

Florida Department of Environmental Protection Adopts Emergency Rule Imposing New Notice Requirements

September 29, 2016

In response to the storm-related sewage and sinkhole-related discharges at the Mosaic facility in Mulberry, Florida, the Department of Environmental Protection (DEP) published two rulemaking notices on September 27, both regarding new public notice requirements for pollutant discharges: a notice of emergency rule and a notice of rule development. Those two notices were followed on September 28, by the publication of a notice of proposed rule on the same subject. In the notice of emergency rule, DEP stated that current circumstances present an immediate hazard to the public health, safety, or welfare, warranting the adoption of Rule 62ER16-1 (“the Emergency Rule”), an emergency rule that took effect when filed with the Secretary of State on September 26. The Emergency Rule imposes notification requirements on the owners and operators of *installations* when some occurrence results in *pollution*. An “installation” includes structures, equipment, facilities, and operations that may emit air or water contaminants in amounts that exceed those permitted under DEP’s rules. § 403.031(4), Fla. Stat. “Pollution” is:

the presence in the outdoor atmosphere or waters of the state of any substances, contaminants, noise, or manmade or human-induced impairment of air or waters or alteration of the chemical, physical, biological, or radiological integrity of air or water *in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which unreasonably interfere with the enjoyment of life or property*, including outdoor recreation unless authorized by applicable law.

§ 403.031(7), Fla. Stat. (emphasis supplied). The Emergency Rule mandates that the owner or operator of an installation provide notice of any occurrence at an installation that results in pollution within 24 hours of the event occurring or within 24 hours of the discovery of the pollution. Written notice must be provided to:

- DEP;
- the senior elected local official for the affected area (e.g. mayor or county commission chair);
- the senior non-elected official (e.g. city manager or county administrator); and
- the general public by local TV broadcast and publication in the local newspaper.

Within 48 hours of the pollution event or discovery of the pollution, the owner or operator must also notify DEP, the same local officials, and the public of any off-site areas that may be affected by the occurrence and the potential risk the occurrence poses to the public health, safety, and welfare. The owners of off-site property that may be affected must be notified in writing with 24 hours after the installation's owner or operator becomes aware that off-site areas have been affected. While numerous laws and regulations already exist that require immediate reporting to DEP and other applicable governmental authorities (such as EPA) of the discharge of pollutants and contaminants at concentrations or amounts that the agencies have determined to pose a potential risk, the Emergency Rule requires the owner/operator to make the more subjective determination of whether a discharge "may be potentially harmful or injurious to human health" or the environment, or otherwise "unreasonably interfere with the enjoyment of life or property"—and then to notify the public as well as local officials. Failure to comply with these notice requirements will be considered violations that may subject the owner or operator to civil and/or criminal penalties under section 403.161, Florida Statutes. The Emergency Rule will remain in effect for 90 days—until December 25, 2016. DEP simultaneously published a notice of rule development, indicating the agency's commencement of formal rulemaking to adopt a non-emergency rule. No workshop on the rule development was scheduled and, the next day, DEP published its formal notice of proposed Rule 62-4.161 ("the Proposed Rule"), with wording identical to that in the Emergency Rule. The September 28 notice indicates that, a public hearing on the Proposed Rule will be conducted only if requested by October 19. The Emergency Rule may not be renewed beyond its December 25 expiration date unless either the Proposed Rule is challenged and the rule challenge remains pending after December 25 or the legislature is required to ratify the Proposed Rule before it becomes effective. Legislative ratification will be required if an economic analysis of the Proposed Rule indicates that it is likely, within five years after implementation, to:

- have an aggregate adverse impact of more than \$1 million on economic growth, private sector job creation or employment, or private sector investment;
- have an aggregate adverse impact of more than \$1 million on business competitiveness; or

- Increase aggregate regulatory costs by more than \$1 million.

Over the last decade, the Legislature has considered the issue of more stringent pollution notification requirements on several occasions. While there have been minor revisions to those statutory provisions, none would approach the breadth and potential impact of the Emergency Rule.

Authored By



Laurel Lockett

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