State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: 3/23/00

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF APPEALS (MOORE) CM
DIVISION OF ELECTRIC AND GAS (MILLS) CMM CMM JJJ

RE: DOCKET NO. 991754-GP - PETITION BY FRIENDS OF THE AQUIFER, INC. TO ADOPT RULES NECESSARY TO ESTABLISH SAFETY STANDARDS AND A SAFETY REGULATORY PROGRAM FOR INTRASTATE AND INTERSTATE NATURAL GAS PIPELINES AND PIPELINE FACILITIES LOCATED IN FLORIDA.

AGENDA: 4/4/00 - REGULAR AGENDA - RULE PETITION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE - 30-DAY STATUTORY DEADLINE WAIVED

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\APP\WP\991754#5.RCM

CASE BACKGROUND

Friends of the Aquifer, Inc., ("the petitioner") filed a Petition to Initiate Rulemaking on November 23, 1999. A petition to intervene was filed on December 20, 1999, by Buccaneer Gas Pipeline Co., L.L.C. ("Buccaneer"). At the agenda conference on December 21, 1999, Friends of the Aquifer agreed to waive the 30-day statutory time for the Commission to act on its petition in order for Friends of the Aquifer to respond to the petition to intervene. The Commission deferred further consideration of the rulemaking petition until the January 18, 2000, agenda conference. No response to Buccaneer's petition to intervene was filed within the time authorized and an order granting the intervention was issued on January 4, 2000.

On January 5, 2000, Friends of the Aquifer, Inc., filed an Amended Petition to Initiate Rulemaking. (Attachment 1.) The

petitioner proposes that the Commission adopt rules establishing safety and environmental standards for intrastate and interstate natural gas pipelines and pipeline facilities. Buccaneer filed a response on January 13, 2000, opposing the petition. (Attachment 2.) The Commission deferred a decision on the original petition at the January 18, 2000, agenda conference. Pursuant to the petitioner's request, this item was again deferred to the February 29, 2000, agenda.

On February 24, 2000, after the staff recommendation was filed, petitioner filed a brief in support of the amended petition. (Attachment 3.) At the February 29, 2000, agenda conference, a Commissioner asked that the item be deferred to allow for review of the brief. On March 7, 2000, Buccaneer filed a reply to the brief. (Attachment 4.)

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the amended petition by Friends of the Aquifer, Inc., to initiate rulemaking to adopt rules stating that it will propose further rules governing safety and environmental standards for intrastate and interstate natural gas pipelines and pipeline facilities?

RECOMMENDATION: No, the Commission should deny the amended petition. To the extent that the Commission has jurisdiction and the authority to adopt rules regulating gas pipelines, it has done so.

STAFF ANALYSIS: The petitioner requests the Commission to adopt two rules. The first rule provides:

> The Florida Public Service Commission accepts the delegation by the United States Department of Transportation, pursuant to 49 U.S.C.A. § 60105, to regulate Florida natural gas pipelines and pipeline facilities. The Commission will proceed to propose rules necessary to ensure the safe construction and operation of Florida natural gas pipelines and pipeline facilities. The Public Service Commission recognizes that its acceptance of such delegation is necessary for the protection of persons and the environment from the risks of harm presented by the

> construction and operation of natural gas pipelines in Florida.

(Petition at 11) The second rule requested by the petitioner provides:

> The Florida Public Service Commission accepts the authority granted to it pursuant to 49 U.S.C.A. § 60106 to enter into an agreement with the United States Department of Transportation to implement the Federal Hazardous Liquid Pipeline Act with respect to intrastate and interstate pipeline facilities located within the State of Florida, to the extent authorized by certification or agreement with the Secretary under 49 U.S.C.A. § 60106. To carry out its responsibilities in implementing the Act, the PSC shall have the same powers act (sic) as given to the Secretary under the Federal Hazardous Liquid Pipeline Act. The PSC will forthwith initiate negotiations with the United States Department of Transportation in order to reach such an agreement. The Public Service Commission recognizes that its entry into such an agreement is necessary for the protection of persons and the environment from the risks of harm presented by the construction and operation of natural gas pipelines in Florida.

(Petition at 12.)

The premise for this proposal is the petitioner's assertion that the Commission is responsible for the promulgation and enforcement of safety and environmental standards for intrastate natural gas pipelines and pipeline facilities. (Emphasis added.) Although the amended petition acknowledges that the Commission has adopted Chapter 25-12, Florida Administrative Code, titled "Safety of Gas Transportation by Pipeline", the petitioner asserts that the rules are deficient because they do not address any environmental risks presented by natural gas pipelines in Florida. The petitioner further asserts that in order for the Commission to discharge its regulatory obligations under Florida law, it is required to enforce the environmental requirements of the Federal Hazardous Liquid Pipeline Act. (Petition at 8.)

First, by protecting life and property from the unintentional release of natural gas, the Commission's natural gas pipeline safety rules act to safeguard the environment. The petitioner is mistaken, however, that section 368.03, Florida Statutes, delegates to the Commission the authority or responsibility to promulgate environmental standards for natural gas pipelines. That section, and section 368.05, prescribing the Commission's jurisdiction, authorizes the Commission to prescribe safety standards for the design and construction of natural gas pipelines and their operation and maintenance. The Commission has implemented this statute by adopting Chapter 25-12, Florida Administrative Code, and it employs six full-time gas safety engineers to inspect pipelines and enforce the rules. In addition, contrary to petitioner's assertion, the Commission's enforcement of its safety regulations is not "substantially unfunded." Inspections are made of all operations under the Commission's jurisdiction and the Commission collects regulatory assessment fees to fund its activities pursuant to sections 350.113 and 366.14, Florida Statutes, and Rule 25-7.0131, Florida Administrative Code. No discernible purpose would be served in adopting another rule to state that "[t]he Commission will proceed to propose rules necessary to ensure the safe construction and operation of Florida natural gas pipelines and pipeline facilities."

Second, it is unclear why the Commission should adopt a rule accepting delegation from the United States Department of Transportation (USDOT). The Commission cannot by rule expand its jurisdiction beyond that which is provided by Florida Statute. In addition, no rule is required for the Commission to seek and obtain certification by USDOT in order to enforce its safety regulations or the federal safety regulations that the Commission has incorporated into its rules. The Commission's pipeline safety program is already certified by the USDOT pursuant to 49 U.S.C. § 60105 and has been since 1971, contrary to the petitioner's assertion. (Attachment 5.)

Third, as Buccaneer asserts in it response, numerous other laws govern the siting of pipelines and the environmental aspects of pipeline construction and operations, and agencies other than the Commission are charged with administering and enforcing those laws. (Buccaneer Response at 3-4.) It is therefore misleading for the petitioner to make the blanket assertion that absent the Commission's adoption of the requested rules, pipelines will avoid regulation designed to address environmental concerns.

Fourth, the Commission does not have jurisdiction over hazardous liquid pipelines. To the extent the petitioner is asking

the Commission to regulate hazardous liquid pipelines in addition to natural gas pipelines, the Commission cannot by rule expand its jurisdiction beyond what Florida Statutes provide.

In its amended petition, the petitioner suggests that the Commission consider several other states' regulations and attaches copies of Virginia, California, and Washington laws. The fact that several other state legislatures have chosen to implement federal pipeline regulations, however, has no relevance to this Commission's regulatory authority.

The Parties' Briefs:

The petitioner argues in its brief in support of the amended petition, and in answer to Buccaneer's response opposing that petition, that the Commission has implied rulemaking authority to the extent necessary to implement a statute governing the agency's express and implied powers and duties. Petitioner does not address the fact that the statute does not confer jurisdiction over hazardous liquid pipelines, however, or that section 368.03, the statute at issue with respect to adopting the rules in question, only confers the authority to establish safety standards.

The petitioner also argues that neither the existing Commission rules nor the incorporated federal regulations address any environmental risks presented by natural gas pipelines in Florida. In addition, the petitioner argues that the fact that a natural gas pipeline project is already subject to federal and state regulation is irrelevant in determining whether the Commission should regulate natural gas pipelines under the Federal Hazardous Liquid Pipeline Safety Act.

In reply, Buccaneer points out that 49 U.S.C. §60109, asserted by the petitioner to cover additional environmental risks, does not give either the USDOT or any state agency authority to regulate environmental matters. Rather, it requires only reporting of the location of gas or hazardous liquid pipelines that are in high-density population areas or, for hazardous liquid lines, in environmentally sensitive areas. Thus, according to Buccaneer, there is no federal environmental authority to be exercised, even if the Commission had authority under state law. Buccaneer agrees with staff that neither rule serves any purpose not already served by the Commission's annual certification to the USDOT for natural gas pipelines; and, to the extent the petitioner's rules address hazardous liquid pipelines, that the Commission has no authority under Florida law to adopt such rules.

Summary:

In summary, to the extent the Commission has the jurisdiction to regulate gas pipelines, it is exercising that jurisdiction and has adopted comprehensive rules. The Commission should deny the amended petition of Friends of the Aquifer, Inc.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes.

STAFF ANALYSIS: If the Commission accepts staff's recommendation in Issue 1, the docket should be closed.

CTM/
Attachments

ATTACHMENT 1

STATE OF FLORIDA

PUBLIC SERVICE COMMISSION

IN RE FRIENDS OF THE AQUIFER, INC.,	)	
	)	
Petitioner.	)	**Docket No. 991754-GP**
	)	

AMENDED PETITION TO INITIATE RULEMAKING

COMES NOW the Petitioner, Friends of the Aquifer, Inc., and, pursuant to Fla. Stat. Ann § 120.54(7), petitions the Florida Public Service Commission ("PSC") to adopt the rules necessary to establish safety and environmental standards and regulatory programs for intrastate and interstate natural gas pipelines and pipeline facilities located within the State of Florida. In order to establish such safety and environmental standards and regulatory programs, the Petitioner requests that the PSC adopt the rules necessary to accept delegation from the United States Department of Transportation, Office of Pipeline Safety, to implement the Federal Hazardous Liquid Pipeline Act, 49 U.S.C. § 60101 et seq. ("the Act"). Currently, there are insufficient safety and environmental standards and regulatory programs with respect to intrastate and interstate natural gas pipelines and pipeline facilities located within the State of Florida to ensure the health and welfare of the citizens of Florida and to protect the environment of this state. In support hereof, the Petitioner alleges the following:

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OTH

1. The Petitioner, a public-interest corporation consisting of concerned Florida citizens, has a substantial interest in the adoption of the proposed rules set forth herein. In

Attachment for 03558-00

the absence of the requested rules, the health and safety of the citizens of Florida, as well as the environment of this state, will be jeopardized due to inadequate regulation of the safety and environmental integrity of intrastate and interstate natural gas pipelines and pipeline facilities located in Florida.

2. The responsibility to promulgate and to enforce safety and environmental standards with respect to Florida intrastate natural gas pipelines and pipeline facilities is conferred at the state level by Fla. Stat. Ann. § 368.03, which authorizes the PSC to establish standards for the installation, operation, and maintenance of natural gas transmission and distribution systems, including gas pipelines, gas compressor stations, gas metering and regulating stations, gas mains, gas services up to the outlet of the customer's meter set assembly, gas-storage equipment of the closed-pipe type, and gas storage lines. Fla. Stat. Ann. § 368.03 states that it is intended that the requirements of the rules and regulations promulgated by the PSC be adequate for safety under conditions normally encountered in the gas industry. Fla. Stat. Ann. § 368.05 confers jurisdiction upon the PSC over all persons, corporations, partnerships, associations, public agencies, municipalities, and other legal entities engaged in the operation of gas transmission or distribution facilities with respect to rules and regulations governing standards established by the PSC pursuant to Fla. Stat. Ann. § 368.03.

3. The authority to promulgate and to enforce safety and environmental standards with respect to Florida intrastate natural gas pipelines and pipeline facilities is conferred at the federal level by 49 U.S.C.A. §§ 60105 and 60109, which are part of the Federal

Hazardous Liquid Pipeline Act. The Act was adopted by Congress to establish and to enforce safety and environmental standards for both intrastate and interstate natural gas and hazardous liquid pipelines and pipeline facilities. The Act was intended to protect citizens of a state by requiring that the responsible federal or state regulatory authority promulgate regulations to ensure that natural gas pipelines and pipeline facilities are constructed and operated safely and with adequate concern for the environment. Pursuant to § 60105, a state agency having regulatory jurisdiction over safety standards and practices relating to intrastate pipeline facilities or pipeline transportation is authorized to adopt standards applicable to the construction and operation of intrastate natural gas pipelines and pipeline facilities. The jurisdiction conferred upon the PSC by Florida law to promulgate regulations for natural gas pipelines makes the PSC a responsible state authority pursuant to the requirements of the Federal Hazardous Liquid Pipeline Act.

4. 49 U.S.C.A. § 60106 provides that if the United States Secretary of Transportation does not receive a certification from the responsible state authority that such authority is asserting regulatory jurisdiction over pipeline facilities or pipeline transportation within its jurisdiction, then the Secretary may make an agreement with a state authority authorizing it to take necessary action with respect to standards for pipeline facilities and pipeline transportation. The Secretary of Transportation has not received such a certification from any responsible Florida state authority. The jurisdiction conferred upon the PSC by Florida law to promulgate regulations for natural gas pipelines makes the PSC a responsible state authority pursuant to § 60106.

5. There are no existing regulations that cover the complete risk of harm presented by natural gas pipelines located in Florida. The regulations promulgated by the PSC at Fla. Admin. Code Ann. r. 25-12.001 et seq. relate generally to the design, construction, installation, and testing of natural gas pipelines, and deal with such matters as required construction materials, design requirements relating to valves and joints, corrosion resistance, leak surveys and gas leak reports, odorization, and accident reports. They do not address any environmental risks presented by natural gas pipelines in Florida. The regulations in Fla. Admin. Code Ann. r. 25-12.001 et seq. incorporate by reference the federal regulations in 49 C.F.R. Parts 191, 192, and 199 (1998). The regulations in 49 C.F.R. Part 191 address reports required of pipeline operators. The regulations in 49 C.F.R. Part 192 are similar to the PSC regulations referenced above, in that they set forth standards for gas pipeline materials, design, construction, corrosion control, testing, operation, and maintenance. The regulations in Part 199 set forth drug and alcohol testing requirements for personnel operating covered facilities. The federal regulations incorporated by the PSC do not address any environmental risks presented by natural gas pipelines in Florida

6. By contrast, the Federal Hazardous Liquid Pipeline Act sets forth standards that require the issuance of criteria for identifying (1) each hazardous liquid pipeline facility, whether otherwise subject to the Act, that crosses waters where a substantial likelihood of commercial navigation exists or that is located in an area described in the criteria as a high-density population area and (2) each hazardous liquid pipeline facility and gathering line, whether otherwise subject to the Act, located in an area that the Secretary of Transportation,

in consultation with the Administrator of the Environmental Protection Agency, describes as unusually sensitive to environmental damage if there is a hazardous liquid pipeline accident. 49 U.S.C.A. § 60109(a). Section 60109(b) provides that, when describing areas that are unusually sensitive to environmental damage if there is a hazardous liquid pipeline accident, the government must consider areas where a pipeline rupture would likely cause permanent or long-term environmental damage, including (1) locations near pipeline rights-of-way that are critical to drinking water, including intake locations for community water systems and critical sole source aquifer protection areas and (2) locations near pipeline rights-of-way that have been identified as critical wetlands, riverine or estuarine systems, national parks, wilderness areas, wildlife preservation areas or refuges, wild and scenic rivers, or critical habitat areas for threatened and endangered species. The current PSC and incorporated federal regulations do not cover such environmental concerns and the substantial risk of environmental harm presented by interstate and intrastate natural gas pipelines located in Florida.

7. In determining how to discharge its responsibility under the Federal Hazardous Liquid Pipeline Act to protect the welfare and safety of the citizens of Florida and the environment of the state with respect to natural gas pipelines, the PSC may wish to consider the regulations of other states. For example, the Commonwealth of Virginia has enacted a system whereby the responsible state authority must accept the delegation to regulate hazardous liquid pipelines pursuant to the federal Act. (*See* Va. Code Ann. § 56-553 et seq. (Michie 1995) (attached as Exhibit A). Under the Virginia Act, the State Corporation

Commission is authorized to act for the United States Secretary of Transportation to implement the federal Act with respect to intrastate and interstate pipelines located within Virginia to the extent authorized by certification or agreement with the Secretary. In order to carry out its responsibilities, the State Corporation Commission is granted the same powers as the Secretary is given under the federal Act. The Virginia regulatory system provides that, for purposes of intrastate pipelines, any person failing or refusing to obey Commission orders relating to the adoption or enforcement of regulations for the design, construction, operation, and maintenance of pipeline facilities is subject to fines, as established by the federal Act. The Commission is also under a duty inspect hazardous liquid pipelines and is authorized to assess and to collect from every hazardous liquid pipeline operator an inspection fee to be used by the Commission in administering the regulatory program established by the Virginia Act.

Similarly, the State of California has adopted a Pipeline Safety Act under which the responsible state authority is required to exercise exclusive authority over intrastate hazardous liquid pipelines and, to the extent authorized by agreement with the United States Secretary of Transportation, may act as agent for the Secretary to implement the Federal Hazardous Liquid Pipeline Act and federal pipeline regulations as to portions of interstate pipelines located within California. Cal. Gov't Code § 51010 et seq. (West Supp. 1999) (attached as Exhibit B). The responsible state authority is required to adopt pipeline safety regulations in compliance with federal law, including, but not limited to, compliance orders, penalties, and inspection and maintenance provisions. The state authority is required to

establish a Pipeline Safety Advisory Committee for purposes of informing local agencies and pipeline operators of changes in applicable laws and regulations affecting the operation of pipelines and of reviewing proposed hazardous liquid pipeline safety regulations adopted pursuant to the California Act. Pipeline operators are required to file with the responsible state authority various assessments regarding the inspection, maintenance, improvement, or replacement of pipelines. New pipelines are required to accommodate the passage of instrumented internal inspection devices, and operators are required to create leak mitigation and emergency response plans as the responsible state authority mandates. Moreover, the California Act recognizes that the protection of pipeline easements is essential to public safety and protection of the environment. Section 51014.6 prohibits any person, other than a pipeline operator, from, among other things, (1) building a structure or improvement within a pipeline easement, (2) building any structure adjacent to a pipeline easement, if such construction would prevent complete and unimpaired access to the easement, and (3) planting any shrubbery or building any shielding on the pipeline easement that would impair the aerial observation of the easement. The California Act also requires the responsible state authority to conduct risk assessment studies regarding hazardous liquid pipelines located near rail lines and mandates that the responsible authority promulgate regulations designed to minimize pipeline accidents in such locations. In addition, the California Act contains provisions protecting public drinking water wells. Pipeline operators are required to file reports in the event of any rupture, explosion, or fire involving a pipeline. As with the

Virginia Act, the California Act requires the payment of fees by pipeline operators for purposes of administering the Act.

The State of Washington has promulgated regulations prohibiting the location of certain gas transmission facilities within specified distances of buildings used by persons. (*See* Exhibit C).

8. As demonstrated by the foregoing state regulation of pipelines, there are many aspects of regulation necessary for the protection of persons and the environment that are not contained in the PSC regulations and in the federal standards adopted by the PSC. For example, the PSC regulations do not undertake to enforce the provisions of the Federal Hazardous Liquid Pipeline Act, including the provisions for the protection of the environment. The federal Act defines hazardous liquid pipelines to include natural gas pipelines. The PSC is the agency that has been granted the authority by Florida law to regulate natural gas pipelines. Accordingly, in order to discharge its regulatory obligations, the PSC is required to regulate intrastate and interstate natural gas pipelines in Florida in order to enforce the environmental requirements of the federal Act.

Moreover, the regulations adopted by the PSC do not establish a mechanism for informing local agencies and pipeline operators of changes in applicable laws and regulations affecting the operation of pipelines and of reviewing proposed hazardous liquid pipeline safety regulations. In addition, existing PSC regulations do not mandate the filing of assessments by gas pipeline operators regarding the inspection, maintenance, improvement, or replacement of pipelines for purposes of identifying facilities presenting a risk of harm to

persons and to the environment. There are also no provisions requiring gas pipeline operators to design their pipelines in such a manner as to facilitate efficient and contemporaneous monitoring of pipeline failures or potential failures. Existing PSC regulations are silent with respect to activities potentially impinging upon gas pipeline easements, which may present a risk of harm to persons and to the environment, and with respect to the siting of gas pipelines near rail facilities and other installations increasing the risk of pipeline accidents and attendant harm to persons and to the environment. The PSC regulations contain no provision protecting public drinking water supplies from the risk of harm presented by natural gas pipelines. Finally, the PSC regulations leave safety and environmental enforcement substantially unfunded by not requiring pipeline operators to pay fees enabling safety and environmental inspections of gas pipeline facilities.

9. On December 20, 1999, Buccaneer Gas Pipeline Company, L.L.C. ("Buccaneer") filed a Petition to Intervene in the Petitioner's original Petition to Initiate Rulemaking before the PSC. Buccaneer alleged that its substantial interests would be affected by the rulemaking sought by the Petitioner because Buccaneer has filed with the United States Federal Energy Regulatory Commission an application for a certificate of public convenience and necessity requesting authorization for the construction and operation of a new natural gas pipeline and related facilities in Florida. In its Petition to Intervene, Buccaneer asserts that it has selected "a potential route that seeks to avoid adverse socioeconomic and environmental impacts to the greatest extent possible." (Petition to Intervene ¶ 5). However, Buccaneer's filings with the PSC belie the allegedly minimal

environmental effect of the project and make plain why the Petitioner seeks the PSC's regulatory assistance in protecting persons and the environment from the risks of harm presented by natural gas pipelines. (*See* Exhibit D). According to Buccaneer, the proposed natural gas pipeline would deliver 950 million cubic feet of natural gas to Florida. (Exhibit D at 3). The offshore portion of the project would require 400 miles of 36-inch diameter pipeline and would extend from a processing plant in Mobile County, Alabama to the west coast of Florida, just north of Tampa. (*Id.*). The onshore portion of the project would bisect Florida, running from the west coast to the Cape Canaveral area on the east coast, and would require approximately 250 miles of onshore pipe. (*Id.* at 3, 6). The diameter of the pipeline built across Florida would vary from 12 to 36 inches and would be buried, according to Buccaneer, with a minimum of three feet of ground cover. (*Id.* at 3). Buccaneer envisions 14 delivery points in Florida, in Pasco, Polk, Osceola, Orange, Lake, Seminole, Volusia, Brevard, and Bay Counties. Buccaneer anticipates that a minimum, permanent easement of 50 feet will be necessary to operate and to maintain the pipeline, but it also states that it may need to acquire an additional 35 feet of temporary right-of-way during the construction phase. (*Id.*).

10. Buccaneer's Petition to Intervene is evidence that existing regulations do not cover the full range of safety and environmental risks presented by the proposed project or by any natural gas pipeline in Florida. According to Buccaneer, the adoption of new regulations during the course of the approval process for the proposed pipeline would create "uncertainty as to the regulatory scheme with which Buccaneer's pipeline will eventually

have to comply." (Petition to Intervene ¶ 7). Such uncertainty would arise because existing regulations do not address the environmental and safety concerns encompassed by the Federal Hazardous Liquid Pipeline Act. Buccaneer's Petition to Intervene also demonstrates the urgency with which new regulations are required. If the PSC, as the state agency having the duty to regulate natural gas pipelines in Florida, waits until after the completion of a major gas pipeline project, like that proposed by Buccaneer, to issue the regulations necessary to protect persons and the environment from the risk of harm presented by gas pipelines, then it will be much more difficult, if not impossible, to impose effective regulations in the future.

11. For all the foregoing reasons, the Petitioner requests that the PSC accept the delegation conferred upon it by 49 U.S.C.A. § 60105, as the responsible state authority, to promulgate regulations necessary to accomplish the purposes of the Federal Hazardous Liquid Pipeline Act.

12. The rule proposed by the Petitioner with respect to the PSC's acceptance of the federal delegation to regulate Florida intrastate pipelines and pipeline facilities is as follows:

> The Florida Public Service Commission accepts the delegation by the United States Department of Transportation, pursuant to 49 U.S.C.A. § 60105, to regulate Florida natural gas pipelines and pipeline facilities. The Commission will proceed to propose rules necessary to ensure the safe construction and operation of Florida natural gas pipelines and pipeline facilities. The Public Service Commission recognizes that its acceptance of such delegation is necessary for the protection of persons and the environment from the risks of harm presented by the construction and operation of natural gas pipelines in Florida.

13. Moreover, the Petitioner requests that the PSC adopt the rules necessary to act for the United States Secretary of Transportation to implement the Federal Hazardous Liquid Pipeline Act with respect to intrastate and interstate natural gas pipelines located within the State of Florida, to the extent authorized by certification or agreement with the Secretary pursuant to 49 U.S.C.A. § 60106. The Petitioner requests that such rules provide that the PSC will have the same powers as given to the Secretary under the Federal Hazardous Liquid Pipeline Act to carry out its responsibilities in implementing the Act.

14. The rule proposed by the Petitioner with respect to the PSC's entry into an agreement with the United States Department of Transportation under § 60106 is as follows:

> The Florida Public Service Commission accepts the authority granted to it pursuant to 49 U.S.C.A. § 60106 to enter into an agreement with the United States Department of Transportation to implement the Federal Hazardous Liquid Pipeline Act with respect to intrastate and interstate pipeline facilities located within the State of Florida, to the extent authorized by certification or agreement with the Secretary under 49 U.S.C.A. § 60106. To carry out its responsibilities in implementing the Act, the PSC shall have the same powers act as given to the Secretary under the Federal Hazardous Liquid Pipeline Act. The PSC will forthwith initiate negotiations with the United States Department of Transportation in order to reach such an agreement. The Public Service Commission recognizes that its entry into such an agreement is necessary for the protection of persons and the environment from the risks of harm presented by the construction and operation of natural gas pipelines in Florida.

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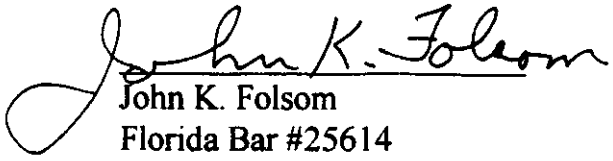
Respectfully submitted,



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Attorney for Petitioner,
Friends of the Aquifer, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Petition to Initiate Rulemaking has been provided via regular U.S. Mail on this 5th day of January, 2000, to the following:

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Tallahassee, FL 32399

Richard D. Melson
Richard S. Brightman
Hopping, Green, Sams & Smith
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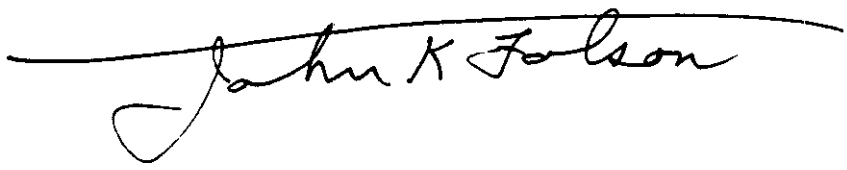

section, for the purpose of funding transportation improvements which are related to or affected by the toll road. Toll rates shall be set in multiples of five cents; however, the Commission shall order that that percentage of each toll by which the toll established exceeds that necessary to provide the operator with an amount necessary to meet the operator's obligations under § 56-543 and earn a reasonable return shall be committed to the fund. In addition the operator, the Board, and the local governments through which the road passes may jointly petition the Commission to establish an additional toll amount to be committed to this fund. (1988, c. 649.)

CHAPTER 21.

HAZARDOUS LIQUID PIPELINE SAFETY ACT.

Sec.
56-553. Title.
56-554. Definitions.
56-555. Commission to implement the federal Hazardous Liquid Pipeline Safety Act.

§ 56-553. Title. — This chapter may be cited as the "Hazardous Liquid Pipeline Safety Act of 1994." (1994, c. 512.)

§ 56-554. Definitions. — For the purposes of this chapter:

"Hazardous liquid" means "hazardous liquid" and "highly volatile liquid" as defined in 49 C.F.R. § 195.2.

"Person" means an individual, corporation, partnership, association or other business entity or a trustee, receiver, assignee, or personal representative of any of these.

"Pipeline operator" means a person who owns and operates pipeline facilities as defined in 49 C.F.R. § 195.2.

"Interstate pipeline" and *"intrastate pipeline"* shall have the same meanings as defined in 49 C.F.R. § 195.2. (1994, c. 512.)

§ 56-555. Commission to implement the federal Hazardous Liquid Pipeline Safety Act. — A. The Commission is authorized to act for the United States Secretary of Transportation to implement the federal Hazardous Liquid Pipeline Safety Act, 49 U.S.C. App. §§ 2001 to 2014, with respect to intrastate and interstate pipelines located within the Commonwealth to the extent authorized by certification or agreement with the Secretary under Section 205 of the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. § 2004). To carry out its responsibilities under this section, the Commission shall have the same powers as given the Secretary in Sections 210 and 211 of the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. §§ 2009 and 2010).

B. For the purposes of intrastate pipelines, any person failing or refusing to obey Commission orders relating to the adoption or enforcement of regulations for the design, construction, operation and maintenance of pipeline facilities and temporary or permanent injunctions issued by the Commission shall be fined such sums not exceeding the fines and penalties specified by § 208 (a) (1) of the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. § 2007 et seq.), as amended.

C. The Commission shall assess and collect from every hazardous liquid pipeline operator an inspection fee to be used by the Commission for administering the regulatory program authorized by this section. For purposes of interstate pipelines, such fees shall be computed based on the number of

inspection man-days devoted to each pipeline operator to determine the operator's compliance with any provision of, or order or agreement issued under, the Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. § 2001 et seq.), and shall not exceed the costs of inspection and investigation under this section. The costs shall not include expenses reimbursed by the federal government. The number of planned inspections conducted on each interstate pipeline operator shall be reasonable under the circumstances and prioritized by risk to the public or to the environment.

D. The authority granted to the Commission under this section to conduct inspections of interstate pipeline operators and facilities in the Commonwealth shall not extend to any official, employee, or agent of any political subdivision in the Commonwealth. No political subdivision shall have the authority to seek reimbursement for the cost of monitoring the inspections conducted by the Commission under this section. Nothing in this subsection, however, shall be deemed to impair or limit the police powers of such political subdivisions otherwise provided by law.

E. The authority of the Commission to act as an agent for the United States Secretary of Transportation with respect to interstate hazardous liquid pipelines shall become effective the first day of July next after the date the Commission receives a formal delegation of authority from the Secretary. (1994, c. 512.)

CHAPTER 22.

PUBLIC-PRIVATE TRANSPORTATION ACT OF 1995.

Sec.
56-556. Title.
56-557. Definitions.
56-558. Policy.
56-559. Prerequisite for operation.
56-560. Approval by the responsible public entity.
56-561. Service contracts.
56-562. [Repealed.]
56-563. Affected local jurisdictions.
56-564. Dedication of public property.
56-565. Powers and duties of the operator.
56-566. Comprehensive agreement.
56-567. Federal, state and local assistance.
56-568. Material default; remedies.
56-569. Condemnation.
56-570. Utility crossings.
56-571. Police powers; violations of law.
56-572. Dedication of assets.
56-573. Sovereign immunity.
56-573.1. Procurement.
56-573.2. Jurisdiction.
56-574. Preservation of the Virginia Highway Corporation Act of 1988.
56-575. [Not set out.]

§ 56-556. Title. — This chapter may be cited as the "Public-Private Transportation Act of 1995." (1994, c. 855; 1995, c. 647.)

The numbers of §§ 56-556 through 56-575 were assigned by the Virginia Code Commission, the numbers in the 1994 act having been §§ 56-553 through 56-572.

Effective date. — This section is effective July 1, 1995.

The 1995 amendment substituted "Public-Private Transportation Act of 1995" for "Qualifying Transportation Facilities Act of 1994."

§ 56-557. Definitions. — As used in this chapter, unless the context requires a different meaning:

"Affected local jurisdiction" means any county, city or town in which all or a

Article 6

FUNDING

Section
50979. Disbursement of assets upon termination of award system.

§ 50979. Disbursement of assets upon termination of award system

Upon termination of the award system, assets in the fund shall be disbursed in the following order:

(a) An amount sufficient to pay awards shall be retained by the board.

(b) An amount sufficient to pay reasonable administrative expenses shall be retained by the board.

(c) An amount sufficient to pay the General Fund loan shall be paid to the General Fund.

(d) From any balance in the fund after the above amounts have been retained or disbursed, each department's accumulated contributions, less a proportionate share of the amount retained for reasonable administrative expenses, less the amount retained to pay awards of that department's volunteers, shall be refunded to the department.

(Added by Stats.1985, c. 909, § 6.)

Chapter 5.5

THE ELDER CALIFORNIA PIPELINE SAFETY ACT OF 1981

Section
51010. Legislative intent.
51010.5. Definitions.
51010.6. Pipelines subject to federal safety acts and regulations.
51011. Regulations; adoption; exemptions.
51012. Pipeline safety advisory committee.
51012.3. Pipeline operators; schedule of conformance with federal regulations.
51012.4. Inspection, maintenance, improvement, or replacement assessment; filing requirements.
51013. New pipelines; design and construction requirements; internal inspection devices.
51013.5. Testing; higher risk pipelines list; risk studies; testing frequency regulations.
51014. Pressure tests; manner of conducting.
51014.3. Notification prior to testing; observation of tests.
51014.5. Hydrostatic testing; certification of results; test result reports.
51014.6. Pipeline easements; building, vegetation and shielding restrictions.
51015. Maps and diagrams; contingency plans for pipeline emergencies; availability of records, maps, etc.; inspections; yearly review of contingency plans.
51015.05. Data base; intrastate pipelines; public access; reporting by agencies; study to encourage replacements and improvements.
51015.1. Risk assessment study; hazardous liquid pipelines near rail lines.
51015.2. Regulations governing hazardous liquid pipelines near rail lines.
51015.3. Emergency regulations; hazardous liquid pipelines near rail lines.
51015.4. Valves and check valves; regulations.
51015.5. Nonemergency site alterations; approval; regulations.
51016. Valve spacing study.
51017. Pipeline information data base.
51017.1. Public drinking water wells; identification of pipelines transporting petroleum products near wells; notification of operators; pipeline wellhead protection plans.
51017.2. Wellhead protection plan regulations.
51018. Rupture, explosion or fire reports; assistance by State Fire Marshal.
51018.5. Repealed.
51018.6. Enforcement proceedings; regulations for conducting; civil penalty for violation; determination of amount; collection; disposition of penalties.
51018.7. Punishment for chapter violations; sign or marker offenses.
51018.8. Orders for compliance.
51019. Fees.
51019.05. Annual fee assessments; interstate pipeline operators; delinquency fees.
51019.1. California hazardous liquid pipeline safety fund; creation; deposit of fees.

Stats.1992, c. 856 (A.B.199), § 1, in the heading of Chapter 5.5 inserted "THE ELDER".

Additions or changes indicated by underline; deletions by asterisks * * *

§ 51010. Legislative intent

It is the intent of the Legislatu
exclusive safety regulatory and e
the extent authorized by agreeme
Transportation, and may act as a
federal Hazardous Liquid Pipelin
regulations as to those portions
annual federal certification.

(Amended by Stats.1983, c. 1222,

1 49 U.S.C.A. § 2001 et seq.

§ 51010.5. Definitions

As used in this chapter, the foll

(a) "Pipeline" includes every
substances or highly volatile liq
containing those substances locat
common carrier and is served by
serves by pipeline at least five

(1) An interstate pipeline subje

(2) A pipeline for the transport

(3) A pipeline for the transpo
percent or less of the specified mi

(4) Transportation of petroleum

(5) A pipeline for the transpor
the outlet flange of each facility
where produced hydrocarbons ar
is farther downstream.

(6) Transportation of a hazardc

(7) A pipeline for the transpor
refining, or manufacturing facili
facility.

(8) Transportation of a hazard
vehicle or terminal facilities us
transportation.

(b) "Flow line" means a pipelir
treating facility or production sto

(c) "Hydrostatic testing" mea
operating pressure to a segment
liquid test medium.

(d) "Local agency" means a cit

(e) "Rural area" means a locat
city or city and county, or othe
shopping center, or a community

(f) "Gathering line" means a
petroleum from a production facil

(g) "Production facility" mear
lifting, stabilization, separation, a
a production facility under this d
petroleum from the ground and t

(h) "Public drinking water we
system as defined in Section 1
Department of Health Services

(i) "GIS mapping system" me
analyze, and display environmer

Additions or chang

EXHIBIT B
22

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e disbursed in the following order:

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aid to the General Fund.

ave been retained or disbursed, each of the amount retained for reasonable that department's volunteers, shall be

ETY ACT OF 1981

isk assessment study; hazardous liquid pipelines near rail lines.
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nnual fee assessments; interstate pipeline operators; delinquency fees.
alifornia hazardous liquid pipeline safety fund; creation; deposit of fees.

5.5 inserted "THE ELDER".

tions by asterisks * * *

§ 51010. Legislative intent

It is the intent of the Legislature, in enacting this chapter, that the State Fire Marshal shall exercise exclusive safety regulatory and enforcement authority over intrastate hazardous liquid pipelines and, to the extent authorized by agreement between the State Fire Marshal and the United States Secretary of Transportation, and may act as agent for the United States Secretary of Transportation to implement the federal Hazardous Liquid Pipeline Safety Act (49 U.S.C. Sec. 2001 et seq.) [1] and federal pipeline safety regulations as to those portions of interstate pipelines located within this state, as necessary to obtain annual federal certification.

(Amended by Stats.1983, c. 1222, § 1, eff. Sept. 30, 1983; Stats.1986, c. 863, § 1; Stats.1988, c. 995, § 1.

[1] 49 U.S.C.A. § 2001 et seq.

§ 51010.5. Definitions

As used in this chapter, the following definitions apply:

(a) "Pipeline" includes every intrastate pipeline used for the transportation of hazardous liquid substances or highly volatile liquid substances, including a common carrier pipeline, and all pipes containing those substances located within a refined products bulk loading facility which is owned by a common carrier and is served by a pipeline of that common carrier, and the common carrier owns and serves by pipeline at least five such facilities in the state. "Pipeline" does not include the following:

(1) An interstate pipeline subject to Part 195 of Title 49 of the Code of Federal Regulations.

(2) A pipeline for the transportation of a hazardous liquid substance in a gaseous state.

(3) A pipeline for the transportation of crude oil that operates by gravity or at a stress level of 20 percent or less of the specified minimum yield strength of the pipe.

(4) Transportation of petroleum in onshore gathering lines located in rural areas.

(5) A pipeline for the transportation of a hazardous liquid substance offshore located upstream from the outlet flange of each facility on the Outer Continental Shelf where hydrocarbons are produced or where produced hydrocarbons are first separated, dehydrated, or otherwise processed, whichever facility is farther downstream.

(6) Transportation of a hazardous liquid by a flow line.

(7) A pipeline for the transportation of a hazardous liquid substance through an onshore production, refining, or manufacturing facility, including a storage or implant piping system associated with that facility.

(8) Transportation of a hazardous liquid substance by vessel, aircraft, tank truck, tank car, or other vehicle or terminal facilities used exclusively to transfer hazardous liquids between those modes of transportation.

(b) "Flow line" means a pipeline which transports hazardous liquid substances from the well head to a treating facility or production storage facility.

(c) "Hydrostatic testing" means the application of internal pressure above the normal or maximum operating pressure to a segment of pipeline, under no-flow conditions for a fixed period of time, utilizing a liquid test medium.

(d) "Local agency" means a city, county, or fire protection district.

(e) "Rural area" means a location which lies outside the limits of any incorporated or unincorporated city or city and county, or other residential or commercial area, such as a subdivision, a business, shopping center, or a community development.

(f) "Gathering line" means a pipeline eight inches or less in nominal diameter that transports petroleum from a production facility.

(g) "Production facility" means piping or equipment used in the production, extraction, recovery, lifting, stabilization, separation, or treatment of petroleum or associated storage or measurement. (To be a production facility under this definition, piping or equipment must be used in the process of extracting petroleum from the ground and transporting it by pipeline.)

(h) "Public drinking water well" means a wellhead that provides drinking water to a public water system as defined in Section 116275 of the Health and Safety Code, that is regulated by the State Department of Health Services and that is subject to Section 116455 of the Health and Safety Code.

(i) "GIS mapping system" means a geographical information system that will collect, store, retrieve, analyze, and display environmental geographical data in a data base that is accessible to the public.

Additions or changes indicated by underline; deletions by asterisks * * *

(j) "Motor vehicle fuel" includes gasoline, natural gasoline, blends of gasoline and alcohol, or gasoline and oxygenates, and any inflammable liquid, by whatever name the liquid may be known or sold, which is used or is usable for propelling motor vehicles operated by the explosion type engine. It does not include kerosene, liquefied petroleum gas, or natural gas in liquid or gaseous form.

(k) "Oxygenate" means an organic compound containing oxygen that has been approved by the United States Environmental Protection Agency as a gasoline additive to meet the requirements for an "oxygenated fuel" pursuant to Section 7545 of Title 42 of the United States Code.

(Amended by Stats.1983, c. 1222, § 2, eff. Sept. 30, 1983; Stats.1985, c. 1407, § 1; Stats.1986, c. 1401, § 1; Stats.1988, c. 1195, § 1; Stats.1990, c. 856 (A.B.3527), § 1; Stats.1992, c. 855 (A.B.199), § 2; Stats.1997, c. 814 (A.B.592), § 1.)

Historical and Statutory Notes

1997 Legislation

Section 14 of Stats.1997, c. 814 (A.B.592), provides:

"This act shall become operative only if Senate Bill 1189 of the 1997–98 Regular Session is also enacted and becomes effective on or before January 1, 1998 [Stats.1997, c. 816 (S.B.1189)]."

§ 51010.6. Pipelines subject to federal safety acts and regulations

Notwithstanding Section 51010.5, that portion of an interstate pipeline which is located within this state and is subject to an agreement between the United States Secretary of Transportation and the State Fire Marshal is subject to the federal Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. Sec. 2001 et seq.), the Pipeline Safety Reauthorization Act of 1988 (Pub. L. 100-561), and federal pipeline safety regulations.

(Added by Stats.1986, c. 963, § 2. Amended by Stats.1989, c. 1277, § 2.)

Historical and Statutory Notes

1989 Legislation

Section 1 of Stats.1989, c. 1277 provides:

"This act shall be known and may be cited as the Hazardous Liquid Pipeline Amendments of 1989."

§ 51011. Regulations; adoption; exemptions

The State Fire Marshal shall adopt hazardous liquid pipeline safety regulations in compliance with the federal law relating to hazardous liquid pipeline safety * * *, including, but not limited to, compliance orders, penalties, and inspection and maintenance provisions, and including amendments to those laws and regulations which may be hereafter enacted and adopted. Regulations adopting the minimum standards for hazardous liquid pipelines contained in the Federal Hazardous Liquid Pipeline Safety Act, 49 U.S.C. Sec. 2001 et seq., and Title 49 of the Code of Federal Regulations, by the State Fire Marshal are exempt from the procedures specified in Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, except that those regulations shall be submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations.

The State Fire Marshal may exempt the application of regulations adopted pursuant to this section to any pipeline, or portion thereof, when it is determined that the risk to public safety is slight and the probability of injury or damage remote.

Notification of exemptions shall be written, and shall include a discussion of those factors which the State Fire Marshal considers significant to the granting of the exemption.

(Amended by Stats.1983, c. 1222, § 3, eff. Sept. 30, 1983; Stats.1989, c. 1277, § 2.5; Stats.1991, c. [illegible] (A.B.718), § 1.)

§ 51012. Pipeline safety advisory committee

The State Fire Marshal shall establish a * * * Pipeline Safety * * * Advisory Committee for purposes of informing local agencies and every pipeline operator of changes in applicable laws and regulations affecting the operations of pipelines and reviewing proposed hazardous liquid pipeline safety regulations adopted pursuant to Section 51011.

The committee shall be composed of eight members of whom two shall represent pipeline operators, three shall represent local agencies, one shall be a fire chief, and two shall be public members. The committee shall meet when requested by the State Fire Marshal, but not less than once a year. The members shall be paid expenses and one hundred dollars ($100) per diem for each meeting.

(Amended by Stats.1983, c. 1222, § 4, eff. Sept. 30, 1983; Stats.1989, c. 1252, § 1.)

Additions or changes indicated by underline; deletions by asterisks * * *

§ 51012.3. Pipeline operators;

(a) Every operator of a pipeline F, inclusive, of Part 195 of Title hereafter amended, in accordance

(1) On or before July 1, 1984, Section 195.401 of Title 49 of the C a pipeline constructed after Januar transports by gravity or which ope yield strength of the pipe.

(2) On or before January 1, 1985 of Title 49 of the Code of Federa regulation under Amendment 195- April 17, 1985, (effective date, Oct Section 195.402 of Title 49 of the C

(3) The pipeline operator shall m 195.414 of Title 49 of the Code of F

(A) On or before October 21, 198

(B) On or before October 21, 198

(C) On or before October 19, 1 provided in paragraph (D).

(D) On or before January 1, 1991 transport by gravity or operate at strength of the pipe.

(4) Operators of intrastate pipelin of Title 49 of the Code of Federal R P.R. 15895 et seq.), shall meet the r of Federal Regulations.

(b) For purposes of applying the Regulations, the word "Secretary," Marshal."

(Added Stats.1983, c. 1222, § 5, eff. 1401, § 2; Stats.1988, c. 1195, § 2.)

Explosives ⇨2.
C.J.S. Explosives §§ 1, 2.

§ 51012.4. Inspection, maintenanc

(a) Notwithstanding any other pro each pipeline operator shall file with maintenance, improvement, or replace

(1) Any pipeline or pipeline segmen

(2) Any pipeline installed on or aft constructed, or which shows diminish

(b) When preparing any assessme older pipelines located in densely po near existing seismic fault lines, or, pi

(c) On or before January 1, 1988, Advisory Committee and pipeline op operator when conducting any assessm

(d) A pipeline inspection, maintenan to this section may incorporate any i that could act as barriers to the ins including, but not limited to, findings f

Additions or changes in

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liquid may be known or sold, which c
ition type engine. It does not include
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to meet the requirements for a
States Code.

c. 1407, § 1; Stats.1986, c. 1401, § 1;
2, c. 855 (A.B.199), § 2; Stats.1997, c

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line which is located within this state
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Act of 1979 (49 U.S.C. Sec. 2001 et
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Regulations adopting the minimum
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uth Section 11346) of Chapter 3.5 of
ese regulations shall be submitted to
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scussion of those factors which the
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em for each meeting.

1252, § 1.)

ns by asterisks * * *

§ 51012.3. Pipeline operators; schedule of conformance with federal regulations

(a) Every operator of a pipeline shall conform the pipeline to the federal regulations in Subparts A to F, inclusive, of Part 195 of Title 49 of the Code of Federal Regulations, as those regulations may be hereafter amended, in accordance with the following schedule:

(1) On or before July 1, 1984, the pipeline operator shall meet the requirements of subsection (c) of Section 195.401 of Title 49 of the Code of Federal Regulations, but those requirements shall apply only to a pipeline constructed after January 1, 1984, and shall not apply until January 1, 1991, to a pipeline which transports by gravity or which operates at a stress level of 20 percent or less of the specified minimum yield strength of the pipe.

(2) On or before January 1, 1986, the pipeline operator shall meet the requirements of Section 195.402 of Title 49 of the Code of Federal Regulations. Operators of intrastate pipelines subject to federal regulation under Amendment 195-33 to Part 195 of Title 49 of the Code of Federal Regulations issued April 17, 1985, (effective date, October 21, 1985—50 F.R. 15895 *et seq.*), shall meet the requirements of Section 195.402 of Title 49 of the Code of Federal Regulations on or before April 21, 1987.

(3) The pipeline operator shall meet the cathodic protection requirements of subdivision (a) of Section 195.414 of Title 49 of the Code of Federal Regulations as follows:

(A) On or before October 21, 1986, 25 percent of the required cathodic protection shall be installed.

(B) On or before October 21, 1987, 50 percent of the required cathodic protection shall be installed.

(C) On or before October 19, 1988, all required cathodic protection shall be installed, except as provided in paragraph (D).

(D) On or before January 1, 1991, all required cathodic protection shall be installed on pipelines which transport by gravity or operate at a stress level of 20 percent or less of the specified minimum yield strength of the pipe.

(4) Operators of intrastate pipelines subject to federal regulation under Amendment 195-33 of Part 195 of Title 49 of the Code of Federal Regulations issued April 17, 1985, (effective date, October 21, 1985—50 F.R. 15895 et seq.), shall meet the requirements of Section 195.414(a), (b), and (c) of Title 49 of the Code of Federal Regulations.

(b) For purposes of applying the federal regulations of Part 195 of Title 49 of the Code of Federal Regulations, the word "Secretary," when it appears in the federal regulations, means the "State Fire Marshal."

(Added Stats.1988, c. 1222, § 5, eff. Sept. 30, 1988. Amended by Stats.1985, c. 1407, § 2; Stats.1986, c. 1401, § 2; Stats.1988, c. 1196, § 2.)

Library References

Explosives ⇐2.
C.J.S. Explosives §§ 1, 3.

§ 51012.4. Inspection, maintenance, improvement, or replacement assessment; *filing* requirements

(a) Notwithstanding any other provision of this chapter, including, but not limited to, Section 51012.3, each pipeline operator shall file with the State Fire Marshal, on or before July 1, 2000, an inspection, maintenance, improvement, or replacement assessment for the following:

(1) Any pipeline or pipeline segments built before January 1, 1960.

(2) Any pipeline installed on or after January 1, 1960, for which regular internal inspections cannot be conducted, or which shows diminished integrity due to corrosion or inadequate cathodic protection.

(b) When preparing any assessment required by subdivision (a), the operator shall give priority to older pipelines located in densely populated areas, pipelines with a high-leak history, pipelines located near existing seismic fault lines, or, pipelines in areas with identified ground formations.

(c) On or before January 1, 1998, the State Fire Marshal, in consultation with the Pipeline Safety Advisory Committee and pipeline operators, shall establish evaluation criteria for use by a pipeline operator when conducting any assessment required by subdivision (a).

(d) A pipeline inspection, maintenance, improvement, or replacement assessment developed pursuant to this section may incorporate any information on regulatory requirements or existing public policies that could act as barriers to the inspection, maintenance, improvement, or replacement of pipelines including, but not limited to, findings from the studies required pursuant to Section 51015.06.

(e) Nothing in this section is intended to require the replacement of a pipeline.

(Added by Stats.1996, c. 973 (A.B.349), § 2.)

Historical and Statutory Notes

1996 Legislation

Sections 1 and 5 of Stats.1996, c. 973 (A.B.349), provide:

"Section 1. The Legislature hereby finds and declares all of the following:

"(a) In the past several years, pipeline spills in California have posed safety hazards to local populations and seriously impacted the environment.

"(b) The State Fire Marshal's Hazardous Liquid Pipeline Risk Assessment report published in 1993 found that the leading cause of hazardous liquid pipeline leaks during the period January 1981 through December 1990 was external corrosion, causing 58.8 percent of all leaks. The State Fire Marshal's report also found a significant correlation between the age of a pipeline and the degree to which it experiences external corrosion and leaks.

"(c) According to the State Fire Marshal's report, pipelines constructed before 1949 leaked at a rate nearly 20 times that of pipelines constructed in the 1980's. Two factors that contribute to the high-leak incidence rate in older pipes, especially those constructed before 1940, are the older coatings on the pipelines and the higher operating temperatures. For example, pre-1940 pipelines operated at an average temperature of 125°F, higher than the average operating temperature for pipelines constructed during any other period.

"(d) The State Fire Marshal's report also found all of the following:

"(1) Pipelines within standard metropolitan statistical areas (SMSA) had a higher external corrosion incident rate than pipelines in non-SMSAs.

"(2) Pipelines without cathodic protection, or with inadequate, older coatings, had a drastically higher frequency of external corrosion-caused leaks than protected leaks.

"(3) Somewhere between 12 and 29 incidents caused by seismic activity are anticipated on regulated California hazardous liquid pipelines during a future 30-year period.

"(e) Existing statutory requirements for hydrostatic pressure testing on some pipelines are helpful in locating leaks, but inadequate as a preventative measure to detect external corrosion that will eventually cause leakage.

"(f) A recent investigation of pipeline regulatory programs by the Department of Fish and Game and the Office of Oil Spill Prevention and Response found that the lack of complete and easily accessible pipeline information frustrated oil spill response efforts.

"(g) Therefore, it is essential for the protection of public health and safety and the environment to develop a statewide inspection, maintenance, improvement, or replacement assessment of older pipelines that are more susceptible to corrosion and leakage, and to centralize information on pipelines to aid in spill prevention planning and response efforts."

"Sec. 5. This act shall become operative only if Assembly Bill 1487 [Stats.1996, c. 765] of the 1995-96 Regular Session is enacted and becomes effective on or before January 1, 1997."

§ 51013. New pipelines; design and construction requirements; internal inspection devices

(a) Any new pipeline constructed after January 1, 1984, and which normally operates under conditions of constant flow and pressure, shall be designed and constructed in accordance with Subparts C and D of Part 195 of Title 49 of the Code of Federal Regulations, and shall include a means of leak detection and cathodic protection which the State Fire Marshal determines is acceptable, except that any * * * pipeline which transports by gravity or operates at a stress level of 20 percent or less of the specified minimum yield strength of the pipe shall meet these design and construction requirements on or before January 1, 1991.

(b) Any new pipeline on which construction begins after January 1, 1990, shall be designed to accommodate the passage of instrumented internal inspection devices, and shall have leak mitigation and emergency response plans and equipment as the State Fire Marshal may require. Any repairs to existing pipelines which can accommodate instrumented internal inspection devices shall be done in a manner not to interfere with the passage of these devices.

(c) Subdivision (a) does not apply to the replacement of valves and the relocation or replacement of portions of pipelines.

(d) For pipelines which cannot accommodate internal inspection devices, replacements of portions of the pipe shall be done in a manner consistent, to the extent practicable, with the eventual accommodation of instrumented internal inspection devices.

(Amended by Stats.1988, c. 1222, § 6, eff. Sept. 20, 1988; Stats.1988, c. 1195, § 3; Stats.1989, c. 1277, § 3.)

§ 51013.5. Testing; higher risk pipelines list; risk studies; testing frequency regulations

(a) Every newly constructed pipeline, existing pipeline, or part of a pipeline system that has been relocated or replaced, and every pipeline that transports a hazardous liquid substance or highly volatile liquid substance, shall be tested in accordance with Subpart E (commencing with Section 195.300) of Part 195 of Title 49 of the Code of Federal Regulations.

(b) Every pipeline not provided with properly sized automatic pressure relief devices or properly designed pressure limiting devices shall be hydrostatically tested annually.

(c) Every pipeline over 10
hydrostatically tested every
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(d) Every pipeline over 1
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(e) Piping within a refined
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(f) Beginning on July 1, 19
pursuant to subdivision (g) u
satisfies any of the following
pipelines until five years pas
Initially, pipelines on that list
placed on the list, whichever
Marshal with a list of all their
any pipeline becomes eligible
shall report that fact to the S
retroactively to the date on w
the list, but are not so repor
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Section 51018.6. Pipelines no
be deleted from the list when
subdivision, a leak which is u
shall be deemed caused by co
or "reportable leak" means a
pipelines are tested in their e
(c) and (d), it shall suffice for
directions along an operator's
retention of that pipeline on t
of the following criteria:

(1) Have suffered two or
pressure test, due to corrosion

(2) Have suffered three or
pressure test, due to corrosion
three years.

(3) Have suffered a repor
corrosion or defect of more t
area, in the prior three years
Marshal finds has resulted in
jurisdiction entering a water
hazardous liquid with a flashp
prior three years.

(4) Are less than 50 miles
hydrostatic pressure test, due
paragraph, the length of a pip
termini along the pipeline.

(5) Have experienced a repe
a certified hydrostatic pressur
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subdivision shall be required o
than 50 years old which is w
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(g) The State Fire Marshal
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with Section 195.300) of Part

relief devices or properly

asterisks * * *

(c) Every pipeline over 10 years of age and not provided with effective cathodic protection shall be hydrostatically tested every three years, except for those on the State Fire Marshal's list of higher risk pipelines, which shall be hydrostatically tested annually.

(d) Every pipeline over 10 years of age and provided with effective cathodic protection shall be hydrostatically tested every five years, except for those on the State Fire Marshal's list of higher risk pipelines which shall be hydrostatically tested every two years.

(e) Piping within a refined products bulk loading facility served by pipeline shall be tested hydrostatically at 125 percent of maximum allowable operating pressure utilizing the product ordinarily transported in that piping if that piping is operated at a stress level of 20 percent or less of the specified minimum yield strength of the pipe. The frequency for pressure testing these pipelines shall be every five years for those pipelines with effective cathodic protection and every three years for those pipelines without effective cathodic protection. If that piping is observable, visual inspection may be the method of testing.

(f) Beginning on July 1, 1990, and continuing until the regulations adopted by the State Fire Marshal pursuant to subdivision (g) take effect, each pipeline within the State Fire Marshal's jurisdiction which satisfies any of the following sets of criteria shall be placed on the State Fire Marshal's list of higher risk pipelines until five years pass without a reportable leak due to corrosion or defect on that pipeline. Initially, pipelines on that list shall be tested by the next scheduled test date, or within two years of being placed on the list, whichever is first. On July 1, 1990, pipeline operators shall provide the State Fire Marshal with a list of all their pipelines which satisfy the criteria in this subdivision as of July 1, 1990. If any pipeline becomes eligible for the list of higher risk pipelines after that date, the pipeline company shall report that fact to the State Fire Marshal within 30 days, and the pipeline shall be placed on the list retroactively to the date on which it became eligible for listing. Pipelines which are found to belong on the list, but are not so reported by the operator to the State Fire Marshal, shall be placed on the list retroactively. Operators failing to properly report their pipelines shall be subject to penalties under Section 51018.6. Pipelines not covered under the risk criteria developed pursuant to subdivision (g) shall be deleted from the list when regulations are adopted pursuant to that subdivision. For purposes of this subdivision, a leak which is traceable to an external force, but for which corrosion is partly responsible, shall be deemed caused by corrosion, "defect" refers to manufacturing or construction defects, and "leak" or "reportable leak" means a rupture required to be reported pursuant to Section 51018. As long as all pipelines are tested in their entirety at least as frequently as standard risk pipelines under subdivisions (c) and (d), it shall suffice for additional tests on higher risk pipelines to cover 20 pipeline miles in all directions along an operator's pipeline from the position of the leak or leaks which led to the inclusion or retention of that pipeline on the higher risk list. The interim list shall include pipelines which meet any of the following criteria:

(1) Have suffered two or more reportable leaks, not including leaks during a certified hydrostatic pressure test, due to corrosion or defect in the prior three years.

(2) Have suffered three or more reportable leaks, not including leaks during a certified hydrostatic pressure test, due to corrosion, defects, or external forces, but not all due to external forces, in the prior three years.

(3) Have suffered a reportable leak, except during a certified hydrostatic pressure test, due to corrosion or defect of more than 50,000 gallons, or 10,000 gallons in a standard metropolitan statistical area, in the prior three years; or have suffered a leak due to corrosion or defect which the State Fire Marshal finds has resulted in more than 42 gallons of a hazardous liquid within the State Fire Marshal's jurisdiction entering a waterway in the prior three years; or have suffered a reportable leak of a hazardous liquid with a flashpoint of less than 140 degrees Fahrenheit, or 60 degrees centigrade, in the prior three years.

(4) Are less than 50 miles long, and have experienced a reportable leak, except during a certified hydrostatic pressure test, due to corrosion or a defect in the prior three years. For the purposes of this paragraph, the length of a pipeline with more than two termini shall be the longest distance between two termini along the pipeline.

(5) Have experienced a reportable leak in the prior five years due to corrosion or defect, except during a certified hydrostatic pressure test, on a section of pipe more than 50 years old. For pipelines which fall in this category, and no other category of higher risk pipeline, additional tests required by this subdivision shall be required only on segments of the pipe more than 50 years old as long as all pipe more than 50 years old which is within 20 pipeline miles from the leak in all directions along an operator's pipeline is tested.

(g) The State Fire Marshal shall study indicators and precursors of serious pipeline accidents, and, in consultation with the Pipeline Safety Advisory Committee, shall develop criteria for identifying which hazardous liquid pipelines pose the greatest risk to people and the environment due to the likelihood of, and likely seriousness of, an accident due to corrosion or defect. The study shall give due consideration

to research done by the industry, the federal government, academia, and to any other information which the State Fire Marshal shall deem relevant, including, but not limited to, recent leak history, pipeline location, and materials transported. Beginning January 1, 1992, using the criteria identified in that study, the State Fire Marshal shall maintain a list of higher risk pipelines, which exceed a standard of risk to be determined by the State Fire Marshal, and which shall be tested as required in subdivisions (c) and (d) as long as they remain on the list. By January 1, 1992, after public hearings, the State Fire Marshal shall adopt regulations to implement this subdivision.

(h) In addition to the requirements of subdivisions (a) to (e), inclusive, the State Fire Marshal may require any pipeline subject to this chapter to be subjected to a pressure test, or any other test or inspection, at any time, in the interest of public safety.

(i) Test methods other than the hydrostatic tests required by subdivisions (b), (c), (d), and (e), including inspection by instrumented internal inspection devices, may be approved by the State Fire Marshal on an individual basis. If the State Fire Marshal approves an alternative to a pressure test in an individual case, the State Fire Marshal may require that the alternative test be given more frequently than the testing frequencies specified in subdivisions (b), (c), (d), and (e).

(j) The State Fire Marshal shall adopt regulations before January 1, 1992, to establish what the State Fire Marshal deems to be an appropriate frequency for tests and inspections, including instrumented internal inspections, which, when permitted as a substitute for tests required under subdivisions (b), (c), and (d), do not damage pipelines or require them to be shut down for the testing period. That testing shall in no event be less frequent than is required by subdivisions (b), (c), and (d). Each time one of these tests is required on a pipeline, it shall be approved on the same individual basis as under subdivision (i). If it is not approved, a hydrostatic test shall be carried out at the time the alternative test would have been carried out, and subsequent tests shall be carried out in accordance with the time intervals prescribed by subdivision (b), (c), or (d), as applicable.

(Added by Stats.1983, c. 1222, § 7, eff. Sept. 30, 1983. Amended by Stats.1985, c. 1407, § 3; Stats.1986, c. 1401, § 3; Stats.1988, c. 1196, § 4; Stats.1989, c. 1277, § 4; Stats.1990, c. 856 (A.B.3527), § 1.5; Stats.1991, c. 385 (A.B.718), § 2.)

Library References

Explosives ⇐2.
C.J.S. Explosives §§ 1, 3.

§ 51014. Pressure tests; manner of conducting

(a) The pressure tests required by subdivisions (b), (c), and (d) of Section 51013.5 shall be conducted in accordance with Subpart E (commencing with Section 195.300) of Part 195 of Title 49 of the Code of Federal Regulations, except that an additional four-hour leak test, as specified in subsection (c) of Section 195.302 of Title 49 of the Code of Federal Regulations, shall not be required under subdivisions (b), (c), and (d) of Section 51013.5. The State Fire Marshal may authorize the use of liquid petroleum having a flashpoint over 140 degrees Fahrenheit or 60 degrees Centigrade as the test medium. The State Fire Marshal shall make these authorizations in writing. Pressure tests performed under subdivisions (b), (c), and (d) of Section 51013.5 shall not show an hourly change for each section of the pipeline under test at the time in excess of either 10 gallons or the sum of one gallon and an amount computed at a rate in gallons per mile equivalent to one-tenth of the nominal internal diameter of the pipe in inches.

(b) Test pressure shall be at least 125 percent of the actual pipeline operating pressure.

(Added by Stats.1983, c. 1222, § 9, eff. Sept. 30, 1983. Amended by Stats.1985, c. 1407, § 4; Stats.1986, c. 1401, § 4; Stats.1989, c. 1277, § 5.)

Historical and Statutory Notes

1983 Legislation.
Former § 51014 was repealed by Stats.1983, c. 1222, § 8, eff. Sept. 30, 1983.

§ 51014.3. Notification prior to testing; observation of tests

(a) Each pipeline operator shall notify the State Fire Marshal and the local fire department having fire suppression responsibilities at least three working days prior to conducting a hydrostatic test which is required by this chapter. The notification shall include all of the following information:

(1) The name, address, and telephone number of the pipeline operator.

(2) The specific location of the pipeline section to be tested and the location of the test equipment.

Additions or changes indicated by underline; deletions by asterisks * * *

(3) The date and time the tes

(4) An invitation and a telep
what they should do in the even

(5) The test medium.

(6) The name and telephon
certification of the test results.

(b) The State Fire Marshal r

(Added by Stats.1983, c. 1222,
c. 1277, § 5.5.)

§ 51014.5. Hydrostatic testir

(a) When hydrostatic testin
independent testing firm or pe
independent testing firms or
Marshal may charge a fee fo
pursuant to this subdivision.

(b) The results of the tests
firm or person within 30 days
review the results. The report

(1) The date of the test.

(2) A description of the pip
pipeline.

(3) The results of the test.

(4) Any other test informati

(c) The State Fire Marshal

(Added by Stats.1988, c. 12
Stats.1988, c. 996, § 3.)

§ 51014.6. Pipeline easemen

(a) Effective January 1, 198
with respect to any pipeline ea

(1) Build, erect, or create
building, erection, or creation

(2) Build, erect, or create
which would prevent complet
erection, or creation thereof.

(b) No shrubbery or shield
observation of the pipeline
landscape disturbed within a
prevent the holder of the ea
seasonal agricultural crops on

(c) This section does not pr
pipeline easement, including
operation of the pipeline.

(Added by Stats.1984, c. 1238

Carriers ⇐1 to 22.
Steam ⇐7.
Waters and Water Courses ⇐
C.J.S. Carriers §§ 1 to 3 et se
878 et seq.

Additions or cha

(3) The date and time the test is to be conducted.

(4) An invitation and a telephone number for local fire departments to call for further information on what they should do in the event of a leak during testing.

(5) The test medium.

(6) The name and telephone number of the independent testing firm or person responsible for certification of the test results.

(b) The State Fire Marshal may observe tests conducted pursuant to this chapter.

(Added by Stats.1983, c. 1222, § 10, eff. Sept. 30, 1983. Amended by Stats.1988, c. 995, § 2; Stats.1989, c. 1277, § 5.5.)

§ 51014.5. Hydrostatic testing; certification of results; test result reports

(a) When hydrostatic testing is required by Section 51013.5, the test results shall be certified by an independent testing firm or person who is selected from a list, provided by the State Fire Marshal, of independent testing firms or persons approved annually by the State Fire Marshal. The State Fire Marshal may charge a fee for consideration and approval of an independent testing firm or person pursuant to this subdivision, not to exceed the reasonable costs of that consideration and approval.

(b) The results of the tests required by Section 51013.5 shall be submitted by the independent testing firm or person within 30 days after completion of the test to the * * * State Fire Marshal, who may review the results. The report shall show all of the following information:

(1) The date of the test.

(2) A description of the pipeline tested including a map of suitable scale showing the route of the pipeline.

(3) The results of the test.

(4) Any other test information that may be specifically requested by the State Fire Marshal * * *.

(c) The State Fire Marshal * * * shall not supervise, control, or otherwise direct the testing.

(Added by Stats.1983, c. 1222, § 11, eff. Sept. 30, 1983. Amended by Stats.1986, c. 1401, § 4.5; Stats.1988, c. 995, § 3.)

§ 51014.6. Pipeline easements; building, vegetation and shielding restrictions

(a) Effective January 1, 1987, no person, other than the pipeline operator, shall do any of the following with respect to any pipeline easement * * *:

(1) Build, erect, or create a structure or improvement within the pipeline easement or permit the building, erection, or creation thereof.

(2) Build, erect, or create a structure, fence, wall, or obstruction adjacent to any pipeline easement which would prevent complete and unimpaired surface access to the easement, or permit the building, erection, or creation thereof.

(b) No shrubbery or shielding shall be installed on the pipeline easement which would impair aerial observation of the pipeline easement. This subdivision does not prevent the revegetation of any landscape disturbed within a pipeline easement as a result of constructing the pipeline and does not prevent the holder of the underlying fee interest or the holder's tenant from planting and harvesting seasonal agricultural crops on a pipeline easement.

(c) This section does not prohibit a pipeline operator from performing any necessary activities within a pipeline easement, including, but not limited to, the construction, replacement, relocation, repair, or operation of the pipeline.

(Added by Stats.1984, c. 1238, § 1. Amended by Stats.1986, c. 1401, § 5.)

Library References

Carriers ⇐1 to 22.
Steam ⇐1.
Waters and Water Courses ⇐210.
C.J.S. Carriers §§ 1 to 3 et seq., 14, 15 et seq., 567 to 578 et seq.
C.J.S. Steam § 19.
C.J.S. Waters § 258.

Additions or changes indicated by underline; deletions by asterisks * * *

§ 51015. Maps and diagrams; contingency plans for pipeline emergencies; availability of records, maps, etc.; inspections; yearly review of contingency plans

(a) Every pipeline operator shall provide to the fire department having fire suppression responsibilities a map or suitable diagram showing the location of the pipeline, a description of all products transported within the pipeline, and a contingency plan for pipeline emergencies which shall include, but not be limited to any reasonable information which the State Fire Marshal may require.

(b) A pipeline operator shall make available to the State Fire Marshal, or any officers or employees authorized by the State Fire Marshal, upon presentation of appropriate credentials, any records, maps, and written procedures that are required, by this chapter, to be kept by the pipeline operator and which concern accident reporting, design, construction, testing, or operation and maintenance.

The State Fire Marshal, or any officer or employee authorized by the State Fire Marshal, may enter, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of any pipeline operators that are required to be inspected and examined to determine whether the pipeline operator is in compliance with this chapter.

(c) Every pipeline operator shall offer to meet with the local fire department having fire suppression responsibilities at least once each calendar year to discuss and review contingency plans for pipeline emergencies.

(Amended by Stats.1983, c. 1222, § 12, eff. Sept. 30, 1983; Stats.1985, c. 1407, § 5; Stats.1988, c. 996, § 4; Stats.1989, c. 1277, § 6.)

§ 51015.05. Data base; intrastate pipelines; public access; reporting by agencies; study to encourage replacements and improvements

Operation of § 51015.05 is contingent by its own terms, upon receipt of federal block grant funds.

(a) The State Fire Marshal shall establish and maintain a centralized data base containing information and data regarding the following intrastate pipelines:

(1) Pipelines, as defined in paragraph (3) of subdivision (a) of Section 51010.5, used for the transportation of crude oil that operate by gravity or at a stress level of 20 percent or less of the specified minimum yield strength of the pipe.

(2) Pipelines, as defined in paragraph (4) of subdivision (a) of Section 51010.5, used for the transportation of petroleum in onshore gathering lines located in rural areas.

(b) The data base shall include, but is not limited to, an inventory of the pipelines described in subdivision (a), including pipeline locations, ownership, ages, and inspection histories, that are in the possession of the owner or operator of the oil field or other gas facility.

(c) The State Fire Marshal shall regularly update the data base and shall make the information in the data base available to the public, and to all local, state, and federal agencies.

(d) Any state or local governmental agency that regulates, supervises, or exerts authority over any pipeline described in subdivision (a) shall report any information or data specified in subdivision (b) in its possession to the State Fire Marshal. That information shall be submitted to the State Fire Marshal in a computer compatible format.

(e) The State Fire Marshal shall conduct a study of the fitness and safety of all pipelines described in subdivision (a), and investigate incentive options that would encourage pipeline replacement or improvements, including, but not limited to, a review of existing regulatory, permit, and environmental impact report requirements and other existing public policies, as may be identified by the Pipeline Safety Advisory Committee and adopted by the State Fire Marshal, that could act as barriers to the replacement or improvement of those pipelines. On or before December 31, 1996, the State Fire Marshal shall report his or her findings and recommendations to the Legislature.

(f) The costs of this section shall be funded from federal block grant funds. This section shall become operative only upon receipt of these federal block grant funds as determined by the State Fire Marshal. Upon receipt of these funds the State Fire Marshal shall provide written notice to both houses of the Legislature for publication in their respective journals.

(Added by Stats.1994, c. 523 (A.B.3261), § 2. Amended by Stats.1995, c. 91 (S.B.975), § 52.)

Additions or changes indicated by underline; deletions by asterisks * * *

1995 Legislation

Subordination of legislation by S
975), to other 1995 legislation, see H
ry Notes under Business and Pro

§ 51015.1. Risk assessment st

(a) The State Fire Marshal si
and interstate hazardous liquid
The study shall include, but is n

(1) Identification of each of
name of the railroad line or lines

(2) Analysis of historic even
derailments. This analysis sha
as those within railroad yards a
for the transfer of railroad vehi

(3) Analysis of the feasibilit
subject to approval of the Stat
and derailments.

(4) Identification and analys
safe operation of intrastate and

(5) Analysis of the feasibilit
intrastate pipelines suspected
minimum, that analysis shall in
way, and requirements for gair
for pipeline relocation.

(6) Analysis of the feasibility
contents of hazardous liquid pi
material being transported.

(7) Evaluation of the best av
emergency resulting from a re

(A) Design and placement o

(B) Barriers or shields to he

(C) Special testing or inspec

(8) Recommendations for ir
Fire Marshal, pipeline operato
in the preparation and implem

(b) A pipeline located in a r

(c) This risk assessment stu
by January 1, 1991.

(d) It is the intent of the L
set forth in the risk assessme
regulations provided for in Se

(Added by Stats.1989, c. 1252,

§ 51015.2. Regulations gov

(a) The Legislature recogn
immediate proximity of rail lir
fashion that their integrity is

(b) In an effort to better
governing the construction, t
state hazardous liquid pipeli
minimum, include provisions

(1) Minimum depth of cove

Additions or cha

Historical and Statutory Notes

Legislation
of legislation by Stats.1996, c. 91 (S.B.
other 1996 legislation, see Historical and Statutory
Notes under Business and Professions Code § 35.

§ 51015.1. Risk assessment study; hazardous liquid pipelines near rail lines

(a) The State Fire Marshal shall conduct and prepare a risk assessment study dealing with intrastate and interstate hazardous liquid pipelines which are located not more than 500 feet from any rail line. The study shall include, but is not limited to, the following:

(1) Identification of each of these pipelines, its operator, geographic location, leak history, and the name of the railroad line or lines.

(2) Analysis of historic events involving reported damage to pipelines as a result of railroad train derailments. This analysis shall differentiate between main higher speed rail lines and other lines such as those within railroad yards and maintenance facilities for railroad vehicles, and other "spur" lines used for the transfer of railroad vehicles from one line or train to another.

(3) Analysis of the feasibility of requiring that railroad operators and pipeline operators prepare, subject to approval of the State Fire Marshal, a coordinated contingency plan for pipeline emergencies and derailments.

(4) Identification and analysis of any impacts which geological or seismic activities may have on the safe operation of intrastate and interstate hazardous liquid pipelines.

(5) Analysis of the feasibility of requiring the pipeline operator to test, repair, replace, or relocate intrastate pipelines suspected of potential damage resulting from a railroad car derailment. As a minimum, that analysis shall include the examination of issues involved in obtaining necessary rights-of-way, and requirements for gaining approval of concerned local, state, and federal governmental agencies for pipeline relocation.

(6) Analysis of the feasibility of requiring pipeline operators to notify local affected fire agencies of the contents of hazardous liquid pipelines. The notification would be required anytime there is a change in material being transported.

(7) Evaluation of the best available control technology to protect public safety in the event of a pipeline emergency resulting from a railroad train derailment. The technology may include, but is not limited to:

(A) Design and placement of check or safety valves.

(B) Barriers or shields to help protect pipelines in the event of a derailment.

(C) Special testing or inspection requirements.

(8) Recommendations for improving coordination and cooperation between local agencies, the State Fire Marshal, pipeline operators, rail line operators, and the United States Department of Transportation in the preparation and implementation of contingency plans for pipeline and rail emergencies.

(b) A pipeline located in a rural area shall be excluded from this study.

(c) This risk assessment study shall be completed and submitted to the Governor and the Legislature by January 1, 1991.

(d) It is the intent of the Legislature in enacting this section that the findings and recommendations set forth in the risk assessment study will be used by the State Fire Marshal in preparing and adopting regulations provided for in Section 51015.2.

(Added by Stats.1989, c. 1252, § 2.)

§ 51015.2. Regulations governing hazardous liquid pipelines near rail lines

(a) The Legislature recognizes that hazardous liquid pipelines are often located alongside and in the immediate proximity of rail lines. In the event of a derailment, these pipelines may be damaged in such a fashion that their integrity is lost, making a rupture or leak more likely.

(b) In an effort to better protect public safety, the State Fire Marshal shall adopt regulations governing the construction, testing, operations, periodic inspection, and emergency operations of intrastate hazardous liquid pipelines located within 500 feet of any rail line. These regulations shall, at a minimum, include provisions dealing with the following:

(1) Minimum depth of cover for newly constructed or reconstructed pipelines.

(2) Minimum hydrostatic testing requirements for newly constructed pipelines.

(3) Minimum requirements for testing existing pipelines which may have been affected by a derailment.

(4) Minimum requirements for periodic inspections.

(5) Minimum requirements for installation and operation of safety or check valves.

(6) Procedures for developing, testing, approving, and implementing coordinated emergency contingency plans prepared by pipeline and rail operators. These procedures shall also provide for consultation with local affected agencies, and require pipeline and rail operations to develop and implement emergency training for their employees approved by the State Fire Marshal.

(Added by Stats.1989, c. 1252, § 3.)

§ 51015.3. Emergency regulations; hazardous liquid pipelines near rail lines

The State Fire Marshal may, in the interest of public safety, adopt emergency regulations which govern intrastate pipeline emergencies involving railroad car derailments. Any hazardous liquid pipeline located in a rural area shall be exempt from these regulations. Notwithstanding any other provision of law, these emergency regulations shall remain in effect until permanent regulations provided for in Section 51015.2 are adopted, but in no case beyond January 1, 1995.

(Added by Stats.1989, c. 1252, § 4.)

§ 51015.4. Valves and check valves; regulations

(a) Each operator shall, as specified in regulations provided for in subdivision (c), maintain each valve and check valve that is necessary for the safe operation of its pipeline systems in good working order at all times.

(b) Each operator shall provide protection for each valve and check valve from unauthorized operation and from vandalism.

(c) The State Fire Marshal shall adopt regulations, not later than June 30, 1991, which establish procedures for maintaining, testing, and inspecting mainline valves and check valves on intrastate hazardous liquid pipelines.

(Added by Stats.1989, c. 1252, § 5.)

§ 51015.5. Nonemergency site alterations; approval; regulations

(a) In the event of an intrastate pipeline rupture, leak, or other incident which could affect safe pipeline operation, any person who performs or intends to perform nonemergency site cleanup, repair, reconstruction, or any other alteration shall obtain prior approval from the State Fire Marshal.

(b) Approval by the State Fire Marshal of a repair plan, submitted by a pipeline operator in conformance with contingency plan requirements established by the State Fire Marshal, shall constitute prior approval to perform repairs as specified in subdivision (a).

(c) The State Fire Marshal may adopt regulations to implement subdivisions (a) and (b).

(Added by Stats.1989, c. 1252, § 6.)

§ 51016. Valve spacing study

The State Fire Marshal shall study the spacing of valves which would limit spillage into standard metropolitan statistical areas and environmentally sensitive areas from surrounding higher ground. If any existing pipeline system's valve spacing is deemed insufficient to protect California's uniquely situated population centers and environmental resources, the State Fire Marshal shall adopt regulations to require the addition of valves on existing pipelines. If the study indicates that guidelines for valve spacing do not, in the State Fire Marshal's opinion, adequately protect these population centers and environmental resources, the State Fire Marshal may adopt regulations to require new valves on new, existing, or replacement pipelines as necessary to protect the public interest.

(Added by Stats.1989, c. 1277, § 6.5.)

Historical and Statutory Notes

1988 Legislation

Former § 51016 was amended by Stats.1988, c. 1222, § 12, and repealed by Stats.1988, c. 995, § 5.

§ 51017. Pipeline information

(a) The State Fire Marshal sh
outlined for emergency respon
information on pipeline location,
capability of mapping pipeline
compatible with any pipeline
Transportation's Office of Pipeli
ment required by Article 12 (co
Health and Safety Code.

(b) The sum of four hundred
California Hazardous Liquid P
subdivision (a).

(Added by Stats.1987, c. 814 (A.

1988 Legislation

Former § 51017 was repealed by

1997 Legislation

Operative effect of Stats.1997,
Historical and Statutory Notes und
§ 51010.5.

§ 51017.1. Public drinking w
uets near wells;

(a) Utilizing GIS-based locati
the State Water Resources Co
determine the identity of each
pursuant to this chapter that tra
of a public drinking water well.

(b) With assistance from the
Control Board, the State Fire M
(a) of the following information:

(1) That the specific pipeline
of a public drinking water well.

(2) The name of the water pu
advice from the GIS mapping s
of the Health and Safety Code,
the State Fire Marshal pursuan
system created by Section 2529
information on pipeline and well

(c) Each pipeline operator
protection plan as required by S
days from the date of either
regulations by the State Fire M

(d) With the advice of the St
Board, appropriate California re
Fire Marshal shall review each
these plans that meet the crite
Section 51017.2. The State Fi
address multiple wellheads wh
similar. The pipeline operator
date of receiving approval from

(e) Each pipeline operator h
pursuant to subdivision (d) shal
is in compliance with the criter
51017.2. The pipeline operator
the previously approved wellhea
or submit a new wellhead protec
requirements of regulations ado

§ 51017. Pipeline information data base

(a) The State Fire Marshal shall develop a comprehensive data base of pipeline information that can be utilized for emergency response and program operational purposes. The data base shall include information on pipeline location, age, reported leak incidences, and inspection history, and shall have the capability of mapping pipeline locations throughout the state. The data collection format shall be compatible with any pipeline mapping project implemented by the United States Department of Transportation's Office of Pipeline Safety and shall be compatible with GIS mapping and data management required by Article 12 (commencing with Section 25299.97) of Chapter 6.75 of Division 20 of the Health and Safety Code.

(b) The sum of four hundred sixty-nine thousand dollars ($469,000) is hereby appropriated from the California Hazardous Liquid Pipeline Safety Fund to the State Fire Marshal for the purposes of subdivision (a).

(Added by Stats.1997, c. 814 (A.B.592), § 3.)

Historical and Statutory Notes

1988 Legislation
Former § 51017 was repealed by Stats.1988, c. 995, § 6.

1997 Legislation
Operative effect of Stats.1997, c. 814 (A.B.592), see Historical and Statutory Notes under Government Code § 51010.6.

Former § 51017, added by Stats.1996, c. 978 (A.B.349), § 2, relating to a pipeline information data base, was repealed by Stats.1997, c. 814 (A.B.592), § 2. See this section.

Derivation: Former § 51017, added by Stats.1996, c. 978, § 3.

§ 51017.1. Public drinking water wells; identification of pipelines transporting petroleum products near wells; notification of operators; pipeline wellhead protection plans

(a) Utilizing GIS-based location information furnished by the State Department of Health Services and the State Water Resources Control Board, at least once every two years the State Fire Marshal shall determine the identity of each pipeline or pipeline segment that is regulated by the State Fire Marshal pursuant to this chapter that transports petroleum product when that pipeline is located within 1,000 feet of a public drinking water well.

(b) With assistance from the State Department of Health Services and the State Water Resources Control Board, the State Fire Marshal shall notify the operator of the pipelines identified in subdivision (a) of the following information:

(1) That the specific pipeline or pipeline segment has been identified as being located within 1,000 feet of a public drinking water well.

(2) The name of the water purveyor and the location of the public drinking water well affected. With advice from the GIS mapping advisory committee, created pursuant to subdivision (b) of Section 25299.97 of the Health and Safety Code, the identification of the pipelines and notification of pipeline owners by the State Fire Marshal pursuant to subdivision (a) and this subdivision shall begin once the GIS mapping system created by Section 25299.97 of the Health and Safety Code is able to provide accurate and useful information on pipeline and wellhead locations.

(c) Each pipeline operator notified pursuant to subdivision (b) shall prepare a pipeline wellhead protection plan as required by Section 51017.2 and submit the plan to the State Fire Marshal within 180 days from the date of either receiving the notification specified in subdivision (b), or adoption of regulations by the State Fire Marshal pursuant to Section 51017.2, whichever is later.

(d) With the advice of the State Department of Health Services, the State Water Resources Control Board, appropriate California regional water quality control boards, and local water purveyors, the State Fire Marshal shall review each wellhead protection plan submitted by a pipeline operator, and approve those plans that meet the criteria of the regulations adopted by the State Fire Marshal pursuant to Section 51017.2. The State Fire Marshal shall have discretion to allow a wellhead protection plan to address multiple wellheads where the conditions creating the risk to the wellheads are substantially similar. The pipeline operator shall implement the wellhead protection plan within 180 days from the date of receiving approval from the State Fire Marshal.

(e) Each pipeline operator having a wellhead protection plan approved by the State Fire Marshal pursuant to subdivision (d) shall evaluate that plan at least once every five years to ensure that the plan is in compliance with the current regulations established by the State Fire Marshal pursuant to Section 51017.2. The pipeline operator shall provide either written documentation to the State Fire Marshal that the previously approved wellhead protection plan has been evaluated and that no changes are warranted, or submit a new wellhead protection plan to remain in compliance with existing regulations or to meet the requirements of regulations adopted since the plan was approved.

(f) The pipeline operator subject to subdivision (c) may petition the State Fire Marshal in writing for an exemption from the requirements of subdivision (c). With advice from the State Water Resources Control Board, the State Department of Health Services, the California regional water quality control boards, and local water purveyors, the State Fire Marshal may approve the exemption if the petition demonstrates that the pipeline either does not transport motor vehicle fuel, or does not pose a significant threat to the public drinking water well based upon, but not limited to, the following criteria:

(1) Pipeline parameters, such as operation pressure, operating temperature, age, design, fabrication materials, construction, corrosive nature of the surrounding soil, cathodic protection, and feasibility of internal inspection or evaluation tools (smart pigs).

(2) Hydrogeologic parameters, such as soil permeability, direction and velocity of groundwater flow, aquifer location or depth, and hydrogeologic barriers or conduits.

(3) Water well parameters, such as depth of well and well construction.

(4) The nature of the fuel and its ability to migrate to public drinking water wells.

(5) The impact of human activity that may elevate or reduce the risk to the drinking water well.

(Added by Stats.1997, c. 814 (A.B.592), § 4. Amended by Stats.1998, c. 485 (A.B.2803), § 91.)

Historical and Statutory Notes

1997 Legislation

Operative effect of Stats.1997, c. 814 (A.B.592), see Historical and Statutory Notes under Government Code § 51010.5.

1998 Legislation

Subordination of legislation by Stats.1998, c. 485 (A.B. 2803), to other 1998 legislation, see Historical and Statutory Notes under Business and Professions Code § 4840.

§ 51017.2. Wellhead protection plan regulations

(a) With advice from the Pipeline Safety Advisory Committee, the State Water Resources Control Board, the California regional water quality control boards, and local water purveyors, the State Fire Marshal shall adopt regulations for wellhead protection plans that provide guidelines to be used by the pipeline operator as specified in Section 51017.1 to protect the public drinking water well from contamination should a pipeline rupture or leak pose a significant threat to a public drinking water well, taking into account the nature of the fuel and its ability to migrate to a public drinking water well. The regulations adopted by the State Fire Marshal shall require each plan to contain adequate and effective measures that are technologically feasible, practical, and operationally sound that protect public drinking water wells. At a minimum, the wellhead protection plan shall contain the following:

(1) Operational activities that provide the pipeline operator with sufficient information to adequately ensure the integrity of the pipeline. These may include internal inspection or evaluation tools (smart pigs), substructure excavation (potholing), well monitoring, additional or more frequent pressure tests, cathodic protection surveys or visual inspections, or other technologies as appropriate.

(2) Response measures that will enhance the pipeline operator's response to an emergency, such as a pipeline rupture, fire, earthquake, or flood. These measures may include activities, such as additional training for operator staff or improved coordination with emergency response agencies.

(b) At least once every five years, the State Fire Marshal, with the advice of the Pipeline Safety Advisory Committee, the State Water Resources Control Board, the California regional water quality control boards, and local water purveyors, shall review the regulations adopted pursuant to subdivision (a) to determine if new measures that have been proven to be technologically feasible, practical, and operationally sound should be included in the regulations. The State Fire Marshal shall adopt new regulations if such new measures are identified.

(Added by Stats.1997, c. 814 (A.B.592), § 5.)

Historical and Statutory Notes

1997 Legislation

Operative effect of Stats.1997, c. 814 (A.B.592), see Historical and Statutory Notes under Government Code § 51010.5.

§ 51018. Rupture, explosion or fire reports; assistance by State Fire Marshal

(a) Every rupture, explosion, or fire involving a pipeline, including a pipeline system otherwise exempted by subdivision (a) of Section 51010.5, and including a pipeline undergoing testing, shall be immediately reported by the pipeline operator to the fire department having fire suppression responsibil-

ties and to the Office of Ex
days of the rupture, explos
information that the State Fi
to subdivision (d).

(b)(1) * * * The Office of
of the incident, who shall i
Marshal or his or her emplo
and all public agencies on act

(2) For purposes of this su
of the "incident commander
direction for the incident con
incident mitigation. Further
of the pipeline operator an
particular location of the inci
incident.

(c) For purposes of this se
that occurs during hydrostati
or flow line in a rural area, o
less than five barrels, when
thereby, does not constitute

(d) The State Fire Marsha
pipeline leak incident rate t
safety, and recommending an
following * * *: total length
* * *, total number of line se
study period * * *, average s
* * *, average diameter of le
* * *, fatalities during study
State Fire Marshal.

(e) This section does not pr

(f) Except as otherwise pro
section shall satisfy any im
permitting agency.

(g) This section does not a
Section 3283 of the Public Res

(Amended by Stats.1988, c. 12
§ 6; Stats.1996, c. 1401, § 6; S
(A.B.3521), § 1; Stats.1994, c.
(A.B.1876), § 2.)

1994 Legislation

Amendment of this section by § :
(A.B.3521), failed to become oper
since of § 4 of that Act.

Under the provisions of § 11 of S
1994 amendments of this section by
c. 1214 (A.B.3404) were given effe
the form set forth in § 4.5 of c. 121

Review of selected 1996 California
L.J. 249 (1996).

§ 51018.5. Repealed by Stats.

The repealed section, added by Sta
related to local agency enforcement

ies and to the Office of Emergency Services * * *. In addition, the pipeline operator shall within 30 days of the rupture, explosion, or fire file a report with the State Fire Marshal containing all the information that the State Fire Marshal may reasonably require to prepare the report required pursuant to subdivision (d).

(b)(1) * * * The Office of Emergency Services * * * shall immediately notify the State Fire Marshal of the incident, who shall immediately dispatch his or her employees to the scene. The State Fire Marshal or his or her employees, upon arrival, shall provide technical expertise and advise the operator and all public agencies on activities needed to mitigate the hazard.

(2) For purposes of this subdivision, the Legislature does not intend to hinder or disrupt the workings of the "incident commander system," but does intend to establish a recognized element of expertise and direction for the incident command to consult and acknowledge as an authority on the subject of pipeline incident mitigation. Furthermore, it is expected that the State Fire Marshal will recognize the expertise of the pipeline operator and any other emergency agency personnel who may be familiar with the particular location of the incident and respect their knowledgeable input regarding the mitigation of the incident.

(c) For purposes of this section, "rupture" includes every unintentional liquid leak, including any leak that occurs during hydrostatic testing, except that a crude oil leak of less than five barrels from a pipeline or flow line in a rural area, or any crude oil or petroleum product leak in any in-plant piping system of less than five barrels, when no fire, explosion, or bodily injury results or no waterway is contaminated thereby, does not constitute a rupture for purposes of the reporting requirements of subdivision (a).

(d) The State Fire Marshal shall, every fifth year commencing in 1998, issue a report identifying pipeline leak incident rate trends, reviewing current regulatory effectiveness with regard to pipeline safety, and recommending any necessary changes to the Legislature. This report shall include all of the following * * *: total length of regulated pipelines * * *, total length of regulated piggable pipeline * * *, total number of line sections * * *, average length of each section * * *, number of leaks during study period * * *, average spill size * * *, average damage per incident * * *, average age of leak pipe * * *, average diameter of leak pipe * * *, injuries during study period * * *, cause of the leak or spill * * *, fatalities during study period * * *, and other information as * * * deemed appropriate by the State Fire Marshal.

(e) This section does not preempt any other applicable federal or state * * * reporting requirement.

(f) Except as otherwise provided in this section and Section 8589.7, a notification made pursuant to this section shall satisfy any immediate notification requirement contained in any permit issued by a permitting agency.

(g) This section does not apply to pipeline ruptures involving nonreportable crude oil spills under Section 3233 of the Public Resources Code, unless the spill involves a fire or explosion.

(Amended by Stats.1992, c. 1222, § 14, eff. Sept. 30, 1992; Stats.1994, c. 1238, § 2; Stats.1995, c. 1407, § 6; Stats.1996, c. 1401, § 6; Stats.1998, c. 995, § 7; Stats.1990, c. 856 (A.B.3527), § 2; Stats.1994, c. 731 (A.B.3521), § 1; Stats.1994, c. 1214 (A.B.3404), § 4.5; Stats.1995, c. 155 (A.B.204), § 2; Stats.1996, c. 605 (A.B.1376), § 2.)

Historical and Statutory Notes

1994 Legislation

Amendment of this section by § 1.5 of Stats.1994, c. 731 (A.B.3521), failed to become operative under the provisions of § 4 of that Act.

Under the provisions of § 11 of Stats.1994, c. 1214, the 1994 amendments of this section by c. 731 (A.B.3521) and c. 1214 (A.B.3404) were given effect and incorporated in the form set forth in § 4.5 of c. 1214. An amendment of this section by § 4 of Stats.1994, c. 1214 (A.B.3404), failed to become operative under the provisions of § 11 of that Act.

Section affected by two or more acts at the same session of the legislature, see Government Code § 9605.

Legislative findings and declarations relating to Stats. 1994, c. 1214 (A.B.3404), see Historical and Statutory Notes under Government Code § 8589.7.

Law Review and Journal Commentaries

Review of selected 1995 California legislation. 27 Pac. L.J. 249 (1996).

§ 51018.5. Repealed by Stats.1998, c. 995, § 8

Historical and Statutory Notes

The repealed section, added by Stats.1992, c. 1222, § 15, related to local agency enforcement and fees.

§ 51018.6. Enforcement proceedings; regulations for conducting; civil penalty for violation; determination of amount; collection; disposition of penalties

(a) The State Fire Marshal shall adopt regulations for conducting enforcement proceedings pursuant to this section. These regulations shall include provisions for the service and the content of the notice of probable violation, response options, conduct of hearings, issuing of the final order, amended final order, and petitions for reconsideration and compromise of penalties, and shall be consistent with the procedures specified in Sections 190.207 to 190.215, inclusive, and Section 190.227 of Title 49 of the Code of Federal Regulations.

(b) If the State Fire Marshal determines, pursuant to the regulations adopted pursuant to subdivision (a), that a person has violated this chapter or any regulation adopted pursuant thereto, that person is subject to a civil penalty of not more than ten thousand dollars ($10,000) for each day that violation persists, except that the maximum civil penalty shall not exceed five hundred thousand dollars ($500,000) for any related series of violations.

(c) The amount of the penalty shall be assessed by the State Fire Marshal pursuant to the regulations adopted pursuant to subdivision (a). In determining the amount of the penalty, the State Fire Marshal shall consider the nature, circumstances, and gravity of the violation and, with respect to the person found to have committed the violation, the degree of culpability, any history of prior violations, the effect on ability to continue to do business, any good faith attempts to achieve compliance, ability to pay the penalty, and any other matters as justice may require.

(d) A civil penalty assessed under subdivision (b) may be recovered in an action brought by the Attorney General on behalf of the state. Prior to referring the penalty action to the Attorney General, the State Fire Marshal may accept an offer to compromise the amount of the assessed penalty pursuant to the regulations adopted pursuant to subdivision (a).

(e) The State Fire Marshal shall deposit all civil penalties assessed pursuant to this section in the Local Training Account in the California Hazardous Liquid Pipeline Safety Fund. The money in the Local Training Account is available, upon appropriation by the Legislature, to the State Fire Marshal, who shall use the money for providing hazardous liquid fire suppression training to local fire departments.

(Added by Stats.1988, c. 1222, § 16, eff. Sept. 30, 1988. Amended by Stats.1989, c. 1277, § 7.)

§ 51018.7. Punishment for chapter violations; sign or marker offenses

(a) Any person who willfully and knowingly violates any provision of this chapter or a regulation issued pursuant thereto shall, upon conviction, be subject, for each offense, to a fine of not more than twenty-five thousand dollars ($25,000), imprisonment for a term not to exceed five years, or both.

(b) Any person who willfully and knowingly defaces, damages, removes, or destroys any pipeline sign or right-of-way marker required by federal or state law or regulation shall, upon conviction, be subject, for each offense, to a fine of not more than five thousand dollars ($5,000), imprisonment for a term not to exceed one year, or both.

(Added by Stats.1988, c. 1222, § 17, eff. Sept. 30, 1988. Amended by Stats.1989, c. 1277, § 8.)

§ 51018.8. Orders for compliance

The State Fire Marshal may issue orders directing compliance with this chapter or any regulations adopted pursuant thereto. The State Fire Marshal shall specify in the order the particular action which is required of the person issued the order.

(Added by Stats.1988, c. 1222, § 18, eff. Sept. 30, 1988.)

§ 51019. Fees

The State Fire Marshal may assess and collect from every pipeline operator an annual fee for the purpose of carrying out this chapter. The State Fire Marshal may assess this fee for expenses which will be incurred during the following year. A pipeline operator shall pay this fee when billed by the State Fire Marshal. The State Fire Marshal may impose a delinquency fee of 10 percent of the annual fee if the pipeline operator does not pay the fee within 60 days after receipt of the bill, and, in addition, the pipeline operator shall pay interest on that portion of its annual fee not paid within 60 days at the rate of 15 percent per annum from the date of receipt of the bill until paid. The total amount of the fee collected

shall not exceed the actual e
State Fire Marshal * * * in
(Added by Stats.1988, c. 1222

1988 Legislation.
Former § 51019 was repeale
§ 18, eff. Sept. 30, 1988.

§ 51019.05. Annual fee as

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carrying out this chapter.
(Added by Stats.1986, c. 86

§ 51019.1. California has

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Local Training Account * *

(b) All fees collected pu
Operations Account. The
State Fire Marshal for the

* * *

(Added by Stats.1988, c. 1
c. 986, § 10; Stats.1991, c.

CALIFOR

Chapter 5.6, added
repealed by Stats.199

§§ 51020 to 51026. Repe

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1989, § 1, related to oil refine
preparedness.
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1990, c. 589 (A.B.2211), § 78.

Former § 51020 was rep
§ 22, eff. Sept. 30, 1988.

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by asterisks * * *

shall not exceed the actual expenses incurred, or the estimated expenses which will be incurred, by the State Fire Marshal * * * in carrying out this chapter. * * *

(Added by Stats.1988, c. 1222, § 20, eff. Sept. 30, 1988. Amended by Stats.1988, c. 996, § 9.)

Historical and Statutory Notes

1988 Legislation.

Former § 51019 was repealed by Stats.1988, c. 1222, § 19, eff. Sept. 30, 1988.

§ 51019.05. Annual fee assessments; interstate pipeline operators; delinquency fees

If the agreement specified in Section 51010.5 is entered into, the State Fire Marshal may assess and collect, from every operator of an interstate pipeline having a portion thereof located within this state, as described in the agreement, an annual fee for the purpose of carrying out this chapter. The State Fire Marshal may assess this fee for expenses which will be incurred during the following year. The pipeline operator shall pay this fee when billed by the State Fire Marshal.

The State Fire Marshal may impose a delinquency fee of 10 percent of the annual fee if the interstate pipeline operator does not pay the fee within 60 days after receipt of the bill, and, in addition, the interstate pipeline operator shall pay interest on that portion of its annual fee not paid within 60 days at the rate of 15 percent per annum from the date of receipt of the bill until paid.

The total amount of the fee collected pursuant to this section and Section 51019 shall not exceed the actual expenses incurred, or the estimated expenses which will be incurred, by the State Fire Marshal in carrying out this chapter.

(Added by Stats.1988, c. 863, § 3.)

§ 51019.1. California hazardous liquid pipeline safety fund; creation; deposit of fees

(a) There is hereby created the California Hazardous Liquid Pipeline Safety Fund, consisting of the Local Training Account * * * and the * * * Pipeline Operations Account.

(b) All fees collected pursuant to Sections 51019 and 51019.05 shall be deposited in the * * * Pipeline Operations Account. The money in the account is available, upon appropriation by the Legislature, to the State Fire Marshal for the purpose of carrying out this chapter * * *.

* * *

(Added by Stats.1988, c. 1222, § 21, eff. Sept. 30, 1988. Amended by Stats.1988, c. 863, § 4; Stats.1988, c. 996, § 10; Stats.1991, c. 395 (A.B.718), § 8.)

Chapter 5.6

CALIFORNIA OIL REFINERY AND CHEMICAL PLANT SAFETY PREPAREDNESS ACT OF 1991 [REPEALED]

Chapter 5.6, added by Stats.1991, c. 924 (A.B.100), § 1, consisting of §§ 51020 to 51026, was repealed by Stats.1991, c. 924 (A.B.100), § 1, operative Jan. 1, 1997.

§§ 51020 to 51026. Repealed by Stats.1991, c. 924 (A.B.100), § 1, operative Jan. 1, 1997

Historical and Statutory Notes

The repealed sections, added by Stats.1991, c. 924 (A.B. 100), § 1, related to oil refinery and chemical plant safety preparedness.

Section 51021 was amended, prior to repeal, by Stats. 1992, c. 699 (A.B.2211), § 73.

Section 51028.5 was amended, prior to repeal, by Stats. 1992, c. 65 (A.B.196), § 1.

Annotations Under Repealed Sections

SECTION 51020

Historical and Statutory Notes

Former § 51020 was repealed by Stats.1988, c. 1222, § 22, eff. Sept. 30, 1988.

Former § 51020, added by Stats.1988, c. 1222, § 1, related to disposition of fees for local agency expenses and was repealed by Stats.1988, c. 996, § 1.

WAC 480-93-020
Proximity considerations.

Gas facilities having a maximum operating pressure greater than five hundred psig shall not be operated within five hundred feet of the places described below without prior written authorization of the commission, unless a waiver previously approved by the commission continues in effect:

(1) A building intended for human occupancy which is in existence or under construction prior to the date authorization for construction is filed with the commission, and which is not owned and used by the petitioning gas company in its gas operations;
(2) Property which has been zoned as residential or commercial prior to the date authorization for construction is filed with the commission;
(3) A well-defined outside area, such as a playground, recreation area, outdoor theater, or other place of public assembly, which is occupied by twenty or more people, sixty days in any twelve-month period which is in existence or under construction prior to the date authorization for construction is filed with the commission; and
(4) A public highway, as defined in RCW 81.80.010(3).

In requesting prior written authorization of the commission, the petitioning gas company shall certify that it is not practical to select an alternative route which will avoid such locations and further certify that management has given due consideration to the possibility of the future development of the area and has designed its facilities accordingly. The petition shall include, upon request of the commission, an aerial photograph showing the exact location of the pipeline in reference to places listed above that are within five hundred feet of the pipeline right of way.

[Statutory Authority: RCW 80.01.040. 92-16-100 (Order R-375, Docket No. UG-911261), § 480-93-020, filed 8/5/92, effective 9/5/92; Order R-28, § 480-93-020, filed 7/15/71; Order R-5, § 480-93-020, filed 6/6/69, effective 10/9/69.]

WAC 480-93-030
Proscribed areas.

Gas facilities having a maximum operating pressure between two hundred fifty-one psig and four hundred ninety-nine psig shall not be operated within 100 feet of the places described below without prior written authorization of the commission, unless a waiver previously approved by the commission continues in effect:

(1) A building intended for human occupancy which is in existence or under construction prior to the date authorization for construction is filed with the commission, and which is not owned and used by the petitioning gas company in its gas operations; and
(2) A well-defined outside area, such as a playground, recreation area, outdoor theater, or other place of public assembly which is occupied by twenty or more people, sixty days in any twelve-month period, which is in existence or under construction prior to the date authorization for construction is filed with the commission.

The petition shall include, upon request of the commission, an aerial photograph showing the exact location of the pipeline in reference to the places listed above that are within one hundred feet of the pipeline right of way.

[Statutory Authority: RCW 80.01.040. 92-16-100 (Order R-375, Docket No. UG-911261), § 480-93-030, filed 8/5/92, effective 9/5/92; Order R-28, § 480-93-030, filed 7/15/71; Order R-5, § 480-93-030, filed 6/6/69, effective 10/9/69.

BUCCANEER PIPELINE PROJECT

Executive Summary

500 South Florida Ave.
Lakeland, Fla. 33801

The company

Based in Tulsa, OK., Williams is the largest-volume transporter of natural gas in the United States and one of the foremost builders of pipelines in the world. Our 27,000-mile natural gas pipeline network extends from the East to the West Coast and from Mexico to Canada, delivering roughly 16 percent of all the natural gas used in the United States.

Natural gas

Cleaner-burning natural gas is the fuel of choice for industrial and commercial users searching for ways to reduce air pollution and costs. Florida's commitment to being in compliance with the Clean Air Act means electric generators and industrial users that now rely on coal or oil to fuel their plants are looking to natural gas as their primary fuel source for new capacity. This could spare the state millions of tons of sulfur dioxide, carbon monoxide and fine particulate matter.

As one of the fastest growing states in the country, Florida has identified the need for an additional 10,000 megawatts of electric generating capacity by the year 2007. Florida residents have increasingly demanded the use of natural gas to help meet the state's power generation needs, because it is one of the cleanest and most economical energy sources.

The Buccaneer Pipeline Project

Williams will soon begin conducting preliminary surveys on public & private properties in several counties in Central Florida to determine the feasibility of constructing a natural gas pipeline to safely serve the state's growing natural gas needs. The surveying is a preliminary step in the process of bringing more inexpensive and environmentally safe natural gas to Florida consumers.

Williams is studying potential routes for the project that minimize the impact on property owners and the environment by maximizing placement adjacent to existing right-of-way and utility corridors. We are committed to building a pipeline that is good for Florida and its citizens. That means the pipeline will be safe for consumers, the community and the environment.

Williams will ask your cooperation during the surveying process. This process does not involve any construction and is relatively simple. Survey crews, usually consisting of four people, will survey a variety of potential pipeline routes. This involves using survey equipment to take certain geographical measurements. The survey process can take several hours on a normal tract of land. Surveyors are directed to exercise the utmost care and concern for your property during this process.

The land surveying is really the beginning of the project. Before a pipeline can be constructed, Williams must receive approval from the Federal Energy Regulatory Commission (FERC), the federal agency which regulates the construction of interstate natural gas pipelines. In addition, Williams must obtain various state and local permits and complete an environmental impact study (EIS). This entire process is expected to last more than a year and includes significant input from the public.

Our Commitment

Williams intends to work with communities and citizens to select a pipeline route that reflects the community's interests and needs and is in line with the technical and environmental requirements of supplying natural gas safely and economically to Florida.

The pipeline project exists to serve consumers in Florida. Therefore, Williams looks forward to partnering with communities throughout Florida to ensure that this project is the best it can be.

Even during the earliest stages of the project, Williams is dedicated to communicating fully with citizens to ensure that we understand the community's needs and interests with regard to the proposed pipeline. We will also answer all questions and be responsive to Florida's consumers throughout the entire process. We are available at any time to address your questions. Please call us at 1-888-214-8475 with any comments or suggestions and we will respond to you directly.

2/99

EXHIBIT 40D

BUCCANEER PIPELINE PROJECT

500 South Florida Ave.
Lakeland, Fla. 33801

About Williams

During the past 90 years, the Williams name has become synonymous with energy, innovation and trust. Based in Tulsa, OK., Williams is a $17.8 billion energy and communications corporation with operations in all 50 states. Williams has operated in Florida for more than a decade.

As the largest-volume transporter of natural gas in the United States, Williams has established itself as one of the foremost builders of natural gas pipelines in the world. Its 27,000-mile natural gas pipeline network extends from the East to the West Coast and from Mexico to Canada, delivering roughly 16 percent of all the natural gas used in the United States. This vast pipeline network includes more than 3,000 miles of pipeline located offshore in the Gulf of Mexico.

Florida's increasing demand for natural gas

Cleaner-burning natural gas is the fuel of choice for industrial and commercial users searching for ways to reduce air pollution and costs. Florida's commitment to being in compliance with the Clean Air Act means that electric generators and industrial users that now rely on coal or oil to fuel their plants are looking to natural gas as their primary fuel source for new capacity. This could spare the state millions of tons of sulfur dioxide, carbon monoxide and fine particulate matter.

As one of the fastest growing states in the country, Florida has identified the need for more than 10,000 megawatts of additional power generation capacity within the state by 2007. If fueled entirely by natural gas, this would require an additional 1.5 billion cubic feet of natural gas per day. Existing pipeline capacity cannot adequately satisfy that growing need.

Natural gas pipelines

Natural gas pipelines safely transport large volumes of gas over long distances. Today in the United States, there are more than 300,000 miles of onshore and offshore natural gas pipelines in operation. Natural gas is put into the pipeline at pipeline interconnects, wellheads, or processing plants near the gas fields. The gas moves through underground pipelines with the aid of compression to customers in the pipelines' market area. These customers include local distribution companies, which resell the gas to residential and business customers. They also include electric utilities that use the natural gas to generate electricity.

Natural gas supplies

The current capacity of the sole interstate pipeline serving peninsular Florida, Florida Gas Transmission, is approximately 1.5 billion cubic feet per day. In order for the State of Florida to grow residentially, industrially and commercially, additional natural gas must be transported into the state.

2/99

The Buccaneer Pipeline Project

Williams is currently conducting various studies to measure market interest and determine the feasibility of constructing a pipeline that would supply approximately 950 million cubic feet of natural gas to Florida.

The offshore portion of the pipeline would require approximately 400 miles of 36-inch diameter pipeline extending from a processing plant in Mobile County, AL, to the west coast of Florida just north of the Tampa area and then continue onshore in an easterly direction.

The diameter of the onshore pipeline will vary from 12-36 inches in diameter and will be buried with a minimum of three feet of ground cover. Williams anticipates that the project will require approximately 250 miles of onshore pipe.

In early 1999, Williams will conduct preliminary surveys on public and private properties to determine the feasibility of potential routes. Williams has identified 14 potential delivery points in Pasco, Polk, Osceola, Orange, Lake, Seminole, Volusia, Brevard and Bay counties, Florida.

The surveying process does not involve any construction and is relatively simple. Survey crews, usually consisting of four people, will survey a variety of potential pipeline routes. This involves using survey equipment to take certain geographical measurements. The survey crews are directed to exercise the utmost care and concern for property during the entire survey process.

Williams is studying potential routes for the project that minimize the impact on property owners and the environment by maximizing placement adjacent to existing right-of-way and utility corridors. If existing landscape forces a deviation from a corridor, Williams would work closely with local municipalities, environmental groups and citizens to find ways to minimize any adverse impacts.

In general, the width of the permanent easement needed to operate and maintain the pipeline would be 50 feet. Williams may also need to acquire an additional 35 feet of temporary right-of-way during the construction period only. These easements are purchased by Williams from the property owner.

An excellent safety record

Statistics gathered by the National Transportation Safety Board, a federal agency, show that natural gas pipelines are the safest mode of transportation for meeting America's energy needs. To ensure pipelines are safe, the United States Department of Transportation (DOT) imposes, and pipelines comply with, a broad range of pipeline design, materials, construction, testing, maintenance and inspection requirements. In addition, Williams complies with state DOTs and other agency requirements, if different from the federal requirements.

What does Williams do to ensure safety?

- Safety starts long before actual construction begins. At steel rolling mills where pipe is fabricated, pipeline representatives carefully inspect the pipe to ensure that it is of high quality and meets both federal and industry standards.
- Coating systems and other corrosion control techniques are used to prevent corrosion of the pipeline and facilities.

- During construction, pipeline representatives inspect the fabrication and construction of the pipeline. Welds linking the joints of the pipeline are 100 percent x-rayed to ensure their integrity.
- Once in the ground, and before being placed into service, the pipeline is pressure tested with water in excess of its maximum operating pressure, adhering to standards set by the United States Department of Transportation.
- Pipeline markers will alert the public of the pipeline's presence, identify pipeline rights-of-way and provide a telephone number to be used to contact pipeline personnel in an emergency.
- To help protect against third-party damage, regular inspections by motor vehicles and patrol aircraft keep a watchful eye on pipeline routes and adjacent areas.
- Pipeline maintenance crews stationed in Florida perform facility inspections at regular intervals to identify any construction in the vicinity of the pipeline and to maintain the pipelines and their rights-of-way.
- Pipelines undergo periodic maintenance inspections, including leak surveys, valve and safety device inspections and electronic inspections using devices known as a smart pigs to confirm the continuing integrity of the line.
- Williams representatives meet with local emergency response officials on pipeline operations and coordinate emergency response procedures in the unlikely event of an emergency.
- Finally, all of Williams' pipelines are monitored 24-hours a day from its Gas Control Centers in addition to local station offices.

Environmental responsibility

All members of the Buccaneer team are committed to protecting sensitive areas and the environment. This commitment extends through all aspects of the project. Williams will work with all agencies to fully comply with all laws and regulations designed to protect sensitive areas. Beyond that, we have our own standards and procedures that help ensure Williams professionals do their utmost to demonstrate care and respect for the possible effect of our actives on sensitive areas.

Williams will select a route that avoids sensitive areas wherever possible. This route will be based on detailed professional surveys and studies. Next, Williams is very careful during construction, choosing only qualified and experienced professional pipeline builders and training and supervising them closely. By doing this, Williams can minimize the impact of construction activities. Finally, after construction, Williams ensures that the site is thoroughly cleaned up and restored, to the best of our ability, to its original condition.

The regulatory process

Before Williams can receive permission to construct an interstate natural gas transmission pipeline, it must first file an application with the Federal Energy Regulatory Commission (FERC). Williams plans to file an application with the FERC in the late summer or early fall of 1999.

Congress charges the FERC with determining whether any proposed interstate pipeline project is in the public interest. The FERC approves the location and construction of interstate pipelines that move natural gas across state boundaries. These pipelines criss-cross the United States moving nearly a quarter of the nation's energy to markets in 48 states. They are vital to the economy.

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Friends of the Aquifer, Inc., to adopt rules necessary to establish safety standards and a safety regulatory program for intrastate and interstate natural gas pipelines and pipeline facilities located in Florida.

Docket No. 991754-GP
Filed January 13, 2000

_____/

RESPONSE IN OPPOSITION TO AMENDED PETITION TO INITIATE RULEMAKING

Intervener, Buccaneer Gas Pipeline Co., L.L.P. ("Buccaneer"), by and through its undersigned counsel, hereby respectfully responds in opposition to the AMENDED PETITION TO INITIATE RULEMAKING ("Amended Petition") filed in this matter on January 5, 2000, and states:

1. The Amended Petition should be denied primarily because it requests the Public Service Commission ("Commission") to adopt rules for which the Commission has no statutory authority. As a creature of statute, the Commission has only that rulemaking authority granted it by the Florida legislature. *Radio Telephone Communications, Inc. v. Southeastern Telephone Company,* 170 So.2d 577, 582 (Fla. 1965). As an agency subject to Chapter 120, Florida Statutes (1999) ("F.S."), the Commission may adopt "only rules that implement or interpret the specific powers and duties granted by the enabling statute." Section 120.536(1), F.S.

2. The Commission is authorized to adopt rules regulating certain aspects of the transmission of gas by pipeline under Section 368.03, F.S., This statute is specific as to the scope of the Commission's authority to adopt rules regulating natural gas pipelines, stating:

> This law authorizes the establishment of rules and regulations covering the design, fabrication, installation, inspection, testing and safety standards for installation, operation and maintenance of gas transmission and distribution systems, including gas pipelines, gas compressor stations, gas metering and regulating stations, gas mains and gas services up to the outlet of the customer's meter set assembly, gas storage equipment of the closed-pipe type fabricated or forged from pipe or fabricated from pipe and fittings.

3. The Commission has adopted Chapter 25-12, Florida Administrative Code ("F.A.C."), pursuant to the grant of rulemaking authority in section 368.03, F.S. Chapter 25-12, F.A.C., either expressly or by incorporation by reference of federal regulations, addresses each and every topic upon which the Commission is authorized by statute to adopt rules.

4. The fact that federal law authorizes the Federal Department of Transportation to enter into agreements with, or delegate its authority to, states to implement federal pipeline regulatory authority does not empower the Commission to adopt any rule regarding such agreements or delegation. The Commission is a creature of state law and has only that authority granted to it by its authorizing state legislation.

5. The fact that other states have chosen to enter into agreements with or accept delegation from the Federal Department of Transportation to implement federal pipeline regulatory authority does not empower the Commission to do so. The Commission is a creature of Florida law and has only that authority granted to it by its authorizing Florida legislation.

6. The Commission has no specific statutory to adopt a rule accepting delegation of federal authority to regulate intrastate pipelines and pipeline facilities as requested by the Amended Petition.

7. The Commission has no specific statutory authority to adopt a rule accepting authority or agreeing to implement the Federal Hazardous Liquid Pipeline Safety Act with respect to

intrastate and interstate pipeline facilities located within the State of Florida as requested by the Amended Petition.

8. The Amended Petition recites Buccaneer's proposed natural gas pipeline project as demonstrating "the urgency with which new regulations are required." Amended Petition, Paragraph 10, at 11. Without attempting to correct the outdated and now extremely inaccurate description of Buccaneer's project contained in the Amended Petition, the record of this proceeding should at least reflect the actual level of regulation, including environmental regulation, to which the Buccaneer project is subject. The primary federal regulatory authority over the Buccaneer project is that of the Federal Energy Regulatory Authority ("FERC"). The FERC process is composed of two major components: a need determination and an environmental analysis. The environmental analysis undertaken by FERC is supported by a full Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act (42 U.S.C. 4321 et seq.). Based upon this EIS, it is the FERC (not Buccaneer) which ultimately decides if and where the Buccaneer pipeline will be built. Also at the federal level, the U.S. Army Corps of Engineers ("Corps") is a cooperating agency with FERC on the EIS, and the Corps will ultimately have to issue a permit for the project under Section 404 of the Clean Water Act (dredge and fill impacts) and Section 10 of the River and Harbor Act (effects on navigation). At the state level, the Buccaneer project must be authorized by an Environmental Resource Permit ("ERP") issued by the Department of Environmental Protection ("DEP") pursuant to Part IV of Chapter 373, F.S., and permission from the Board of Trustees of the Internal Improvement Trust Fund (Governor and Cabinet) to cross state owned lands pursuant to Chapter 253, F.S. The ERP permit involves the full array of environmental issues, including but not limited to siting, water quality protection,

surface water and storm water management, wetland impacts and mitigation, threatened and endangered species protection, and archaeological and historic site protection. The ERP also includes a determination as to whether the Buccaneer project is consistent with Florida's federally approved Coastal Zone Management Plan. The approval to cross state lands involves a public interest test applicable to the entire project (not just the actual crossings), and Buccaneer will have to show that the project is clearly in the public interest. In addition, at the local level, Buccaneer will have to comply with the local government comprehensive plans and land development regulations of each and every local government jurisdiction through which the pipeline will pass. It is misleading to suggest that the Buccaneer project will somehow avoid regulation if the Commission does not grant the Amended Petition.

WHEREFORE, Buccaneer Gas Pipeline Co., L.L.P., respectfully requests that the AMENDED PETITION TO INITIATE RULEMAKING filed in this matter by Friends of the Aquifer, Inc., on January 5, 2000, be denied and this docket be closed.

Respectfully submitted this 13th day of January, 2000 in Tallahassee, Florida.

Hopping Green Sams & Smith, P.A.

BY: _____

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO AMENDED PETITION TO INITIATE RULEMAKING was **hand delivered** this 13th day of January, 2000, to the following:

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Attorney

FJAG

ATTACHMENT 3

STATE OF FLORIDA

PUBLIC SERVICE COMMISSION

FEB 25 2000

IN RE FRIENDS OF THE AQUIFER, INC.,)
)
Petitioner.) **Docket No. 991754-GP**
)

BRIEF IN SUPPORT OF AMENDED PETITION TO INITIATE RULEMAKING

STATEMENT OF FACTS

The Petitioner, Friends of the Aquifer, Inc., has filed an Amended Petition to Initiate Rulemaking in which the Petitioner requests that the Public Service Commission ("PSC") adopt the rules necessary to establish safety and environmental standards and regulatory programs for intrastate and interstate natural gas pipelines and pipeline facilities located within the State of Florida. Specifically, the Petitioner asks that the PSC adopt the rules necessary to accept the federal delegation, granted in the Federal Hazardous Liquid Pipeline Safety Act ("FHLPSA"), 49 U.S.C.A. § 60101 et seq. (West 1997 & Supp. 1999), to regulate intrastate and interstate pipelines and pipeline facilities located in Florida or, in the alternative, to enter into an agreement with the Secretary of the United States Department of Transportation to enforce federal hazardous liquid pipeline safety standards.

Buccaneer Gas Pipeline Company, L.L.P. ("Buccaneer") intervened in this matter on the basis of its interest in a proposed natural gas pipeline project to be constructed and operated in the State of Florida. Buccaneer then filed a Response in Opposition to the Amended Petition to Initiate Rulemaking, in which Buccaneer argues that the Amended Petition should be denied. Buccaneer's argument is three-fold. First, it asserts that the PSC has no statutory authority to adopt the rules sought by the Petitioner. Second, Buccaneer claims that the PSC has already issued regulations that address "each and every topic upon which the Commission is authorized by statute to adopt rules." (Response in Opposition to Amended Petition to Initiate Rulemaking ¶ 3). Third, Buccaneer argues that its proposed pipeline project is already subject to a plethora of federal and state regulations and, by implication, that the regulations sought by the Petitioner are unnecessary. The Petitioner will prove herein that, as it has shown in its Amended Petition to Initiate Rulemaking, the PSC

has statutory authority to prescribe the rules sought in this proceeding, that existing regulations do not address the risks of harm that would be controlled by the regulations required by the FHLPSA, and that the PSC should not abstain from adopting the rules sought by the Petitioner merely because the proposed pipeline project is subject to other federal and state regulations that do not address the risks of harm recognized by the FHLPSA.

ARGUMENT

I. THE PSC HAS STATUTORY AUTHORITY TO ADOPT THE RULES SOUGHT BY THE PETITIONER.

While it is axiomatic that a regulatory agency may not prescribe rules that are in excess of the legislature's statutory delegation of authority to the agency, an agency's implementation of its specific powers and duties may be effected through the agency's implied powers. *See Peoples Gas System, Inc. v. City Gas Co.*, 167 So. 2d 577 (Fla. 3d DCA 1964), *aff'd*, 182 So. 2d 429 (Fla. 1965). An express grant of power to an agency is deemed to include such powers as are necessary or reasonably incident to the powers expressly granted. *Hall v. Career Service Commission*, 478 So. 2d 1111 (Fla. 1st DCA 1985). Such implied powers include the power to make rules. When the legislature authorizes an agency of the state to enforce a statute enacted under the police power, the legislature is not required to prescribe specific rules of action or to cover every conceivable situation that may confront the agency. *Astral Liquors, Inc. v. Florida Department of Business Regulation*, 463 So. 2d 1130 (Fla. 1985); *Board of Dentistry v. Payne*, 687 So. 2d 866 (Fla. 1st DCA 1997). Rulemaking authority may be implied to the extent necessary to implement properly a statute governing the agency's statutory duties and responsibilities. *Payne*, 687 So. 2d at 868;

Cortes v. State, Board of Regents, 655 So. 2d 132 (Fla. 1st DCA 1995) (while executive-branch agencies may not usurp legislative prerogatives, rulemaking authority may be implied to extent necessary to implement a statute properly; an administrative agency must have some discretion when a regulatory statute is in need of construction in its implementation). Not only does an administrative agency have such implied rulemaking authority, but an agency is accorded wide discretion in the exercise of lawful rulemaking authority that is fairly implied and that is consistent with the statutory duties of the agency. *Florida Commission on Human Relations v. Human Development Center*, 413 So. 2d 1251 (Fla. 1st DCA 1982).

The PSC is an administrative agency that partakes of these implied rulemaking powers that courts have recognized. The powers and duties of the PSC are those that are conferred expressly or that are implied by statute. *E.g.*, *State, Department of Transportation v. Mayo*, 354 So. 2d 359 (Fla. 1977); *City Gas Co. v. Peoples Gas System, Inc.*, 182 So. 2d 429 (Fla. 1965) (Public Utility Commission's powers include both those expressly given and those given by clear and necessary implication from the provisions of the enabling statute; neither category of power is possessed of greater dignity or effect than the other). Moreover, the powers of the PSC to regulate the operation of utilities may, in proper instances, be exercised on the initiative of the Commission. *See Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335 (Fla. 1966). The PSC itself has the authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and to issue orders accordingly. *Florida Public Service Commission v. Bryson*, 569 So. 2d 1253 (Fla. 1990). In *Gulf Coast Electric Cooperative, Inc. v. Johnson*, 727 So. 2d 259 (Fla. 1999), the Florida Supreme Court held

that the ultimate measuring stick to guide the PSC in its jurisdictional decisions is the public interest.

Applying these principles to the proceedings at hand, it is clear that the PSC has statutory authority to adopt the rules set forth in the Amended Petition to Initiate Rulemaking. While Buccaneer argues that the PSC's issuance of the proposed rules would be impermissible, the Florida Administrative Procedure Act makes clear that such action is appropriate and within the jurisdiction of the PSC. Fla. Stat. Ann. § 120.52(8) (West Supp. 2000) provides that an "invalid exercise of delegated legislative authority" consists of "action which goes beyond the powers, functions, and duties delegated by the Legislature." This section goes on to state that a proposed or existing rule is an invalid exercise of delegated legislative authority if the agency has exceeded its grant of rulemaking authority or the rule enlarges, modifies, or contravenes the specific provisions of law implemented. *Id.* § 120.52(8)(b), (c). Finally, § 120.52(8) provides

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

Section 120.58 does not paralyze an administrative agency or render the agency useless by making it impossible for the agency to act if an enabling statute does not contain language expressly granting authority to make rules on a precise subject. As noted by the

court in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998),[1] it is unlikely that the legislature intended "to establish a rulemaking standard based on the level of detail in the enabling statute, because such a standard would be unworkable." *Id.* at 79. The court reasoned that "a standard based on the precision and detail of an enabling statute would produce endless litigation regarding the sufficiency of the delegated power." *Id.* at 80. It noted that a standard based upon the sufficiency of detail in the enabling statute "would be difficult to define and even more difficult to apply," given that specificity cannot be neatly divided into identifiable degrees. *Id.* The court correctly observed that an argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the legislature attempted to be in describing the powers delegated to the agency. *Id.*

For these reasons, the case-law principles discussed above, holding that an agency possesses implied rulemaking powers sufficient to enable it to implement its governing statute properly, have not been abrogated by the adoption of § 120.52(8). It is unreasonable to conclude that the legislature intended to sweep away decades of agency practice under enabling statutes that the legislature has not made more detailed in order to allow an agency to satisfy any purported requirements for exactitude under § 120.52(8). Accordingly, while an agency has the power to adopt only rules that implement the specific powers and duties

[1]While § 120.52(8) has been amended since the *St. Johns* decision, the reasoning of that decision remains valid. The purpose of an administrative agency is to free the legislature from having to anticipate precisely every situation that might conceivably arise under the enabling statute, when the intent of that statute is clearly to regulate a certain range of activities.

granted by the enabling statute, an agency still may accomplish this result within its implied authority to apply its enabling statute properly.

The legislature has given the PSC the specific duty to regulate natural gas pipelines in the manner sought by the Petitioner in the present case. Fla. Stat. Ann. § 368.03 authorizes the PSC to establish standards for the installation, operation, and maintenance of natural gas transmission and distribution systems, including gas pipelines. Fla. Stat. Ann. § 368.03 states that it is intended that the requirements of the rules and regulations promulgated by the PSC be adequate for safety under conditions normally encountered in the gas industry. With respect to the scope of the PSC's rulemaking powers, the legislature stated that "[t]his law, and the rules and regulations adopted pursuant to it, are declared to be in the public interest and are deemed to be an exercise of the police power of the state for the protection of the public welfare and *shall be liberally construed for the accomplishment of that purpose.*" *Id.* (emphasis added). Fla. Stat. Ann. § 368.05 confers jurisdiction upon the PSC over all persons, corporations, partnerships, associations, public agencies, municipalities, and other legal entities engaged in the operation of gas transmission or distribution facilities with respect to rules and regulations governing standards established by the PSC pursuant to Fla. Stat. Ann. § 368.03. The PSC is also statutorily authorized to determine the need for natural gas transmission pipelines in the State of Florida. Fla. Stat. Ann. § 403.9422 (West 1998); *see Florida Gas Transmission Co. v. Public Service Commission*, 635 So. 2d 941 (Fla. 1994).

In light of the foregoing statutory authority, the PSC is authorized to adopt rules accepting federal delegation to regulate, pursuant to the FHLPSA, intrastate and interstate natural gas pipelines located in Florida or to enter into an agreement with the federal

government to enforce federal standards under the FHLPSA. Such regulation is within the specific, comprehensive grant of power to the PSC in Fla. Stat. Ann. § 368.03. The PSC possesses express and implied power to implement the specific duties set forth in that statute. For these reasons, the PSC has the authority to prescribe the rules sought in the Amended Petition to Initiate Rulemaking.

II. EXISTING REGULATIONS DO NOT ADDRESS THE RISKS OF HARM COVERED BY THE FEDERAL ACT.

In addition to claiming that the PSC does not have the authority to issue the rules sought in the Amended Petition to Initiate Rulemaking, Buccaneer argues by implication that existing regulations are sufficient to control the risks of harm presented by natural gas pipelines like Buccaneer's proposed project. However, while Fla. Admin. Code Ann. r. 25-12.001 et seq. sets forth some regulations relevant to natural gas pipelines and incorporates by reference the federal regulations in 49 C.F.R. Parts 191, 192, and 199 (1998), neither the state rules nor the incorporated federal regulations address any environmental risks presented by natural gas pipelines in Florida. Such risks are specifically covered in the FHLPSA. *See* 49 U.S.C.A. § 60109(a), (b). As the Petitioner has discussed in its Amended Petition to Initiate Rulemaking, other states with regulatory systems similar to that of Florida have recognized that the FHLPSA addresses concerns different from those in the state regulations and have accepted the delegation granted by the federal Act to regulate hazardous liquid pipelines within their borders. While Buccaneer correctly argues that the fact that other states have adopted regulations similar to those sought by the Petitioner does not empower

the PSC to do so, what Buccaneer neglects to mention is that the PSC's enabling statute itself provides for such regulation, as discussed above.

In arguing that the PSC should deny the rulemaking sought by the Petitioner, Buccaneer lists a number of regulations that allegedly already affect its proposed natural gas pipeline project. (Response in Opposition to Amended Petition to Initiate Rulemaking ¶ 8). Such an argument is not responsive to the issue in this matter. The question is not whether there are some regulations currently applicable to the project. If this were the test, there would never be any concurrent regulation of an industry by different federal or state agencies whose statutory responsibilities are distinct yet may, at times, coincide. Experience shows that such multiple regulation is the rule, rather than the exception. The Petitioner is not attempting to suggest that the Buccaneer project or any other natural gas pipeline will avoid regulation if the PSC does not grant the Amended Petition. Rather, the true issue is whether the PSC, which is authorized to adopt the rules sought by the Petitioner in discharging its statutory duty to protect the public welfare by regulating the installation, operation, and maintenance of natural gas pipelines, should decide not to accept the delegation to regulate under the FHLPSA merely because some other regulations currently exist. While Buccaneer argues that existing federal and state regulations will undertake an environmental analysis of its proposed project, Buccaneer does not claim that such an analysis will address the *identical matters* encompassed by 49 U.S.C.A. § 60109. Despite the existence of the federal environmental regulations to which Buccaneer refers, Congress deemed the environmental risks associated with natural gas pipelines sufficiently serious to have also enacted 49 U.S.C.A. § 60109. For these reasons, the fact that a natural gas pipeline project like

Buccaneer's is already subject to federal and state regulation is irrelevant in determining whether the PSC should regulate natural gas pipelines under the FHLPSA.

CONCLUSION

The PSC possesses statutory authority to adopt the rules set forth in the Amended Petition to Initiate Rulemaking. The PSC's enabling statute expressly grants the PSC authority to regulate natural gas pipelines in the public interest and in the manner required by the FHLPSA. Moreover, the PSC has implied authority to implement its enabling statute properly. Because the type of natural-gas pipeline regulations required by the FHLPSA fall within the PSC's statutory grant of rulemaking authority, the PSC has the power to adopt the proposed rules set forth in the Amended Petition to Initiate Rulemaking.

The existence of some regulations already applicable to natural gas pipelines does not preclude the PSC from discharging its statutory duty to regulate natural gas pipelines in the public interest and for the public welfare. The FHLPSA authorizes the regulation of natural gas pipelines with respect to environmental concerns that are distinct from the subject of other existing regulations.

For all the foregoing reasons, the Petitioner, Friends of the Aquifer, Inc., respectfully requests that the Public Service Commission grant its Amended Petition to Initiate Rulemaking.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Support of the Amended Petition to Initiate Rulemaking has been provided via regular U.S. Mail on this 24th day of February, 2000, to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Friends of the Aquifer, Inc., to adopt rules necessary to establish safety standards and a safety regulatory program for intrastate and interstate natural gas pipelines and pipeline facilities located in Florida.	)	Docket No. 991754-GP Filed: March 7, 2000

BUCANEER'S REPLY TO PETITIONER'S BRIEF IN SUPPORT OF AMENDED PETITION TO INITIATE RULEMAKING

Intervenor, Buccaneer Gas Pipeline Co., L.L.C. ("Buccaneer"), by and through its undersigned counsel, hereby files its reply to the Brief in Support of Amended Petition to Initiate Rulemaking ("Brief") filed in this docket by the Friends of the Aquifer ("Petitioner") on February 24, 2000.[1] This reply will first summarize the two rules proposed by Petitioner and will then respond to the two points addressed in the Brief.

THE PROPOSED RULES

The Amended Petition to Initiate Rulemaking ("Amended Petition") asks the Commission to adopt two rules which Petitioner asserts are "necessary to establish safety *and environmental* standards and regulatory programs for intrastate and interstate natural gas pipelines and pipeline facilities located within the State of Florida." (Amended Petition, page 1, emphasis added).

The first proposed rule would have the Commission "accept[] the delegation" by the United States Department of Transportation ("USDOT") to regulate Florida natural gas pipelines

[1] It is unusual for a party to file a brief of this type after the staff has filed its recommendation. Bucaneer understands the Commission's desire to be fully informed in this matter, however, and therefore offers this response.

and pipeline facilities under 49 U.S.C.A. §60105 [sic] and would require the Commission to proceed to propose rules necessary to ensure the safe construction and operation of such facilities. (Amended Petition, ¶12).

The second proposed rule would have the Commission "accept[] the authority granted to it" pursuant to 49 U.S.C.A. §60106 to enter into an agreement with the USDOT to implement the provisions of the Federal Hazardous Liquid Pipeline Act. (Amended Petition, ¶14).

In each case, the proposed rule states that acceptance of such delegation or authority "is necessary for the protection of persons *and the environment* from the risks of harm presented by the construction and operation of *natural gas pipelines* in Florida." (Amended Petition, ¶¶ 12, 14). The rules as proposed by Petitioner therefore appear to apply only to natural gas pipelines, not to hazardous liquid pipelines.

Putting aside momentarily the question of the Commission's statutory authority to adopt the proposed rules, neither rule serves any useful purpose. Under the regulatory scheme established by 49 U.S.C.A. §60101 *et. seq.*, if a state agency has and is exercising authority to regulate natural gas pipelines and/or hazardous liquid pipelines in a manner consistent with the federal law, then the state agency simply certifies that fact to the USDOT under §60105 and the USDOT defers to the state regulation. If no such certification is received with respect to natural gas pipelines and/or hazardous liquid pipelines, then USDOT either enters into an agreement with a state agency delegating authority to that agency under §60106 or, in the absence of an agreement, USDOT continues to enforce the federal standards.

As to natural gas pipelines, the Commission has and exercises the authority to regulate such pipelines in a manner consistent with federal law and has been so certifying to USDOT on an annual basis since 1971. (Staff Recommendation, page 4 and Attachment 3). As to hazardous

liquid pipelines, the Commission has no state law authority.[2] Thus neither rule serves any purpose not already served by the Commission's annual certification to the USDOT with respect to natural gas pipelines.

RESPONSE TO PETITIONER'S ARGUMENT

To the extent that the proposed rules could be read as requiring the Commission to exercise authority over the environmental aspects of natural gas pipelines, or over any aspect of hazardous liquid pipelines, they exceed the Commission's statutory rulemaking authority.

I. THE PSC LACKS EXPRESS STATUTORY AUTHORITY TO ADOPT RULES RELATING TO ENVIRONMENTAL ASPECTS OF NATURAL GAS PIPELINES OR TO ANY ASPECTS OF HAZARDOUS LIQUID PIPELINES, AND THERE IS NO IMPLIED POWER TO ADOPT SUCH RULES

The Commission Staff has filed recommendations with the Commission on both Petitioner's original petition to initiate rulemaking and on its Amended Petition. In each case, the Staff concluded that the Commission (i) does not have the statutory authority to adopt the rules insofar as they relate to hazardous liquid pipelines, and (ii) to the extent the Commission has jurisdiction to regulate natural gas pipelines, is it already exercising that jurisdiction and has adopted comprehensive rules. Staff's conclusion is correct and should be adopted by the Commission in the form of a denial of the Amended Petition for Rulemaking. As shown below, there is nothing in Petitioner's most recent Brief that demonstrates any flaw in the Staff's prior legal analysis.

[2] Petitioner's proposed rules do not appear to be intended to address hazardous liquid pipelines in any event.

The argument in Part I of Petitioner's Brief is that the Commission has the implied power under Sections 368.03 and 368.05 to adopt the proposed rules, and that nothing in the recent amendments to Chapter 120 detracts from that implied authority. That analysis is simply wrong.

A. No Express Authority

When the provisions of Part I of Chapter 368 are read as a whole, the inescapable conclusion is that the chapter gives the Commission rulemaking authority only over natural gas pipelines and only for purpose of establishing and enforcing safety standards. It does not contain express authority to establish environmental standards for natural gas pipelines, or to adopt rules relating to any aspect of hazardous liquid pipelines.

In this regard:

- Section 368.01 designates the law as the "Gas Safety Law of 1967."
- Section 368.021 limits the laws applicability to gas transmission or distribution pipelines and facilities, and makes no reference to hazardous liquid pipelines.
- Section 368.03 states the detailed purpose of the statute and requires the Commission's rules and regulations to be "adequate for safety" under conditions normally encountered in the gas industry.
- Section 368.05 gives the Commission authority to enforce the "safety standards" established by the Commission pursuant to the law and to require reporting to determine whether "the safety standards prescribed by it" are being met.
- Section 368.061 establishes penalties for violation of the statute and rules and authorizes certain court proceedings to enforce the statute and rules.

Notably absent from Chapter 368 is any mention of environmental standards and any mention of hazardous liquid pipelines. The absence of environmental standards is not surprising, since the authority to adopt environmental standards is typically granted to agencies other than the Commission.

B. No Implied Authority

With the exception of the case of *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So.2d 72 (Fla. 1st DCA, 1998) ("*Consolidated-Tomoka*"), all of the cases cited by Petitioner predate the 1996 revision of the Administrative Procedure Act ("APA"). They are thus of little use in determining the scope of the Commission's rulemaking authority under the current statute. Moreover, even *Consolidated-Tomoka* predates the 1999 amendments to Section 120.52(8), which rejected -- at least prospectively -- the "class of powers and duties analysis" relied on in that decision. As discussed below, the Commission lacks authority to adopt the proposed rules, either under the 1996 APA as interpreted by *Consolidated-Tomoka*, or under the current APA as amended in 1999.

1. 1996 APA Revisions and *Consolidated-Tomoka*

In the 1996 revisions to the APA the Legislature added so-called "flush left" language to Section 120.52(8), Florida Statutes, which states:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary or capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

In analyzing this revision in *Consolidated-Tomoka*, the court held that the clear and unambiguous portions of this statute meant that:

- A grant of rulemaking authority is necessary, but not alone sufficient to support a rule. The agency must also show that its rule implements a specific statute. *Id.* at 78.

- A rule is not a valid exercise of delegated legislative authority merely because it is based on an expression of legislative intent or policy. This provision is consistent with the requirement that a rule must implement a specific statute. *Id.* at 78.
- A rule is no longer valid merely because it is "reasonably related" to the purpose of the enabling legislation. In this regard, the 1996 revisions were intended to overrule prior judicial decisions. *Id.* at 78-79.

The *Consolidated-Tomoka* court then went on to determine the type of delegation that is sufficient to support a rule by construing the language that "[a]n agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute." (Emphasis added). In doing so, the court focused on the phrase "particular powers and duties." The court held that the Legislature did not intend to require a statute to contain a detailed description of the agencies' powers and duties as a prerequisite to rulemaking. Instead, the court held that the term "particular" meant that the powers and duties must be identifiable as powers and duties falling within a class of powers and duties identified in the enabling statute. *Id.* at 79-80. The court therefore announced the standard that:

> A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented.
>
> *Consolidated-Tomoka* at 80.

To the extent they address either the environmental impacts of natural gas pipelines, or any aspects of hazardous liquid pipelines, Petitioner's proposed rules fail the *Consolidated-Tomoka* test. The Legislature has given the Commission no powers and duties with respect to hazardous liquid pipelines. Any rule dealing with such pipelines is therefore beyond the class of powers and duties identified in Chapter 368. As to natural gas pipelines, the Legislature has given

the Commission powers and duties only with respect to gas pipeline safety regulation. Any rule dealing with the environmental aspects of such pipelines is also beyond the class of powers and duties identified in Chapter 368. In sum, the proposed rules do not purport to implement any class of powers and duties delegated to the Commission by the Legislature.

2. 1999 Amendments to Section 120.52(8) and Impact on Standard Established by *Consolidated-Tomoka*

In 1999, the Legislature enacted Chapter 99-379, Laws of Florida, which amended Section 120.52(8) as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or; interpret ~~or make~~ specific ~~the particular~~ powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary or capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific ~~the particular~~ powers and duties conferred by the same statute.
>
> Chapter 99-379, Section 2.

The intent of the 1999 Legislature in adopting this amendment to the "flush left" language in Section 120.52(8) was announced in Section 1 of Chapter 99-379.

> It is the intent of the Legislature that modifications in sections 2 and 3 of this act which apply to rulemaking are intended to clarify the limited authority of agencies to adopt rules in accordance with Chapter 96-159, Laws of Florida, and are intended to reject the class of powers and duties analysis. However, it is not the intent of the Legislature to reverse the result of any specific judicial decision.

Although no court has yet construed the effect of this 1999 Amendment, at least one Administrative Law Judge has construed the statute in the context of a rule challenge proceeding.

Save the Manatee Club, Inc. v. Southwest Florida Water Management District, ER FALR '00:036 (DOAH, December 9, 1999).[3] That order interpreted the 1999 amendment to mean that the "class of powers and duties analysis" conducted by the First District Court of Appeal in *Consolidated-Tomoka* may not be applied to cases arising after the effective date of such amendments. *Id.* at ¶90. The ALJ construed the Legislature's stated intent not to overrule any specific court decision to mean that the *Consolidated-Tomoka* decision remains undisturbed as to its application prior to the effective date of the 1999 amendments.[4] *Id.* In any event, the 1999 amendment means that even if a court might previously have construed Chapter 368 broadly to grant the Commission a class of powers and duties with respect to the regulation of natural gas pipelines, the only rulemaking authority the Commission has today is to implement or interpret the "specific powers and duties" granted by Chapter 368. And nothing in that chapter give the Commission *specific* powers and duties related to environmental issues or to hazardous liquid pipelines.

II. THE PSC'S EXISTING RULES ADDRESS ALL RISKS OF HARM THAT THE COMMISSION IS AUTHORIZED BY STATE LAW TO ADDRESS

Petitioner's argues in Part II of its Brief that additional rulemaking is needed because the Commission's existing rules do not address any environmental risks presented by natural gas pipelines in Florida. Petitioner suggests that consideration of such risks by state authorities is contemplated by 49 U.S.C. §60109. Petitioner's argument must be rejected for two reasons.

---

[3] A copy of this order is attached for ease of reference.

[4] Another reasonable interpretation is that the changes to Section 120.52(8) may apply retroactively, but are not intended to invalidate the specific rules upheld in *Consolidated-Tomoka*.

First, §60109 does not give either USDOT or any state agency the authority to regulate environmental matters. That section requires USDOT to establish criteria (a) for operators of gas pipelines to identify each gas pipeline facility located in a high-density population area, and (b) for operators of hazardous liquid pipelines to identify pipeline facilities located in high-density population areas and certain unusually sensitive environmental areas. There is **no** reference to environmentally sensitive areas with regard to natural gas pipelines. Further, this section does not give USDOT (or any state agency) environmental regulatory authority over either gas or hazardous liquid pipelines. It merely requires the lines' location in high-density population areas or (for hazardous liquid pipelines) in environmentally sensitive areas, to be reported on an inventory record available to USDOT. §§60109(b), 60102(e). Thus, contrary to Petitioner's claim, there is no federal environmental authority to be exercised, even if the Commission had rulemaking authority under state law.

Second, as discussed in Part I above, the Legislature has delegated the Commission specific duties related to gas pipeline safety and the Commission has rulemaking authority only to implement those specific duties. That obligation has been fully discharged by the adoption of Chapter 25-12, F.A.C, which comprehensively covers all aspects of natural gas pipeline safety regulation. There simply is no authority to establish rules based on environmental considerations, even if such considerations were contemplated by federal law.

CONCLUSION

To the extent the proposed rules relate to environmental aspects of natural gas pipelines, they are beyond the Commission's rulemaking authority, which is limited to natural gas pipeline safety issues. Further, the federal laws cited by Petitioner do not contemplate either USDOT or a state agency exercising any authority over the environmental impacts of such pipelines.

Since the Commission has no statutory duties with regard to hazardous liquids pipelines, the rules are beyond the Commission's authority to the extent they purport to regulate hazardous liquids pipelines.

RESPECTFULLY SUBMITTED this 7th day of March, 2000.

HOPPING GREEN SAMS & SMITH, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered this 7th day of March, 2000, to the following:

Christiana Moore
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Florida Public Service Commission
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Tallahassee, FL 32399

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Tallahassee, FL 32301

_____
Attorney

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE THE MANATEE CLUB, INC.,

Petitioner,

vs.

ER '00:036
Case No. 99-3885RX

SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,

Respondent,

and

SOUTH SHORES PROPERTIES PARTNERS, LTD.,

Intervenor.

_____/

FINAL ORDER

This case was heard by David M. Maloney, Administrative Law Judge of the Division of Administrative Hearings, on October 14, 1999, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether Save the Manatee Club has standing in this proceeding? Whether the exemptions in paragraphs (3), (5) and (6) of Rule 40D-4.051, Florida Administrative Code, (the Exemptions) are "invalid exercises of delegated legislative authority" as defined in paragraphs (b) and (c) of Section 120.52(8), Florida Statutes? Whether the Exemptions violate the prohibitions and restrictions on agency rulemaking contained in the last four sentences of Section 120.52(8), Florida Statutes?

PRELIMINARY STATEMENT

On September 17, 1999, Save the Manatee Club (the Club or Petitioner) filed a petition with the Division of Administrative Hearings (DOAH). Entitled "Petition for Formal Administrative Proceeding and for an Administrative Determination of the Invalidity of the Exemptions in Florida Administrative Code Rule 40D-4.051(3), (5) and (6)", the petition asks for two types of administrative hearings: the first to challenge agency action, the second to challenge provisions in rule.

The first challenge is brought under the authority of Sections 120.569 and 120.57, Florida Statutes. The Club hopes to convince the Southwest Florida Water Management District (SWFWMD or the District) to deny South Shores Property Partners, Ltd., (South Shores or the Developer) the benefit of exemptions from permit requirements and ultimately a conceptual permit. South Shores seeks the benefit of the Exemptions in order to conduct activities the Club postulates will harm the manatee and its habitat near and in Tampa Bay.

Through the second challenge, the Club, under the authority of Section 120.56(3), Florida Statutes, seeks an administrative determination of the invalidity of existing rules, namely paragraphs (3), (5) and (6) of Rule 40D-4.051, Florida Administrative Code, (the Rule). These paragraphs provide exemptions the District has decided to afford the Developer. This proceeding concerns only the latter challenge: the challenge to the rule provisions.

A second copy of the Petition was filed contemporaneously with the District. The District, in turn, referred the petition to DOAH where it has been assigned Case no. 99-4155 (currently pending before the undersigned.) As a result of the filing and the referral, Case no. 99-4155 concerns only the challenge to the decisions of the District that the Exemptions apply to South Shores and that South Shores should, therefore, receive a conceptual permit.

On September 23, 1999, the undersigned was designated as the administrative law judge to conduct the proceedings in this case. On the next day, September 24, a notice of hearing was issued setting the final hearing for October 14, 1999. (Within the next few weeks, the undersigned was also designated as the administrative law judge to conduct the proceedings in Case no. 99-4155. That case has been set for final hearing in Brooksville, commencing December 16, 1999.)

In the meantime, South Shores petitioned to intervene in this case. The District filed a motion in limine and South Shores filed a motion to strike. One of the aims of the two motions was to exclude from this proceeding any consideration of the challenge to the agency action taken by the District, and evidence relating thereto.

Following a status conference, South Shores' petition was granted subject to proof of standing to intervene at hearing. By the time of the status conference, all were aware that the single petition filed by the Club had initiated two proceedings, one at DOAH, the other through the District's referral to DOAH. The parties agreed at the conference that the two cases (albeit initiated by the same petition) should not be consolidated. The agreement rendered unnecessary any need for a ruling on South Shores motion to strike and the District's motion in limine: there is no dispute that this proceeding concerns only the challenge to the Rule's Exemptions pursuant to Section 120.56(3), Florida Statute.

On October 11, 1999, Petitioner filed a motion to amend its petition. The motion sought to amend the allegations relating to the Club's standing and to delete subparagraph (j) of paragraph 10

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in the petition which related to some of the arguments for invalidating the Exemptions. The motion was granted at the commencement of the hearing on October 14. The result of the amendment by the deletion is that the Petitioner has limited its claim to the invalidity of the Exemptions. In the aftermath of the amendment, the claim is based on the definition of "invalid exercise of delegated legislative authority" contained in paragraphs (b) and (c) and the prohibitions and restrictions on agency rulemaking authority in the last four sentences of Section 120.52(8), Florida Statutes.

After its motion to amend was granted, Petitioner presented its case. It offered Exhibit nos. 1-15, all of which were admitted into evidence. It requested and received official recognition of documents marked as OR 1, 2 and 4-8. (A document marked as OR 3 was offered but withdrawn before a ruling on its recognition was made.) The testimony of Patti Thompson, staff biologist with the Club was presented. Ms. Thompson was accepted as an expert in manatee biology, particularly as it relates to Tampa Bay.

South Shores presented the testimony of Glen Cross. The District presented no evidence. No exhibits, other than those introduced by Petitioner, were offered.

The transcript of the final hearing was filed on October 22, 1999. On October 29, 1999, Petitioner filed a notice that it stipulated to the standing of South Shores to intervene in the proceeding. All parties filed proposed orders by October 29, 1999, the date established at hearing for timely filing.

FINDINGS OF FACT

a. The parties

1. Petitioner, Save the Manatee Club, Inc., is a not-for-profit corporation dedicated to protecting the manatee.

2. Respondent, The Southwest Florida Water Management District, is one of five water management districts in the State of Florida. A public corporation created pursuant to Chapter 61-691, Laws of Florida, the District's geographic boundaries encompass a number of counties or some part of them including the three counties on the shores of Tampa Bay: Hillsborough, Pinellas and Manatee. See Section 373.069(2)(d), Florida Statutes. Within this boundary, the District is generally charged with the protection of water resources and with the management and storage of surface waters of the State pursuant to Part IV, Section 373.403 et seq., Florida Statutes.

3. Intervenor, South Shores Properties Partners, Ltd., is a limited partnership composed of a subsidiary of Tampa Electric Company (TECO) and another business organization, Shimberg Cross Company, referred to by its President Glen Cross as "actually SCSS" (Tr. 133), apparently an acronym for Shimberg Cross Company. Mr. Cross' company is the general partner in the South Shores partnership. South Shores was formed in anticipation of closing on a contract entered by Shimberg Cross to purchase a parcel of real estate in Hillsborough County. The closing proceeded in January of 1998. On January 23, 1998, eight days or so before the closing, South Shores was formed as "a limited partnership organized under the laws of the State of Florida." (Petitioner's Exhibit no. 15). It succeeded to the contract rights of Shimberg Cross and then, pursuant to the closing, became the owner of the real estate subject to the contract. South Shores hopes to sell the property to Atlantic Gulf Communities, an organization that will actually develop it. If the arrangement with Atlantic Gulf Communities is not consummated, South Shores will look for another developer or develop the property itself. No matter what party (if any) is the actual developer, South Shores, as the present owner, now seeks the benefit of the Exemptions in support of a District-issued conceptual permit for development of the parcel in Hillsborough County (the Parcel).

b. The Parcel and Its Proposed Development

4. The Parcel is 720 acres in southwestern Hillsborough County. South Shores proposes to use it for a multi-phase, mixed-use project. The development project is denominated "Apollo Beach aka (sic) Bay Side" (Petitioner's Exhibit 13) on the draft of the conceptual permit attached to the District's Notice of Proposed Agency Action. Atlantic Gulf Communities calls it "Harbor Bay". (Petitioner's Exhibits 3 and 4). (It will be referred to in this order as Apollo Beach/Bay Side).

5. If all goes as planned by South Shores, the Parcel's developer (whether South Shores, Atlantic Gulf Communities, or some other party) will be able to provide the residential portion of Apollo Beach/Bay Side with direct access by boat to Tampa Bay through an existing canal system on the Parcel. For now access to the bay is blocked by an earthen berm or "plug." With the plug in place, boat access to the bay from the canals can only be achieved by means of a boat lift.

6. A lagoon is also part of South Shores' development plans for Apollo Beach/Bayside. Not yet excavated, the lagoon will allow residents to harbor boats close to their residences. If the lagoon is dug, a boat lift (different from the one necessary to allow boats to cross the plug if left in place) will be constructed to give the boats access to the canal system. With access to the canal system established, once the plug is removed, the boats will have unrestricted access to Tampa Bay.

7. In the "Abstract" section of the conceptual permit proposed for issuance by the District, the project was described as follows:

> Apollo Beach (a.k.a. Bay Side) is a proposed multi-phase, mixed use development on approximately 720.0 acres in ... Southwestern Hillsborough County. The project will include single-family and multi-family residential areas and commercial sites. The property is in close proximity to Tampa Bay, West of U.S. Highway 41 and immediately south of the existing Apollo Beach development. The site is presently undeveloped but does contain an existing manmade canal system that is tidally connected to Tampa Bay.
>
> The Applicant has demonstrated that the proposed project has an Environmental Resource Permit exemption pursuant to Chapters 40D-4.051(3)(5) and (6), F.A.C. and will only require Standard General Permits for Minor Surface Water Management Systems for the future construction in accordance with Chapter 40D-4.041(4), F.A.C. Because of this exemption, this Conceptual Permit will only review the storm water quality aspects of the project in accordance with 40D-301(2) and will not address storm water quantity issues or impacts to wetland/fish and wildlife habitats.
>
> The project will include the realignment of existing Lyssley Road and the construction of a roadway system to serve the proposed residential and commercial areas. The project will also include the excavation of a "fresh water Lagoon" approximately 136 acres in size. Most of the proposed single-family residential lots will be constructed on the "Lagoon" or existing canal system. Surface water runoff from the upland portions of the project will be treated in 25 proposed

ponds or isolated wetlands prior to discharge to the "Lagoon" or existing canal system.

(Petitioner's Exhibit no. 13.)

8. The ultimate effects to manatees of the proposed development project, if completed, were described by Ms. Thompson, the Club's witness:

> A typical project such as this one will introduce a good number of powerboats into the system, in this case, Tampa Bay. And manatees are impacted by powerboats either through propeller injuries or through collision with the hull of a fast-moving boat and the results are either death or in some cases sublethal injuries that may have other consequences such as inability to reproduce, et cetera.
>
> ... [T]he very same boats can affect manatee habitat by prop scarring, boats going over sea grass beds and destroying the grasses. They also, in shallow water, kick up ... turbidity which can affect light attenuation reaching the sea grass beds. And then there are the water quality issues which have secondary impacts to the sea grass beds...

(Tr. 96). The Exemptions preliminarily afforded South Shore by the District will allow the removal of the plug in the canal system. Because removal of the plug will facilitate access to Tampa Bay by power boats harbored in the lagoon, it is the issue about the development of the Parcel that most concerns the Club in its efforts to protect manatees in Tampa Bay and elsewhere.

c. Standing of Save the Manatee Club

(i). The Manatee

9. The manatee is the "Florida State marine mammal." Section 370.12(2)(b), Florida Statutes.

10. Designated an endangered species under both federal and state law, 50 CFR s. 17.11 and Rule 39-27.003, Florida Administrative Code, the manatee is protected by the federal Endangered Species Act and by the federal Marine Mammal Protection Act. In Florida, the manatee enjoys, too, the protection of the Florida Endangered Species Act and the Florida Manatee Sanctuary Act.

11. The State of Florida has been declared to be "a refuge and sanctuary for the manatee." Id.

(ii). The Club's Purpose and Activities

12. The Club's primary purpose is to protect the manatee and its habitat through public awareness, research support and advocacy.

13. Long active in efforts to protect the manatee, the Club has achieved special status in manatee protection in Florida. In 1996, it was the recipient of a resolution by the Florida Legislature's House of Representative recognizing its endeavors on behalf of the manatee. The Club has been designated a member of the Manatee Technical Advisory Council provided by the Florida Manatee Sanctuary Act. See sub-sections (2)(p) and (4)(a) of section 370.12(2)(p) and (4)(a), Florida Statutes. The Department of Environmental Protection annually solicits recommendations from the Club regarding the use of Save the Manatee Trust Fund monies.

14. In furtherance of its efforts, the Club has frequently participated before the Division of Administrative Hearings in administrative litigation involving manatees and manatee habitat on behalf of itself and its members.

(iii). The Club's Membership

15. The Club has approximately 40,000 members. The number of individual persons who are members of the Club, however, is far in excess of this number because many members are groups that receive membership at discounted fees. For example, a family may be one member or, as is quite common, an entire elementary school classroom may be one member.

16. One-quarter of the Club's membership resides in Florida. Approximately 2,200 of the members are on the west coast of Florida with 439 in Hillsborough County, 584 in Pinellas and 165 in Manatee. The total number of members is therefore about 1,188 in the three counties whose shores are washed by Tampa Bay.

(iv). Tampa Bay

17. Tampa Bay is "prime essential manatee habitat." (Tr. 65). At least two factors make this so: the Bay's sea grass beds (manatee feeding areas) and warm water sources, particularly in winter, three of which are "power plant effluence." (Tr. 77).

18. Not surprisingly, therefore, the Club has funded long-term research on the manatee in Tampa Bay. It has "provided about ten years of financial support for aerial surveys to count manatees in Tampa Bay and determine their distribution and the health of the sea grass beds..." (Tr. 75), a research project which finished last year. This research has contributed to other manatee research in the Bay leading the Club's witness at hearing to conclude, "[t]here's no other place in the state of Florida that has as long a term, as comprehensive a [manatee] database as Tampa Bay." (Tr. 76).

19. Other activities in Tampa Bay conducted by the Club include the placement of manatee awareness signs. And the Club's staff biologist sits on the Tampa Bay Manatee Awareness Coalition established by the Tampa Bay National Estuary Program. In sum, the quality of manatee habitat in Tampa Bay is enough to make it especially important to the Club. But, its importance to the Club takes on added significance because it is the site of one of only three adoption programs the Club sponsors in Florida.

(v). The Tampa Bay Adoption Program

20. The Tampa Bay Adopt-a-Manatee Program was established in April of 1999.

21. The six manatees subject to the Tampa Bay Manatee Adoption Program (as of October 7, 1999) have been adopted by 1,229 members, 284 of which have been schools. (Petitioner's Exhibit 9). Those adopting receive a photo of the manatee, a biography, a scar pattern sheet, and a map showing their manatees' favorite habitat areas along the west coast of Florida.

22. Of the six "Tampa Bay Adoption" program manatees, five have been seen in Tampa Bay and one south of Tampa Bay in the Marco Island area. Of the five seen in the bay, four "winter at the warm water discharge area of Tampa Electric Company's power plant" (Petitioner's Exhibit No. 5, Tr. 67) where they can be observed by members of the Club and the Tampa Bay adoption program as well as by the public.

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(vi). The TECO Power Plant

23. The TECO power plant area is the major warm water refuge for manatees known to frequent Tampa Bay, particularly during the winter. The waters near the plant have been observed to be the host of more than 100 manatees at one time, following the movement of cold fronts through the area.

24. The plant has a manatee-viewing center, one of the two principal places in the state for viewing manatees in the wild. The Club's membership handbook gives detailed information about how to see manatees at the TECO viewing center. During the winter months, the Club frequently directs its members to the TECO viewing center. Precisely how many individuals, either as members of the Club through a group membership or as members, themselves, actually have viewed manatees at the TECO viewing center or elsewhere in Tampa Bay was not established. Nor was any competent estimate made of how many might visit the TECO viewing center in the future.

25. The viewing center and the power plant are in the vicinity of Apollo Beach/Bay Side, the development project South Shores seeks to have approved for an Environmental Resource Permit (the ERP).

(vii). The SWFWMD ERP Program

26. Chapter 373, Florida Statutes, governs water resources in the state and sets out the powers and duties of the water management districts, including their permitting powers. Part IV of the chapter covers the management and storage of surface waters.

27. According to SWFWMD rules, "'Environmental Resource Permit' means a conceptual, individual, or general permit for a surface water management system issued pursuant to Part IV, Chapter 373, Florida Statutes." Rule 40D-4.021, Florida Administrative Code.

28. The permit issued to South Shores in this case through the application of the challenged Exemptions, is a conceptual Environmental Resource Permit. See Petitioner's Exhibit no. 13 and Rule 40D-4.021(2), Florida Administrative Code.

29. The conceptual permit preliminarily issued South Shores is one that was reviewed by the Club's staff, just as it reviews many permit applications for potential effects to manatees. Because of use of the Exemptions as proposed by the District to South Shores, however, any review the Club conducted to assure that the permit met all general permitting criteria was of no use. Much of those criteria were not applied by the District to the application.

30. If the Exemptions were not available to South Shores, the District would have to employ ERP permitting criteria to the surface water management activities associated with the development project, including removal of the plug, lagoon construction, and boat lift installation. The Exemptions, therefore, keep the Club from participating in what otherwise would be the process for the District's administrative decision on the application of those criteria. In sum, the Exemptions preempt the Club's participation in the state mechanism provided by ERP permitting criteria for assessing, inter alia, threats to the manatee and its habitat from harms associated with the proposed development project.

31. The District recognized this effect of the permit in the draft of the permit. The draft states: "Because of this Exemption, this Conceptual Permit will ... not address ... impacts to ... wildlife habitat." (Petitioner's Exhibit no. 13). The Exemptions, therefore, prevent the Club from carrying out functions useful to protection of manatee habitat, that is, participation in the District's application of wildlife habitat protection criteria. The non-application by the District of permit criteria related to wildlife habitat protection and the Club's inability to assure itself that the criteria are correctly applied poses the danger that manatee habitat will be lost, diminished or damaged. If the Club is ultimately proved right in its assertion that the manatee and its habitat will be damaged by the South Shores development without application of permitting criteria related to wildlife habitat, then the approved application increases the threat that Club members will encounter greater difficulty in observing, studying and enjoying manatees in the wild and in Tampa Bay in particular.

d. Standing of South Shores to Intervene

32. The District has no opposition to South Shores' intervention. As for the Club's position with regard to South Shores intervention, the Club stipulated to South Shores' standing to intervene in a notice filed with its proposed order.

33. South Shores benefits, moreover, from the application of the Exemptions to its proposed project. In light of not having to show compliance with permitting criteria otherwise applicable, South Shores will escape some permitting costs and therefore, enjoys economic benefit. Furthermore, by allowing South Shores to avoid the requirements of compliance with ERP permitting criteria, the Exemptions facilitate fulfillment of the obligation of South Shores to obtain a permit to develop.

e. The District's Rule-making Authority

34. The District governing board has been granted general authority by the Legislature to adopt rules to implement the provisions of Chapter 373, Florida Statutes, the Florida Water Resources Act of 1972:

> The governing board of the district is authorized to adopt rules ... to implement the provisions of law conferring powers or duties upon it.

Section 373.113, Florida Statutes. The Legislature has framed this authority in relationship to the District's power to administer the Chapter and its Part IV:

> In administering the provisions of this chapter the governing board has authority to adopt rules ... to implement provisions of law conferring powers or duties upon it.

Section 373.113, Florida Statutes.

35. In another provision in Chapter 373, the district has been given rule-making authority that exceeds the authority to implement specific provisions granted typically to most administrative agencies in Florida. This authority is broad indeed. Tied to water use in general, it is bound only by unspecified conditions as warranted:

> ... governing boards, ... may:
>
> (a) Adopt rules ... affecting the use of water, as conditions warrant, ...

Section 373.171, Florida Statutes.

f. The Exemptions; Specific Authority and Laws Implemented

36. The Exemptions are as follows:

40D-4.051 Exemptions. The following activities are exempt from [ERP] permitting under this chapter:

* * *

(3) Any project, work or activity which has received all governmental approvals necessary to begin construction and is under construction prior to October 1, 1984.

(4) Any project, work or activity which received a surface water management permit from the District prior to October 1, 1984.

* * *

(6) Any phased or long term buildout project, including a development of regional impact, planned unit development, development with a master plan or master site plan, or similar project, which has received local or regional approval prior to October 1, 1984, if:

(a) The approval process requires a specific site plan and provides for a master drainage plan approved prior to the issuance of a building permit, and

(b) The Developer has notified the District of its intention to rely upon this exemption prior to April 1, 1985.

Projects exempt under this subsection shall continue to be subject to the District's surface water management rules in effect prior to October 1, 1984.

37. As specific authority, the Rule containing the Exemptions references 373.044, 373.113, 373.149, 373.171 and 373.414(9), Florida Statutes. For "Law Implemented", the Rule lists Sections 373.406, 373.413 and 373.414(9), Florida Statutes. Section 373.414(9) is cited by the Rule both as specific authority and as one of the laws implemented.

38. The first of the statutory provisions cited by the Rule as a law implemented is Section 373.406, Florida Statutes. It reads:

373.406 Exemptions.-

The following exemptions shall apply:

(1) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any natural person to capture, discharge, and use water for purposes permitted by law.

(2) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

(3) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to be applicable to construction, operation, or maintenance of any agricultural closed system. However, part II of this chapter shall be applicable as to the taking and discharging of water for filling, replenishing, and maintaining the water level in any such agricultural closed system. This subsection shall not be construed to eliminate the necessity to meet generally accepted engineering practices for construction, operation, and maintenance of dams, dikes, or levees.

(4) All rights and restrictions set forth in this section shall be enforced by the governing board or the Department of Environmental Protection or its successor agency, and nothing contained herein shall be construed to establish a basis for a cause of action for private litigants.

(5) The department or the governing board may by rule establish general permits for stormwater management systems which have, either singularly or cumulatively, minimal environmental impact. The department or the governing board also may establish by rule exemptions or general permits that implement interagency agreements entered into pursuant to s. 373.046, s. 378.202, s. 378.205, or s. 378.402.

(6) Any district or the department may exempt from regulation under this part those activities that the district or department determines will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district. The district and the department are authorized to determine, on a case-by-case basis, whether a specific activity comes within this exemption. Requests to qualify for this exemption shall be submitted in writing to the district or department, and such activities shall not be commenced without a written determination from the district or department confirming that the activity qualifies for the exemption.

(7) Nothing in this part, or in any rule or order adopted under this part, may be construed to require a permit for mining activities for which an operator receives a life-of-the-mine permit under s. 378.901.

(8) Certified aquaculture activities which apply appropriate best management practices adopted pursuant to s. 597.004 are exempt from this part.

For the most part, this section sets out general classes of exemptions. And it allows the District to consider whether an activity comes within an exemption on a "case-by-case" basis. See Section 373.406(6), Florida Statutes. But, none of these "exemptions" appear to have anything to do with the grandfather protections provided by the Exemptions at issue in this proceeding. See paragraphs 93-96, below.

39. Section 373.413, Florida Statutes, in pertinent part, reads:

(1) Except for the exemptions set forth herein, the governing board or the department may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable

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> rules promulgated thereto and will not be harmful to the water resources of the district. The department or the governing board may delineate areas within the district wherein permits may be required.

Other than to make reference in subsection (1) to the existence of *exemptions under* Part IV of Chapter 373: "Except for the exemptions set forth herein ...", Section 373.413 does not deal at all with exemptions. Certainly, it does not make reference with any specificity to the subject matter of the Exemptions at issue in *this proceeding.*

40. Cited both as "specific authority" and "law implemented" is paragraph (9) of Section 373.414, Florida Statutes. Unlike Sections 373.406 and 373.413, it has a connection to the Exemptions at issue in this proceeding as is seen from perusal of the underscored language, below:

> (9) The department and the governing boards, on or *before July 1, 1994, shall adopt rules to incorporate* the provision of this section, relying primarily on the existing rules of the department and the water management districts, into the rules governing the management and storage of surface waters. *Such rules shall* seek to achieve a statewide, coordinated and consistent permitting approach to activities regulated under this part. Variations in permitting criteria in the rules of *individual water management districts or the department* shall only be provided to address differing physical or natural characteristics. Such rules adopted pursuant to this subsection shall include the special criteria adopted *pursuant to s. 403.061(29) and may* include the special criteria adopted pursuant to s. 403.061(35). Such rules shall include a provision requiring that a notice of intent to deny or a permit denial based upon this section shall contain an explanation of the reasons for such denial and an explanation, in general terms, of what changes, if any, are necessary to address such reasons for denial. Such rules may establish exemptions and general permits, if such exemptions and general permits do not allow significant adverse impacts to occur individually or cumulatively...

(emphasis supplied.)

g. History of the Exemptions

41. The Exemptions have been adopted twice and amended several times. One of the amendments and the second adoption followed omnibus legislation in the environmental permitting arena: the amendment in the wake of the passage of the Warren S. Henderson Wetlands Protection Act of 1984, and the second adoption in the aftermath of the Florida Environmental Reorganization Act of 1993.

(i). Amendment after the Henderson Act

42. The Warren S. Henderson Wetlands Protection Act of *1984, (the "Henderson Act", later codified as Part VII of Chapter* 403, Florida Statutes) was enacted through Chapter 84-79, Laws of Florida. Approved by the Governor on June 1, 1984 and filed in the Office of the Secretary of State on the same day, (see Laws of Florida, 1984, General Acts, Vol.1, Part One, p. 224) the Act had an effective date of October 1, 1984.

43. The Henderson Act does not amend any provision of Part IV of Chapter 373, Florida Statutes, the part of the Water Resources Act which delineates water management district authority over the program for permitting related to the management and storage of surface waters ("MSSW"). Nonetheless, between the adoption of the Henderson Act and its effective date, the District amended and adopted rules in Chapters 40D-4 and 40D-40 of the Florida Administrative Code because of the Act's passage. Rule 40D-4.011 set out the policy for the amendments and adoptions:

> (2) The rules in this chapter implement the comprehensive surface water management permit system contemplated in part IV of Chapter 373, Florida Statutes. As a result of the passage of Chapter 84-79, Laws of Florida, the Warren G. Henderson Wetlands Protection Act of 1984, the District has adopted the rules in this Chapter and Chapter 40D-40 to ensure continued protection of the water resources of the District including wetlands and other natural resources.

(Exhibit OR 4. See the page containing paragraph (2) of Rule 40D-4.011 in the exhibit.)[1]

44. Exhibit OR 4, a document officially recognized during this proceeding, is denominated "SWFWMD's Rule Amendment No. 116." The exhibit contains a letter on SWFWMD letterhead, signed by Dianne M. Lee for "J. Edward Curren, Attorney - Regulation" dated September 5, 1984. Under cover of the letter is a rule package filed by the District with the Secretary of State on September 11, 1984. Included in the package is the newly *amended* Rule 40D-4.051. The amended 40D-4.051 contains subparagraphs (3), (5) and (6), the Exemptions challenged in this proceeding. They are worded precisely as they remain worded today.

45. *Consistent with the policy expressed in* Rule 40D-4.011, Florida Administrative Code as filed in September of 1984, the effective date of the amendment to the Rule containing the Exemptions was the effective date of the Henderson Act: October *1, 1984.*

46. The Exemptions contained in the amendment filed in September of 1984 are "grandfather provisions." The first two are designed to protect certain projects, work or activities from the requirements of *the Henderson Act if they had governmental* approvals on October 1, 1984. The third is designed to protect from the Act "phased or long term buildout project[s]" that meet certain requirements, among them receipt of governmental approvals by *October 1, 1984.*

47. At the time of the 1984 amendments, the Rule cited to Sections 373.044, 373.113, 373.149 and 373.171 for "Specific Authority," that is, the statutory source for the district's authority to make *rules. For "Law Implemented" the Rule cited to Section* 373.406, Florida Statutes. At that time, Section 373.406 contained only four subsections. These four are worded substantially the same as the first four subsections of the section today. Although *Section 373.406 was the only law implemented* by the Rule in 1984, the section is neither mentioned in nor part of the Henderson Act. The section, itself, does not make mention of the Henderson Act or of protection from it based on government approvals *obtained by October 1, 1984. Section* 373.406, Florida Statutes, in its form both immediately before and after the Henderson Act provided exemptions that appear to have nothing to do with the Exemptions challenged in this proceeding. The only connection *between Section* 373.406, Florida Statutes, in 1984 and the Exemptions at issue in this proceeding when amended into the Rule in 1984 appears to be the use of the term "exemptions." The

exemptions set out in the Section 373.406, Florida Statutes, as it existed in 1984, are not related to grandfather protection from the effects the Henderson Act had on the District's permitting considerations.

48. Following the amendment to the Rule containing the Exemptions, the Rule was amended further. It was amended on October 1, 1986, March 1, 1988, and January 24, 1990. None of these amendments appear to have affected the Exemptions under consideration in this proceeding. The Rule became the subject of rule promulgation by the District again, however, as a result of a second omnibus act of the Legislature in the environmental permitting arena, the Florida Environmental Reorganization Act of 1993.

(ii). The Reorganization Act of 1993

49. Nine years after the passage of the Henderson Act, the Legislature enacted the Florida Environmental Reorganization Act of 1993 (the "Reorganization Act"). Passed as Chapter 93-213, Laws of Florida, the Session Law declares its underlying policy:

> Declaration of Policy.—
>
> (1) The protection, preservation, and restoration of air, water, and other natural resources of this state are vital to the social and economic well-being and the quality of life of the citizens of this state and visitors to this state.
>
> (2) It is the policy of the Legislature:
>
> (a) To develop a consistent state policy for the protection and management of the environment and natural resources.
>
> (b) To provide efficient governmental services to the public.
>
> (c) To protect the functions of entire ecological systems through enhanced co-ordination of public land acquisition, regulatory, and planning programs.
>
> (d) To maintain and enhance the powers, duties, and responsibilities of the environmental agencies of the state in the most efficient and effective manner.
>
> (e) To streamline governmental services, providing for delivery of such services to the public in a timely, cost-efficient manner.

Section 2., Ch. 93-213, Laws of Florida. The Reorganization Act carried out this policy in a number of ways. Among these, it merged the Departments of Environmental Regulation (DER) and Natural Resources into the Department of Environmental Protection. In so doing and at the same time, it incorporated DER's dredge and fill permitting program instituted by the Henderson Act into the programs of the water management districts for the Management and Storage of Surface Waters (MSSW). The permitting program that resulted from the consolidation of DER's dredge and fill permitting program with the District's MSSW permitting program is what has been referred to in this order as the Environmental Resource Permitting or ERP program.

50. With regard to rules under the new ERP program, the Reorganization Act amended Section 373.414, Florida Statutes. Two sentences in subsection (9) of the amended section bear repeating:

> The department and the governing boards [of the water management districts], on or before July 1, [1994, shall] adopt rules to incorporate the provisions of this section, relying primarily on the existing rules of the department and the water management districts, into the rules governing the management and storage of surface waters.
>
> * * *
>
> Such rules may establish exemptions ... if such exemptions ... do not allow significant adverse impacts to occur individually or cumulatively....

51. As discussed earlier in this order, the Henderson Act did not directly create exemptions in the District's MSSW permitting program. Nonetheless, the District through the Exemptions of Rule 40D-4.051, Florida Administrative Code, provided "grandfather" protections in the wake of the Act effective October 1, 1984. Whereas grandfather concerns were raised in front of the District after the Henderson Act, grandfather concerns and concerns about other situation that should be entitled to exemptions were raised to the Legislature during the advent of the Reorganization Act. These concerns were addressed in the Florida Environmental Reorganization Act, itself. The Act provided specific exemptions that were self-executing. Included were ones providing grandfather protection for certain activities approved under Chapter 403, Florida Statutes, (DER's dredge and fill program) from imposition of new ERP permitting criteria expected to be promulgated in the wake of the Reorganization Act. The are contained in subsections (11) through (16) of Section 373.414, Florida Statutes. None of these exemptions make reference to the Exemptions at issue in this case. Of these provisions, only one addresses activities subject to rules adopted pursuant to Part IV of Chapter 373 prior to the anticipated ERP permitting criteria:

> An application under this part for dredging and filling or other activity, which is submitted and complete prior to the effective date of [the anticipated ERP rules] shall be reviewed under the rules adopted pursuant to this part [including the Exemptions in Rule 40D-4.051] and part VIII of chapter 403 in existence prior to the effective date of the [anticipated ERP rules] and shall be acted upon by the agency which received the application, unless the applicant elects to have such activities reviewed under the [anticipated ERP rules].

Chapter 93-213, Section 30, p. 2149 of Laws of Florida, 1993, General Acts, Vol. 1, Part Two, now Section 373.414(14), Florida Statutes.[2]

h. Rule Activity in 1995

52. In observance of the mandate in the first section of Section 373.414(9), Florida Statutes, the District undertook adoption of rules "to incorporate the provisions of [Section 373.414] ... into the rules governing the management and storage of surface waters." These rules were the ERP rules anticipated by the Reorganization Act. They included the rules necessary for the District to administer under its ERP program its newfound authority over much of the dredge and fill permitting program

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formerly administered by DER and now consolidated with its permitting authority in its MSSW rules.

53. Among the rules passed under the authority of the Reorganization Act's Section 373.414(9) is Rule 40D-4.051, the Rule containing the Exemptions subject to this proceeding. Filed with the Secretary of State on September 13, 1995, the adoption package for the new readopted states the following, in pertinent part:

> 40D-4.051 Exemptions
>
> The following activities are exempt from permitting under this chapter [Individual ERPs]:
>
> (1) - (7) - No change.

(Exhibit OR 6, p. 14). The result of this adoption is that the Exemptions became part of the District's ERP Rules. They now apply to both the MSSW authority under Part IV, Chapter 373, Florida Statutes, which existed prior to the Reorganization Act, and, in a consolidated fashion, the District's authority conferred by the Reorganization Act to regulate certain dredge and fill activity formerly regulated by DER.

CONCLUSIONS OF LAW

Jurisdiction

54. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Section 120.56(3), Florida Statutes.

Standing

55. The standing of South Shores has not been contested by any party. In fact, Petitioner has stipulated to South Shores standing to intervene. In the presentation of its case, South Shores demonstrated that it receives economic benefit from the Exemptions. The Club, moreover, demonstrated that the Exemptions make the permitting process easier for South Shores.

56. Standing for intervenors in rule challenge proceedings brought under Section 120.56, Florida Statutes, is governed by language in paragraph (e) of subsection (1) of that section:

> Other substantially affected person may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings.

South Shores is a "substantially affected person" in this case and therefore has standing to intervene.

57. The standing requirements for intervenors is similar to the standing requirement petitioners must meet in a proceeding of this kind: "A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule." Section 120.56(3), Florida Statutes.

58. Unlike South Shores, however, as an association, the Club must meet the standing requirements for trade or professional association announced in Florida Home Builders Association v. Department of Labor and Employment Security, 412 So.2d 351 (Fla. 1982). This is true even though the Club is not a trade or professional association. The standing requirements of Florida Home Builders were applied to a non-profit environmental organization in Friends of the Everglades v. Board of Trustees of the Internal Improvement Trust Fund, 595 So.2d 186, (Fla. 1st DCA 1992):

> "To meet the requirements of standing under the [Administrative Procedure Act], an association must demonstrate that a substantial number of its members would have standing. See Florida Home Builders Association v. Department of Labor and Employment Security, [citation omitted].

Friends of the Everglades, above, at 188.

59. The test of standing of Florida Home Builders that an association must meet in order to seek an administrative determination of the invalidity of an existing rule is three pronged:

> [First], an association must demonstrate that a substantial number of its members, although not necessarily the majority are "substantially affected. [Second], the subject matter of the rule must be within the association's general scope of interest and activity, and [third] the relief requested must be of the type appropriate for a[n] association to receive on behalf of its members.

Florida Home Builders Association, above, at 353, 354.

60. Save the Manatee Club has demonstrated in this proceeding that it meets the tri-partite test of Florida Home Builders Association, as explained in paragraphs 62 to 64, below.

61. The Club argues that a significant number of its members are substantially affected by the Exemptions. The argument's base is that the Exemptions pave the way for the removal of the plug in the canal system and ultimately for the introduction of a significant number of power boats into the manatee feeding grounds south of Tampa Bay and the bay, itself. The Exemptions, therefore, in the Club's view, threaten the ability of those Club members who observe and study the manatee as well as conduct programs like the Tampa Bay adoption program.

62. The project, however, through the benefit of the Exemptions, may affect more than some part of the Club's membership. Although the District cannot be satisfied for sure that the manatee is protected until ERP permitting criteria are applied to the South Shores project, by paving the way for the introduction of power boats into Tampa Bay and important manatee habitat, without conducting such a review of the permitting criteria, the Exemptions pose a threat to the manatee. If the manatee and its habitat are threatened by an administrative rule to the point of significant impacts then not just some part of the Club but all of the Club's members are substantially affected by the rule. After all, the Club's purpose is to protect the manatee. The threat to the manatee posed by the Exemptions is significant. The Exemptions will facilitate the introduction of a consequential number of power boats into prime manatee habitat without consideration of permitting criteria designed to protect that habitat.[3] Since Exemptions threaten the manatee in a significant way, the Club is substantially affected by the Exemptions. The Club meets the first test of Florida Home Builders' Association.

63. The subject matter of the rule is within the Club's "general scope of interest and activity." The Club examines permit applications. It follows decisions of the District. And, when it finds it necessary, it participates in the decision-making process through administrative litigation over individual decisions, all in carrying out its interest in protecting the manatee. The Club meets the second test.

64. The relief requested, invalidation of the Exemptions, is appropriate relief for the Club to receive on behalf of its members because it will assist the Club in ensuring the manatee is provided the protection that ERP permitting criteria would provide but for the application of the Exemptions. The Club meets the third test.

65. Save the Manatee Club, Inc., has standing to bring this proceeding.

Burden and Standard of Proof

66. In contrast to Section 120.56(3), Florida Statutes, the provision governing challenges to proposed rules passed by the Legislature in the 1996 revision to the APA requires the petitioner to "go forward." Section 120.56(2), Florida Statutes. It then places on the agency the "burden to prove by a preponderance of the evidence that the proposed rule is not [invalid]." Section 120.56(2)(a), Florida Statutes. Section 120.56(3), Florida Statutes, governing challenges to existing rules, however, is silent as to which party carries the burden of proof and what standard of proof must be met.

67. The Club accepts that the petitioner in a 120.56(3) proceeding normally has the burden of proof. As authority for this position, it cites in its proposed final order to a trio of cases: Agrico Chemical Co. v. State, Department of Environmental Regulation, 365 So.2d 759, 763 (Fla. 1st DCA 1979); Dravo Basic Materials Co., Inc. v. State, Department of Transportation, 602 So.2d 632, 635 (Fla. 2d DCA 1992); and St. Johns River Water Management District v. Consolidated-Tomoka Land Co., below. The District and South Shores concur in this much of the Club's argument.

68. But the Club argues that its burden in this proceeding is somehow affected by language in Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So.2d 419 (Fla. 5th DCA 1988) and other cases that laws exempting activities from regulation in the public interest are subject, in their application, to strict scrutiny and are not favored. Whatever authority Booker Creek and other cases might have in a proceeding challenging the District's issuance of the conceptual permit to South Shores, they have no function with regard to the burden of proof in this proceeding. The scrutiny to which "exemptions" as a class of law are subject to does nothing to affect the burden of proof in a Section 120.56(3) proceeding.

69. The standard of proof that challengers to existing rules traditionally have been required to meet is the "preponderance of evidence" standard. Department of Professional Regulation v Durrani, 455 So.2d 515 (1st DCA 1984). Whether this is the "post-1996 revision to the APA" standard in an existing rule challenge is uncertain. See Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks, 721 So.2d 317 (Fla. 1st DCA 1998), an appellate decision involving a challenge to a proposed rule: "However, proof 'by a preponderance of the evidence' is not required in Florida Statutes section 120.52(8), and the ALJ erred in imposing that burden on the agency." Id., at 318. For purposes of this proceeding, both the District and South Shores agree that the Club should not have to meet a more stringent standard. See the District's PRO, at p. 9 and Intervenor's PRO at p. 11.

70. In applying the "preponderance" standard, however, it must be considered that the rules carry with them a presumption of correctness. The presumption, moreover, grows stronger each year that the Legislature (aware of the rules through the activities of its Joint Administrative Procedure Committee) has had the opportunity to take action if it regarded the rule to be an invalid exercise of its authority. Department of Administration v. Nelson, 424 So.2d 852, 858 (Fla. 1st DCA 1982); Jax Liquors, Inc. v. Department of Alcoholic Beverages and Tobacco, Department of Business Regulation, 388 So.2d 1306 (Fla. 1st DCA 1980).

71. The Club has the burden of proof in establishing that the Exemptions should be determined to be invalid. It must do so by a preponderance of the evidence in the face of a strong presumption of correctness.

The Merits

a. Subsection 120.52(8)

72. The Club claims three bases for invalidating the exemptions. All are found in Subsection 120.52(8), Florida Statutes.

73. The first two appear in paragraphs (b) and (c) of the statute. Section 120.52(8)(b) and (c), Florida Statutes, provides, in pertinent part:

> ... A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> * * *
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.
>
> (c) The rule enlarges, modifies or contravenes the specific provision of law implemented, citation to which is required by s. 120.54(3)(a)1.

74. The third base advanced by the Club in support of its claim of invalidity appears in the last four sentences of Section 120.52(8), Florida Statutes. Dubbed by the District in this proceeding as the "flush left language" of the statute, these four sentences read as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statutes. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

b. The Defenses of the District and South Shores

75. With respect to the claim of invalidity under Section 120.52(8)(b), the District points to Sections 373.044, 373.113 and 373.171, Florida Statutes. These three provisions of Chapter 373, as required by the rulemaking provisions of the APA, are cited in the Rule as the "reference[s] to the specific rulemaking authority pursuant to which the rule is adopted," Section 120.54(3)(a)1., Florida Statutes. They are:

> 373.044 Rules; enforcement; availability of personnel rule.

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> The governing board of the district is authorized to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter. Rules and orders may be enforced by mandatory injunction or other appropriate action in the courts of the state. Rules relating to personnel matters shall be made available to the public and affected persons at no more than cost but need not be published in the Florida Administrative Code or the Florida Administrative Weekly.
>
> 373.113 Adoption of rules by the governing board. In administering the provisions of this chapter the governing board has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring powers or duties upon it.
>
> 373.171 Rules.
>
> (1) In order to obtain the most beneficial use of the water resources of the state and to protect the public health, safety, and welfare and the interests of the water users affected, governing boards, by action not inconsistent with the other provisions of this law and without impairing property rights, may:
>
> (a) Adopt rules or issue orders affecting the use of water, as conditions warrant, and forbidding the construction of new diversion facilities or wells, the initiation of new water uses, or the modification of any existing uses, diversion facilities, or storage facilities within the affected area.
>
> (b) Regulate the use of water within the affected area by apportioning, limiting, or rotating uses of water or by preventing those uses which the governing board finds have ceased to be reasonable or beneficial.
>
> (c) Issue orders and adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter.
>
> (2) In adopting rules and issuing orders under this law, the governing board shall act with a view to full protection of the existing rights to water in this state insofar as is consistent with the purpose of this law.
>
> (3) No rule or order shall require any modification of existing use or disposition of water in the district unless it is shown that the use or disposition proposed to be modified is detrimental to other water users or to the water resources of the state.
>
> (4) All rules adopted by the governing board shall be filed with the Department of State as provided in chapter 120. An information copy will be filed with the Department of Environmental Protection.

76. On this point the District states in the "Conclusions of Law" section of its proposed order: "The cited language in Sections 373.044, 373.113 and 373.171, F.S. grants to the District the 'necessary' rulemaking authority required by Section 120.58(2), F.S." As the District recognizes, this authority could not be clearer. The District's grant of rulemaking authority is stated three times and in three ways in the statutory provisions cited above.

77. The question posed by the Club, because it is framed in terms of Section 120.52(8)(b), however, is whether that grant has been exceeded. Without construing Section 120.52(8)(b) in para materia with the other provisions in Section 120.52, and in particular with what has been referred to in the proceeding as the "flush left language", there is little question that the Exemptions do not exceed the District's grant of rulemaking authority. That grant is very broad. The District has the authority to make rules to implement the provisions of all of Chapter 373, whether in Part IV or not. Section 373.044, Florida Statutes. The District has authority by rule to "implement provisions of law (whether in Chapter 373 or elsewhere) conferring powers and duties upon it." Section 373.113, Florida Statutes. Most broadly of all, the District has the authority to "[a]dopt rules ... affecting the use of water, as conditions warrant," Section 373.171(1)(a), Florida Statutes, (emphasis supplied.)

78. In response to the two claims of invalidity based on Section 120.52(8)(c), Florida Statutes, and its "flush left language," the District makes several arguments.

79. Primarily, it points to the only statutory section cited by the Rule both as a "grant of rulemaking authority" and as a "specific provision[] of law implemented." That provision is Section 373.414(9), Florida Statutes. It allows the District to "adopt rules to incorporate the provisions of this section [passed as part of the Reorganization Act] relying primarily on the existing rules of the Department and the water management districts."

80. Next, the District points out that Section 373.414(9), Florida Statutes, further directs that "[s]uch rules shall seek to achieve a statewide, coordinated and consistent permitting approach to activities regulated under this part." No such evidence that the rules do not seek such an approach, argues the District, was presented by the Club.

81. Finally, the District points to the language in Section 373.414(9), Florida Statutes, that "[s]uch rules may establish exemptions ... if such exemptions ... do not allow significant adverse impacts to occur individually or generally." The District asserts that the Club did not present any evidence that the Exemptions allow significant adverse impacts.[3] This assertion is consistent with the District's position that it would not have tolerated the Club's presenting such evidence in this rule challenge proceeding without raising an objection since:

> ... a determination regarding the application of the challenged exemptions is not appropriately a part of this proceeding. Such a determination is a mixed question of law and fact and not a strict legal challenge to the delegation of authority to the District. Therefore, that issue is appropriately addressed in the Permit Challenge proceeding pending before DOAH in Case No. 99-4155RX.

The District's PRO, p. 9.

82. South Shores makes an additional argument in defense of the Club's claims. It points out that the permitting authority of the District is discretionary in the first place. See Section 373.413(1), Florida Statutes, which, in pertinent part, follows:

> Except for the exemptions set forth herein, the governing board may require such permits [relative to surface water storage and management]... The ... governing board may delineate areas within the district wherein permits may be required...

If the District has the authority in the first instance to require or not require permits, goes the argument of South Shores, then it

must also have the authority to provide for exemptions from permitting requirements, particularly where the enabling legislation spells out exemptions within the legislation itself and allows promulgations by rule of exemptions if they do not cause adverse impacts. As the District does, South Shores also emphasizes Section 373.414(9), Florida Statutes, as all that is needed to fend off the three claims of invalidity.

83. If the defenses raised by the District and South Shores had only to contend with the claims of the Club based on paragraphs (b) and (c) of Section 120.52(8), Florida Statutes, the District and South Shores would prevail in this proceeding. But there is another claim made by the Club. This third claim is based on the "flush left language" in Section 120.52(8).

d. The "flush left language" claim

84. The "flush left" language appeared in Section 120.52(8) following the 1996 revision of the APA as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule: a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

Section 120.52(8), Florida Statutes, (1997).

85. This language was construed in St. Johns River Water Management District v. Consolidated-Tomoka, 717 So.2d 72 (Fla. 1st DCA 1998). In that case, the First District Court of Appeal reviewed a final order of the Division of Administrative Hearings declaring invalid a series of rules proposed by the St. Johns River Water Management District. The court describes the rules in its opinion:

> In broad terms, the new rules define two areas within the District as hydrologic basins and establish more restrictive permitting and development requirements within these basins.

Id., at 75. The Court then summarized the disposition of the case by the Division of Administrative Hearings.

> Although the administrative law judge determined that the proposed rules were supported by the evidence, he concluded that most of them were invalid as a matter of law. The major theme of the final order is that the rules are an invalid exercise of legislative authority because they are not within "particular powers and duties" granted by the enabling statutes. (Citations omitted.) [Other bases of invalidity are also discussed].

Id., at 76.

86. In construing the terms "particular powers and duties," the court found the term "particular" to be ambiguous. That is, "[t]he statute could mean that the powers and duties delegated by the enabling statutes must be particular in the sense that they are identified (and therefore limited to those identified) or in the sense that they are described in detail." Id. at 79. The court then disagreed with the interpretation in the administrative law judge's final order that the Legislature intended the words "particular powers and duties" as requiring the enabling statute to "detail" the powers and duties that will be the subject matter of the rule. The court concluded instead:

> In our view, the term "particular" in section 120.52(8) restricts rulemaking authority to subjects that are directly within the class of powers and duties identified in the enabling statute. It was not designed to require a minimum level of detail in the statutory language used to describe the powers and duties.

Id. The court found support for its interpretation by construing the statutory term in para materia with other APA provisions. Most noteworthy, it opted for this view of the term "particular" in order to avoid what it felt would be an unreasonable result:

> We consider it unlikely that the Legislature intended to establish a rulemaking standard based on the level of detail in the enabling statute, because such a standard would be unworkable. The courts are bound to interpret the ambiguous statutes in the most logical and sensible way. If possible, the court must avoid an interpretation that produces an unreasonable consequence. (citation omitted). A standard based on the precision and detail of an enabling statute would produce endless litigation regarding the sufficiency of the delegated power. Section 120.52(8) provides that a rule can implement, interpret or make specific, the powers and duties granted by the enabling statute. (Emphasis added.) If follows from this statement that the enabling statute can be, and most likely will be, more general than the rule. Just how general the statute can be is not explained.
>
> * * *
>
> Consequently, it is more likely that the Legislature used the term "particular" to mean that the powers and duties must be identifiable as powers and duties falling within a class.

Id. at 79, 80. The court went on to employ the principle of statutory construction that statutes should be construed to avoid internal conflict among various statutes. In particular, the court referred to the declaration by the legislature in the APA that "rulemaking is not a matter of agency discretion." Section 120.54(1)(a), Florida Statutes. The court concluded, "[this] section[] suggest[s] that rulemaking authority is not restricted to those situations in which the enabling statute details the precise subject of a proposed rule. The legislative command directing the agency to adopt rules carries with it an implication that the agencies have authority to adopt rules, at least within the class of powers conferred by the applicable enabling statute." Id., at 80.

87. The decision of the First District in Consolidated-Tomoka was discussed with approval by the Florida Supreme Court in a decision in the area of Florida administrative law handed down just last month.

88. In Florida Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Investment

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Corporation of Palm Beach, 24 FLW SC 520, Sup. Ct. Case No. 93,952, Op. Filed November 4, 1999, the court considered an issue related to declaratory statements under the Administrative Procedure Act. Because the issue concerned the relationship between agency declaratory statements and rulemaking, the court examined Consolidated-Tomoka. Referring to the decision as Tomoka Land, the Supreme Court called it "an important case." With approval, the court quoted extensively from the Consolidated-Tomoka opinion. After a discussion of Consolidated-Tomoka and Chiles v. Department of State, 711 So.2d 151 (Fla. 1st DCA 1998), the Court drew the conclusion that these cases demonstrate that, "the Legislature will not micromanage Florida's administrative agencies...".

89. Between the decision by the First District Court of Appeal in Consolidated-Tomoka and the favorable light shone on that decision by the Florida Supreme Court, however, the Legislature enacted Chapter 99-379, Laws of Florida. In the enactment, the Legislature amended the "flush left language" of Section 120.52(8), Florida Statutes. The amendments (the "1999 Amendments" appear in the session law as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or~~,~~ interpret the~~ or make~~ specific ~~the particular~~ powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific ~~the particular~~ powers and duties conferred by the same statute.

Chapter 99-379, Laws of Florida, Section 2. The purpose of the 1999 Legislature in amending the "flush left language" was announced in Section 1 of Chapter 99-379, Laws of Florida:

> It is the intent of the Legislature that modifications in sections 2 and 3 of this act which apply to rulemaking are to clarify the limited authority of agencies to adopt rules in accordance with chapter 96-159, Laws of Florida, and are intended to reject the class of powers and duties analysis. However, it is not the intent of the Legislature to reverse the result of any specific judicial decision.

(emphasis supplied).

90. The statement of legislative intent in Chapter 99-379, Laws of Florida, is interpreted in this order to mean that the "class of powers and duties" analysis conducted by the First District Court of Appeal in Consolidated-Tomoka may not be applied to cases arising after the amendments effectuated through Chapter 99-379, Laws of Florida. The Legislature made clear that it had no intent to reverse or overrule Consolidated-Tomoka. That decision of the First District Court of Appeal, therefore, remains undisturbed as to its application prior to the effective date of the 1999 amendments. But because the "flush left language" of the statute was amended in 1999 and because of the clear intent behind the 1999 Amendments, the analysis conducted in the Consolidated-Tomoka is not of any value in cases arising after the 1999 Amendments. The "class of powers and duties" analysis of the First District Court of Appeal in Consolidated-Tomoka is not applicable to this case.

e. Application of the 1999 Amendments.

91. The legislature required the District to adopt new rules to implement the Reorganization Act of 1993, and in so doing to rely on existing rules. It did so in Section 373.414(9), Florida Statutes. On this provision rests the defense of the District and much of the assistance South Shores renders to the District's cause. Is the power and duty delineated in Section 373.414(9), Florida Statutes, specific enough to allow the District to re-adopt rules that provided protections from the effects of the Henderson Act passed nine years earlier?

92. The question as to whether the requisite specificity has been provided by the laws implemented by the Rule becomes particularly pointed when one considers the Reorganization Act's approach to exemptions (including through operation of grandfather protections) from the effects of the Reorganization Act. In order to provide protections by exemptions, the Act sets out categories of exemptions in Section 373.414(11)-(16), Florida Statutes. In so doing, it provides specific exemptions from the effects of the 1993 Act. None of these exemptions mention the need to grandfather projects that had received approvals nine years earlier. Nor do they mention the need to grandfather from water management district permitting requirements projects that had received all necessary approvals prior to the passage of the Henderson Act.

93. The polestar of statutory construction is legislative intent. The plain meaning of statutory language is the first consideration in discerning intent. Plain meaning discerned from unambiguous language will be given effect unless the effect is absurd, ridiculous or unreasonable. Investment Corporation of Palm Beach, at 524(?). With regard to the intent of the Legislature when it passed the Reorganization Act, it is certainly possible that the Legislature meant not to carry forward exemptions for projects with approvals at least nine years old. If the Legislature was aware of Booker Creek, above it is very likely that had it meant to carry forward the Exemptions after the Reorganization Act, it would have done so in statute, along with the exemptions it did provide in Reorganization Act, itself, because of the length of time that had passed since the Exemptions or grandfather clauses were promulgated. About these very same Exemptions, the court wrote in Booker Creek:

> With regard to subsection (3), (4), (5) and (6) of Rule 40D-4.051, these exemptions relate to grandfathering in projects underway in 1984 when the surface water legislation was passed. It does not appear that any of these provisions would apply to projects seeking permits in 1987.

Booker Creek, above, at 424.

94. Whatever the legislative intent in regard to the Reorganization Act's effect on the Exemptions in this case, its intent is clear with regard to the 1999 amendments to Section 120.52(8), Florida Statutes: the "class of powers and duties" analysis conducted in Consolidated-Tomoka is not applicable to challenges to rules arising after the 1999 amendments.

95. The 1999 amendments to Section 120.52(8) make it clear that agencies, including water management districts, have limited authority to adopt rules. When administrative agencies do

so, the rules must implement powers and duties that are more detailed than a general class of power or duty provides.

96. Three statutory provisions [Sections 373.406, 373.413 and 373.416(9)] are cited in the Rule containing the Exemptions as "law implemented." (South Shores argues that another statutory provision should be considered as law implemented. To do so, however, runs afoul of the legislative mandate in Section 120.54(3)(a)1., Florida Statutes, that rules contain a citation to each law they implement. See also, Section 120.52(8)(c), Florida Statutes.) None of the three laws implemented by the Rule describe in detail any power or duty related to protection from the effects of the Henderson Act or, for that matter, grandfathering in any manner, as discussed in the next three paragraphs of this order.

97. Section 373.406, Florida Statutes, describes various activities that are not to be subject to water resource regulation, none of which relate to grandfathering. Furthermore, it authorizes the District to provide exemptions under interagency agreements. It also authorizes the District to exempt certain activities that have minimal impacts, mining activities for which a life-of-the-mine permit has been issued and certified aquaculture activities which apply appropriate best management practices. The only relationship between the Exemptions and Section 373.406 is that both use the term, "exemption."

98. Likewise, Section 373.413 makes no reference to grandfather protection in the wake of the Henderson Act. It uses the term "exemption" but modifies it with the phase "set forth herein." The exemptions referred to in Section 373.413 are exemptions set out in Chapter 373, that is, they are statutory exemptions. Neither the District nor South Shores has cited to any statutory exemptions that refer with any specificity to grandfather protection either as of October 1, 1984, or in the wake of the Henderson Act.

99. The only law implemented by the Exemptions and the Rule left for consideration is the one on which the defense in this case primarily rests: Section 373.414(9), Florida Statutes. The question recurs: is it specific enough? In Consolidated-Tomoka, above, Judge Padovano predicted that if a standard calling for analysis of the specificity of the law implemented were to become the law, there would be great difficulty for those called upon to apply it:

> A standard based on the sufficiency of detail in the language of the enabling statute would be difficult to define and even more difficult to apply. Specificity is a subjective concept that cannot be neatly divided into identifiable degrees. Moreover, the concept is one that is relative. What is specific enough in one circumstance may be too general in another. An argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the Legislature tried to be in describing the power delegated to the agency.

Id.

100. However difficult, the standard of the 1999 Amendments must be applied in this case. The direction by the Legislature that the District adopt rules to implement the Reorganization Act in reliance on existing rules is not enough detail to justify the adoption of grandfather provisions set in place a decade earlier in the wake of the Henderson Act. The permission granted to the District that rules adopted to implement the Reorganization Act may establish exemptions if the exemptions do not allow significant adverse impacts falls into a general "class of powers and duties." Section 373.414(9), does not provide any specificity that hints at grandfather protection as of October 1, 1984, from the effects of the Henderson Act.

101. There is, quite simply, no specific power and duty cited as "law implemented" by the Rule for the Exemptions at issue in this case that satisfies the command of the legislature in the 1999 amendment to Section 120.52(8), Florida Statutes: "An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute." Section 120.52(8), Florida Statutes.

102. Given the clarity of 1999 Amendments, the intent behind them that the Consolidated-Tomoka analysis is rejected, and their effect on this proceeding, the Club has carried the burden of proving by a preponderance of the evidence in the face of a strong presumption of correctness that the Exemptions are an invalid exercise of delegated legislative authority.

ORDER

Based on the foregoing, it is hereby

ORDERED that the exemptions in paragraphs (3), (5) and (6) of Rule 40D-4.051, Florida Administrative Code, are invalid exercises of delegated legislative authority because, in violation of Section 120.52(8), Florida Statutes, they do not implement specific powers or duties in the District's enabling legislation.

DONE and ORDERED this 9th day of December, 1999, in Tallahassee, Leon County, Florida.

DAVID M. MALONEY
Administrative Law Judge
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ENDNOTES

[1] While the record is not clear in this regard, one would surmise that the rules (including the amendment that created the Exemptions in Rule 40D-4.051) were adopted because of interagency agreements between the SWFWMD and the Department of Environmental Regulation.

[2] Whether South Shores' application falls under this provision was not addressed by evidence in this proceeding. It would not be appropriate, moreover, to consider such a claim in this case. (The claim may not exist since South Shores apparently elected to have its activities reviewed under the ERP rules.) In any event, such a claim, if there is a basis for it, belongs in Case no. 99-4155, the companion case to this one challenging the issuance of the conceptual permit.

[3] Whether these concerns can be addressed in a permitting process free of the Exemptions for South Shores development project is an open question.

[4] In fact, the testimony of Ms. Patti Thompson was to the effect that the manatees will be adversely impacted in a significant way by South Shores project, in part, because of the Exemptions. This testimony is accepted only for purposes of establishing the Club's standing in this rule challenge proceeding. It is not accepted for purposes of whether the conceptual permit issued to South Shores, does allow significant impacts. That determination awaits another day and a different proceeding: one that challenges a District decision rather than a District rule.

GAS PIPELINE SAFETY PROGRAM

CERTIFICATION FOR CALENDAR YEAR 2000

This certificate (including attachments) is submitted by the Florida Public Service Commission *(insert name of state agency)* (the state agency) to the Secretary of Transportation (the Secretary) under Section 60105 of Title 49, United States Code.

Pursuant to Section 60105(a)of this Title, the state agency hereby certifies to the Secretary that--

1. Except as set forth in Attachment 1, under the Constitution and laws of * Florida *(insert name of state)* it has regulatory jurisdiction over the safety standards and practices of all intrastate pipeline transportation within Florida *(insert name of state)* as summarized on Attachment 1.

2. It has adopted, as of the date of this certification, each federal safety standard established under this Title that is applicable to the intrastate pipeline transportation under its jurisdiction as set forth in paragraph 1, or, with respect to each such federal safety standard established within 120 days before the date of the certification, is taking steps pursuant to state law to adopt such standard. (The adoption by a state agency of a safety standard that is additional to or more stringent than the applicable federal standard and is compatible with the federal standards [see Section 60102(a)(1) of this Title] does not prohibit that state agency from certifying to the actions described in this paragraph.)

3. It is enforcing each standard referred to in paragraph 2.

4. It is encouraging and promoting programs designed to prevent damage to pipeline facilities as a consequence of demolition, excavation, tunneling, or construction activity.

5. It has authority to require each person who engages in the transportation of gas or who owns or operates pipeline facilities subject to its jurisdiction as set forth in paragraph 1, to establish and maintain records, to make reports, and to provide information, and that this authority is substantially the same as the authority provided under Section 60117 of this Title.

6. It has authority to require each person who engages in the transportation of gas or who owns or operates intrastate pipeline transportation facilities, subject to its jurisdiction as set forth in

* Applicability as defined in Chapter 368, Gas Transmission and Distribution, Florida Statutes and Florida Public Service Commission Rules Chapter 25-12 Safety of Gas Transportation by Pipeline, Florida Administrative Code.

paragraph 1, to file with it for approval a plan for inspection and maintenance substantially as described under Section 60108(a) and (b) of this Title.

7. The laws of Florida provide for the enforcement of the safety
(insert name of state)
standards referred to in paragraph 2 by injunctive and monetary sanctions substantially the same as those provided under Sections 60120 and 60122(a)(1) and (b)-(f) of this Title.

The state agency furthermore agrees to cooperate fully in a system of federal monitoring of the state program to assure the program is being carried out in compliance with this certification.

The terms "intrastate pipeline transportation," "pipeline facilities," "transportation of gas," and "state," are used in this certification as defined in this Title. This certification is subject to termination by the Secretary in accordance with Section 60105(f) of this Title if the Secretary determines the state agency is not satisfactorily enforcing compliance with federal safety standards. Under Section 60105(f), the Secretary, on reasonable notice and after opportunity for hearing, may reject the certification or take such other action as deemed appropriate to achieve adequate enforcement including assertion of federal jurisdiction.

In witness whereof, the hand and seal of the Florida Public Service Commission
(insert name of state agency)
is hereby affixed on 2/28/00
(date)

Florida Public Service Commission
(insert name of state agency)

BY _____
(official signature)
Executive Director