

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB RRS 12-03 Ratification of Rules  
**SPONSOR(S):** Rulemaking & Regulation Subcommittee  
**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE  | ACTION    | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--|-----------|---------|--|
| Orig. Comm.: Rulemaking & Regulation<br>Subcommittee | 13 Y, 0 N | Miller  | Rubottom                                 |

### SUMMARY ANALYSIS

The Department of Agriculture and Consumer Services (department) adopted its rule updating the minimum standards for the storage and handling of liquefied petroleum gases as required by s. 527.06, F.S. The statement of estimated regulatory costs showed Rule 5F-11.002, FAC, *Standards of National Fire Protection Association Adopted*, would have a specific, adverse economic effect, or would increase regulatory costs, exceeding \$1 million over the first 5 years the rule was in effect. Accordingly, the rule must be ratified by the Legislature before it may go into effect.

The rule was adopted by the department on July 7, 2011, and submitted for ratification on December 7, 2011.

The proposed bill authorizes the referenced rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

The Department of Agriculture and Consumer Service (department) is the primary agency charged with the regulation of liquefied petroleum gas (LP Gas) wherever the product is stored, distributed, transported and used in Florida. The department also has statutory authority over the licensing, inspection, enforcement, accident investigation, and training of persons and firms involved in the LP Gas industry in the state.<sup>1</sup> As of December 7, 2011, there were 13,558 LP Gas licensees in Florida.<sup>2</sup>

The department is required to promulgate and enforce rules setting minimum standards for numerous issues pertaining to the safe handling of LP Gas, including the design, construction, location, installation, and operation of storage of LP Gas. The rules must substantially conform to generally accepted standards of safety.<sup>3</sup> Rules that substantially conform to the published standards of the National Fire Protection Association (NFPA) are deemed to meet this standard.<sup>4</sup> The department implements this requirement by adopting and periodically updating Rule 5F-11.002, Florida Administrative Code (FAC), incorporating by reference the applicable NFPA codes with certain exclusions.

#### Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>5</sup> Rulemaking authority is delegated by the Legislature<sup>6</sup> through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”<sup>7</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>8</sup> To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>9</sup> The grant of rulemaking authority itself need not be detailed.<sup>10</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>11</sup>

An agency begins the formal rulemaking process by filing a notice of the proposed rule.<sup>12</sup> The notice is published by the Department of State in the Florida Administrative Weekly<sup>13</sup> and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule’s adverse effect on specified aspects of the state’s economy or increase in regulatory costs.<sup>14</sup>

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<sup>1</sup> Chapter 527, F.S.

<sup>2</sup> Florida Department of Agriculture and Consumer Services, *Statement of Estimated Regulatory Costs*, filed with the Request for Legislative Ratification and on file with the Rulemaking & Regulation Subcommittee.

<sup>3</sup> Section 527.06(2), F.S.

<sup>4</sup> Section 527.06(3)(a), F.S.

<sup>5</sup> Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>6</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>7</sup> Section 120.52(17).

<sup>8</sup> Section 120.54(1)(a), F.S.

<sup>9</sup> Section 120.52(8) & s. 120.536(1), F.S.

<sup>10</sup> *Save the Manatee Club, Inc.*, supra at 599.

<sup>11</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>12</sup> Section 120.54(3)(a)1, F.S..

<sup>13</sup> Section 120.55(1)(b)2, F.S.

<sup>14</sup> Section 120.541(2)(a), F.S.

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.<sup>15</sup> Next is the likely adverse impact on business competitiveness,<sup>16</sup> productivity, or innovation.<sup>17</sup> Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.<sup>18</sup> If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."<sup>19</sup> A rule must be filed for adoption before it may go into effect<sup>20</sup> and cannot be filed for adoption until completion of the rulemaking process.<sup>21</sup> A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over 5 years<sup>22</sup> must be ratified by the Legislature before going into effect.<sup>23</sup> As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

### Impact of Rule

The department completed the rulemaking process and filed Rule 5F-11.002 for adoption on July 7, 2011. The rule adopts the standards published in NFPA 58, *Liquefied Petroleum Gas Code*, 2011 edition, and NFPA 54, *National Fuel Gas Code*, 2006 edition, together with two manuals prepared by NFPA for consistent interpretation of these codes. The code change with the most substantial economic impact on industry licensees is in NFPA 58, 2011 edition, for the installation of underground gas containers. The new code requires all new underground installations be protected from corrosion damage by use of a cathodic protection system.<sup>24</sup> The department projects this enhanced protection will increase the useful life of underground tanks by approximately 300%, prolonging the need to purchase replacements.

About 525 of the current licensees install underground tanks. These include both LP Gas Dealers and LP Gas Installers. The SERC prepared by the department projected the revised standards in the NFPA 58, 2011 edition, would result in increased transaction costs for these licensees of \$2,731,154 in the first year and approximately \$2,464,200 in each subsequent year. This is a conservative estimate using the projected cost of a larger anode and initial costs for required voltage testers. The department notes many licensees already install cathodic protection systems in order to comply with the requirements of tank manufacturers.

### Effect of Proposed Change

The bill ratifies Rule 5F-11.002, FAC, allowing the rule to become effective.

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<sup>15</sup> Section 120.541(2)(a)1., F.S.

<sup>16</sup> Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>17</sup> Section 120.541(2)(a) 2., F.S.

<sup>18</sup> Section 120.541(2)(a) 3., F.S.

<sup>19</sup> Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State .

<sup>20</sup> Section 120.54(3)(e)6, F.S.

<sup>21</sup> Section 120.54(3)(e), F.S.

<sup>22</sup> Section 120.541(2)(a), F.S.

<sup>23</sup> Section 120.541(3), F.S.

<sup>24</sup> A cathodic protection system prevents corrosion by reversing the outflow of electrons from the object being protected. This is done by attaching a separate anode by wire to the underground tank, making the tank a *cathode* , attempting to reverse the flow of electrical current out of the tank. Mississippi Department of Environmental Quality, *Guidelines for the Evaluation of Underground Storage Tank Cathodic Protection Systems* (July, 2002), at [http://www.deq.state.ms.us/MDEQ.nsf/page/UST\\_Publications?OpenDocument](http://www.deq.state.ms.us/MDEQ.nsf/page/UST_Publications?OpenDocument) (accessed 2/9/2012).

**B. SECTION DIRECTORY:**

Section 1: Ratifies Rule 5F-11.002, FAC, solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. Expressly limits ratification to the effectiveness of the rules. Directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

Revenues: The bill creates no additional source of state revenues.

Expenditures: The bill requires no state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

Revenues: The bill itself has no impact on local government revenues.

Expenditures: The bill does not impose additional expenditures on local governments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill itself does not directly impact the private sector.

**D. FISCAL COMMENTS:**

The economic impacts projected in the statements of estimated regulatory costs would result from the operation of the new rules. Some of these economic impacts, including increased sales taxes for required materials and equipment, may result in increased revenues for local governments.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other: No other constitutional issues are presented by the bill.

**B. RULE-MAKING AUTHORITY:**

The bill meets the final statutory requirement for the department to exercise its rulemaking authority concerning the adoption of these standards. No additional rulemaking authority is required.

**C. DRAFTING ISSUES OR OTHER COMMENTS:** None

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**