FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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January 9, 2015

Ms. Suzanne G. Printy, Chief Attorney
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 W. Madison Street
Tallahassee, FL 32399-1400
By Hand Delivery

Re: Response to November 25, 2014 Letter regarding NOPR rulemaking
Rule Nos.: 62-701.400, .630, & .730,
FAR ID#: 15103693; OGC No.: 12-1375

Dear Ms. Printy:

This is the Department's response to your comment letter of November 25, 2014, regarding the above referenced rulemaking. Additionally, I want to thank you again for your helpful input and quick review of our proposed rule language.

We will repeat your comments with the Department's responses following.

62-701.400

As stated in my letter of October 21, 2014, methods ASTM D5321, ASTM D6243, ASTM 04716, ASTM D5887 and ASTM D6766, incorporated in this rule, incorporate several additional standards.

Rulemaking is a legislative function It is a "derivative of lawmaking," and "[w]hen an agency promulgates a rule having the force of law, it acts in place of the legislature." Whiley v. Scott, 79 So.3d 702, 710 (Fla. 2011), quoting Dep 't of Revenue v. Novoa, 745 So.2d 378, 380 (Fla. 1st DCA 1999). Legislation is limited by Article III, section 1 of the Florida Constitution to enactment by the legislature, and therefore cannot be delegated to another entity by the incorporation of the works of the other entity. When adopting administrative rules, a legislative function, agencies likewise cannot adopt the works of other entities without proper incorporation pursuant to ss. 120.54(1)(i) and 120.55, F.S.

The materials incorporated in rule 62-701.400 include many "referential incorporations" of other documents. In a referential incorporation, the materials may not state that the referenced documents are "incorporated by reference." Nonetheless, the reference "constitutes an incorporation if it is necessary to consult the [referenced] material to complete the meaning of the referencing legislation," in this case the referencing rule. Peek, et al v. State Bd. of Education and Dept. of Education, Case. No. 12-111 IRP, p. 33, St. of Fla. Div. of Admin. Hrgs. (August 22, 2012), citing F. Scott Boyd, Looking Glass Law: Legislation by Reference in the States, 68 La. L. Rev. at 1212-1213 (2008). ("A reference is

incorporative if its effect is to adopt the standards, requirements, or prohibitions of the referenced material as its own standards, requirements, or prohibitions. An incorporative reference occurs whenever legislation references material outside of itself and indicates expressly or by implication that this material should be treated as if it were fully set forth at that point in the legislation.")·

The referenced materials included in the documents incorporated in 62-701.400 appear to be required for the complete understanding of the referencing material. Those materials are therefore incorporated into the document, and into the rule. For that reason, Department of State rule 1-1.013(2), F.A.C., requires the incorporating rule to identify all incorporated documents by title and effective date, and to include a statement that the material is incorporated by reference and a statement describing how a copy of the material may be obtained. Subparagraph 120.54(3)(a)4., F.S., requires a copy of the materials to be provided to this Committee for review not later than 21 days prior to the date the rule is filed for adoption, and s. 120.54(3)(e)l., F.S., requires one copy of all materials incorporated by referenced to be filed with the Department of State when the rule is filed for adoption.

Response: The Department understands your comments and is willing to amend Ch. 62-701, F.A.C., to incorporate those secondarily referenced ASTM methods; however, the Department proposes to do so by separate rulemaking immediately following the filing and completion of these current proposed amendments. The Department has been engaged in this second phase of rulemaking since February 2014 and needs to file the proposed amendments prior to the current legislative session. Many of the amendments in this proposed rule are being done to address statutory amendments passed by the legislature in 2010. Additionally, some of the amendments, as identified in the Statement of Estimated Regulatory Costs, will impose costs that are in excess of the amount established in Section 120.541(3), F.S., and therefore require legislative ratification. As you know, Section 120.541(3), F.S., requires that rules that need to be ratified be filed with the legislature at least 30 days prior to the legislative session. Given the need to promptly complete this rulemaking, the Department proposes filing these proposed amendments with the Department of State and then reopen Rule 62-701.400, by expeditiously publishing a notice of rule development to address the adoption by reference of the secondary ASTM methods referenced in the main ASTM methods adopted by the Department in Ch. 62-701.

62-701.630(2)(b) *This rule requires proof of financial assurance in an "approved" amount of closing and long-term cost estimates. Your letter of November 17, 2014, states that the approval process is explained through the steps provided in subsection (3) of this rule. This rule should cross-reference that subsection (a technical change) for clarification.*

Response: The Department will cross-reference subsection (3) of this rule as a technical change.

62-701.630(6)(a) *This rule requires use of the "appropriate parts of Form 62-701.900(5)," and "lists" eight subparts of the form by providing eight separate hyperlinks to the same form. Failure to provide the titles of the subparts of the form forces the reader to guess at which subpart is appropriate. Because the form is incorporated in the rule, including the title of each*

subpart would probably not change the meaning of the rule, but would certainly be helpful to the reader.

Response: The Department appreciates your additional input and will include the title of each subpart as a technical change.

62-701.730(7)(k) *My letter of October 21, 2014, states that this rule, which requires arrangements for deposits other than construction and demolition (C&D) debris, appears to modify or to contravenes. 403.707(9)(a), F.S., cited as law implemented for this rule. That statue authorizes the department to issue a permit for a disposal facility which accepts only C&D debris. Your response points out that the definition of C&D debris at s. 403.703(6)(d), F.S., includes mixing of "de minimis" amounts of nonhazardous non-C&D wastes generated at C&D projects under certain circumstances. However, you also state that this rule does not address de minimis amounts of non C&D wastes, but only informs the C&D facility owner or operator of the requirement to segregate and properly manage non-C&D debris which has been inadvertently received at the facility for disposal. The legislature did recognize the possibility of including incidental amounts of non-C&D waste with the C&D debris at a C&D facility. However, such inclusion is addressed ins. 403. 707(9)(a), in terms of a permit violation, stating, "In any enforcement action taken pursuant to this section, the department shall consider the difficulty of removing these incidental amounts from the waste stream." Further, the purpose of creation of a C&D facility appears to be to allow a facility to exist which, according to s. 403.707(9), imposes "less stringent requirements, including a system of general permits or registration requirements, for facilities that accept only a segregated waste stream which is expected to pose a minimal risk to the environment and public health, such as clean debris." This rule would appear to authorize the acceptance and disposal of any solid waste at a C&D facility, despite the less stringent requirements, including hazardous waste, so long as that waste is segregated, managed and disposed of in accordance with Department rules." Because s. 403.707(9)(a) limits the issuance of a C&D permit to facilities which accept only C&D debris, please provide the specific law implemented for the exceptions to that limitation provided in this rule.*

Further, the second sentence of this rule states, "Such solid waste that is accepted by the facility shall be segregated and disposed of in accordance with Department rules." Failure to specify the Department rules with which these actions are to comply forces the reader to guess at the meaning of the rule, rendering it impermissibly vague.

Response: This language is existing language in the rule that is being relocated for clarification. Although a construction and demolition debris disposal facility (C&D facility) may accept "de minimis" amounts of other nonhazardous wastes generated at construction or destruction projects in accordance with paragraph 403.703(6)(d), F.S., a C&D facility is not authorized by the rule

language to dispose of such wastes. Specifically, the rule requires such wastes be transported to an authorized disposal or recycling facility. See 62-701.730(7)(k), F.A.C.

With respect to the comment on the second sentence of this rule, the Department will replace the phrase "with Department rules" with the reference "with Chapter 62-701, F.A.C.," as a technical change.

The Department plans to file the proposed rule amendments with the Department of State on January 14, 1015. Please send a certification to the Department of State's Administrative Code and Register Section that we have responded to your office. If you have any questions, please call Brynna Ross at 245-8763 or the FDEP rule manager Richard Tedder at 245-8735.

Sincerely,

Justin G. Wolfe
Assistant Deputy General Counsel

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