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THE FLORIDA LEGISLATURE
**JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE**

June 18, 2007

Ms. Cynthia K. Christen
Senior Assistant General Counsel
Department of Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

**Re: Department of Environmental Protection
Proposed Amendments to Rule Chapter 62-602, F.A.C.**

Dear Ms. Christen:

I have completed a review of the above-referenced rule package, which was advertised in the Florida Administrative Weekly on **May 18, 2007**. The following comments are for your consideration and response:

62-602.200(1) This rule defines "Approved County Health Department" as a county health department "approved by the Department of Environmental Protection as having a qualified sanitary engineering staff to perform the duties described in s. 403.862(1)(c), F.S." The rule, however, fails to specify the procedure for either the department's approval of the county health department or the qualification of the sanitary engineering staff. The rule therefore forces the reader to guess at these procedures, rendering this rule impermissibly vague.

62-602.200(5) This rule defines a "Delegated local program" as "any county, municipality, or combination thereof that has established and administers, a pollution control program approved by the Department of Environmental Protection in compliance with s. 403.182, F.S." The definition does not specify the procedure for the DEP's approval of the local pollution control programs. Accordingly, even though the rule requires compliance with s. 403.182, F.S., neither the statute nor the rule provides approval procedures, thereby forcing the reader to guess at the procedures, rendering this rule impermissibly vague.

In addition, unless the program is actually the “county, municipality, or combination thereof,” a better way to word this definition might be “a pollution control program established and administered by a county, municipality, or combination thereof.”

- 62-602.200(13)** This rule defines “operator” as “any person who has an active license issued, under the chapter, by the Department. License classes and levels are Class A, B, C, and D for treatment plant operators and Level 1, 2, 3, and 4 for water distribution system operators.” The definition of “operator” in s. 403.866, F.S., the law implemented, is “any person, including the owner, who is in onsite charge of the actual operation, supervision, and the maintenance of a water treatment plant, water distribution system, or domestic wastewater treatment plant and includes the person in onsite charge of a shift or period of operation during any part of the day.” The difference in definitions appears to constitute a modification of the law implemented.
- 62-602.200(20)** This rule defines “water distribution system” as, “those components of a *regulated* public water system used in conveying water for human consumption from the water treatment plant to the consumer’s property, including pipes, tanks, pumps, and other constructed conveyances.” (e.s.) The definition of “water distribution system” included in the law implemented, s. 403.866(5), F.S., defines “water distribution system” as, “those components of a public water system used in conveying water for human consumption from the water treatment plant to the consumer's property, including pipes, tanks, pumps, and other constructed conveyances.” The addition of the word “regulated” in the rule definition appears to impermissibly modify the definition included in the law implemented.
- 62-602.300(1) – (4)** These rules list the criteria for licensure as a Class D through A operator. The criteria include: high school diploma or its equivalent; specified amount of training, or the successful completion of appropriate training course for Class D operator; and obtaining a passing score on the appropriate examination. The law implemented, s. 403.872, F.S., requires, in subsection (4), “The department shall establish, by rule, the criteria for licensure, including, but not limited to, a requirement of a high school diploma or its equivalent, a training course approved by the department, and onsite operational experience.” These rules impermissibly modify or contravene the law implemented by failing to include a training course approved by the department as one of the requirements for licensure.
- 62-602.300(5)-(9)** These rules list the criteria for licensure as a Level 4 through 1 water distribution system operator. The criteria do not require a training course

approved by the department as required by the law implemented, s. 403.872, F.S. These rules likewise impermissibly modify or contravene the law implemented by failing to include a training course approved by the department as one of the requirements for licensure.

62-602.360 This rule lists the criteria for licensure as an operator in Florida when the applicant is licensed in another state. Again, the criteria do not require a training course approved by the department as required by the law implemented, s. 403.872, F.S. This rule likewise impermissibly modifies or contravenes the law implemented by failing to include a training course approved by the department as one of the requirements for licensure.

62-602.560 This rule provides an opportunity for applicants who have failed the operator's examination to review the questions answered incorrectly by the applicant and the answers to those questions. Please provide and explain the specific law being implemented by this rule.

62-602.560(1) This rule requires payment of a fee for the post-exam review discussed above. Please provide and explain the specific law being implemented by this rule.

62-602.600(6) This rule establishes a fee of \$75 for the post-exam review discussed above. Please provide and explain the specific law being implemented by this rule.

62-602.600(7) This rule establishes a fee of \$10 for applications, examinations and licenses for wards of the state. Please provide and explain the specific law being implemented by this rule, and please explain why this rule is not arbitrary or capricious.

62-602.650 This rule states that an operator is responsible for performing operation and maintenance duties in a "responsible and professional manner consistent with standard operating practices." The rule then continues, listing the duties to be performed. The law being implemented by this rule, s. 403.875(1)(a), F.S., prohibits unlicensed persons from performing the duties of an operator. Please explain how a statute which prohibits the performance of those duties by unlicensed persons is implemented by a rule that requires a level of performance of certain duties by licensees.

In addition, the level of performance required by this rule, "standard operating practices," is not explained and therefore forces the reader to guess at its meaning. This rule, therefore, appears to be impermissibly vague.

62-602.710(4) This rule requires continuing education units (CEUs) to be performed for license renewal. The law being implemented by this rule, s. 403.873, F.S., requires the department to renew a license upon “receipt of the renewal application and fee and in accordance with the other provisions of ss. 403.865-403.876.” The statute continues in subsection (2), “The department shall adopt rules establishing a procedure for the biennial renewal of licenses.” Because the statutory requirement for license renewal is limited to submission of an application and fee, and because the department’s rulemaking authority is limited to adopting a renewal procedure, the substantive requirement in this rule for continuing education units appears to impermissibly enlarge upon the law implemented.

62-602.720(4) This rule states that inactive licenses that are not reactivated “within two years following the end of the most recent licensing period shall be expired.” The law implemented requires the DEP to “reactivate an inactive license upon receipt of the reactivation application and fee,” and to adopt rules “relating to licenses that have become inactive and for the reactivation of inactive licenses.” The law implemented does not provide for license expiration. This rule, therefore, appears to enlarge upon the law implemented.

In addition, this rule requires inactive licensees whose licenses have expired to meet “all the requirements for initial licensure.” The law implemented for this rule, s. 403.874, F.S., merely requires inactive licenses to be reactivated “upon receipt of the reactivation application and fee.” Because the rule requires more than the submission of a reactivation application and fee, the rule appears to enlarge upon the law implemented.

Finally, this rule requires expired licensees applying for relicensure to meet “all the requirements for initial licensure at the highest class or level previously obtained.” Please provide and explain the law implemented which would prohibit application for licensure at something less than “the highest class or level previously obtained.”

62-602.800(4) This rule prohibits the performance of operations “in a manner that is not consistent with standard operating practices.” The failure to specify what constitutes “standard operating practices” renders this rule impermissibly vague, and vests unbridled discretion the DEP to make that determination based upon whim or caprice.

62-602.850(1)(h) The last sentence of this rule states, “The actual penalty imposed depends upon the severity of the violation to cause harm to the environment, or to endanger the public’s or plant employees’ health or safety.” This sentence

is incomprehensible to the public.

62-602.850(1)(j) This rule imposes a penalty from one year suspension for failure to comply with an order of the DEP to license revocation for failure to comply with more than one order. Please explain why this rule does not contravene law implemented s. 403.876(3), F.S., which states, “The department shall reissue the license of a disciplined operator when that operator has complied with all terms and conditions of the department's final order.” That statute appears to include its own enforcement mechanism, and does not authorize additional penalties for failure to comply with a final order.

62-602.850(2) This rule establishes a system to increase or decrease penalties beyond that specified in the disciplinary guidelines based on a showing of aggravating or mitigating circumstances. Please provide and explain the specific law implemented authorizing the DEP to adopt this rule allowing penalties to be increased or decreased based on aggravating and mitigating circumstances.

In addition, this rule appears to limit the showing of aggravating or mitigating circumstances to that presented “by the accused.” Because the accused probably never presents aggravating circumstances to increase his or her penalty, this rule should probably be rewritten to allow the DEP to present that evidence.

62-602.850(2)(a)2. This rule lists as an aggravating circumstance, “For negligence, the magnitude and scope of the damage inflicted upon the environment, treatment plant or water distribution system, treatment plant or water distribution system employees, or general public by the operator’s misfeasance.” The basis for the imposition of the original discipline for negligence is, “The actual penalty imposed depends upon the severity of the violation to cause harm to the environment, or to endanger the public’s or plant employees health or safety.” Because “the magnitude and scope of the damage inflicted” appears to be very similar to “the severity of the violation and the likelihood of the violation to cause harm,” please explain why this aggravating circumstance used to enhance the penalty does not actually include the circumstances used to determine the original penalty a second time.

62-602.870(2)(c) This rule requires the DEP to permanently revoke a license for a finding that negligence in the performance of duties as an operator has resulted in a threat to public health or safety or harm to the environment. Because “a threat to public health or safety or harm to the environment” could

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potentially be any type of negligence, this rule appears to be impermissibly vague, as it forces the reader to guess at its meaning.

In addition, again, please explain how this finding differs from the finding required in 62-602.850(1)(h) which would result in a maximum fine of \$1,000. Considering this finding for a permanent revocation would again appear to include the same circumstances used to determine the original penalty.

These comments have been provided for your consideration and response. Final notice of any substantive change must be noticed in the FAW and filed with this Committee no later than 21 days prior to the date these rules are filed for adoption. Notices of technical change or no change must be submitted to this Committee no later than 7 days prior to adoption. Therefore, if you could provide me with a response within two to three weeks of the date of this letter in the form of corrections, explanations, or additional authority it will help us to meet these deadlines.

Sincerely,

Suzanne G. Printy
Chief Attorney

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