Florida.



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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.