



In The Matter Of:

COMBS OIL COMPANY

Case No.: 91285-07-FM

Petition for Permanent Waiver of NFPA 30 (2000 edition), Section 2.3.2.3.3, as adopted in Rule 69A-3.012, *Florida Administrative Code*.

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ORDER DENYING PETITION FOR PERMANENT WAIVER

THIS CAUSE came on for consideration upon the Petition for Permanent Waiver (hereinafter “Petition”) filed by Combs Oil Company (hereinafter “Petitioner”), received by the Department of Financial Services, Division of State Fire Marshal (hereinafter the “Department”), on August 7, 2007. Upon consideration thereof, and being duly advised, the Chief Financial Officer, as State Fire Marshal, finds as follows:

BACKGROUND AND FACTS ASSERTED

1. The Department has jurisdiction over the subject matter and party to this action.
2. This Order was requested pursuant to the provisions of Section 120.542, *Florida Statutes*, and Rule 28.104, *Florida Administrative Code*, which authorize a person subject to the Department’s regulation to file a Petition requesting a variance from or waiver of the Department’s rule.
3. The Petition requests a permanent waiver of National Fire Prevention Association (hereinafter “NFPA”) 30, Section 2.3.2.3.3, as adopted by Rule 69A-3.012(1) which prohibits the volume of secondary containment tanks used to provide spill control to exceed 12,000 gallons.

4. Notice of receipt of the Petition herein was published in Volume 33, Number 24 of the *Florida Administrative Weekly*, on August 24, 2007.

5. The Petitioner intends to install double-walled, factory-installed storage tanks at its facility located at 68 Industrial Blvd., Naples, Florida. The installation of the storage tanks, as proposed, is regulated by the Florida Fire Prevention Code, adopted as rule by the Department, and does not meet the requirement of the rule.<sup>1</sup>

6. The Department initially referred the Petition to the local authority having jurisdiction to determine whether the proposed installation could be deemed equivalent to the requirements of rule, as authorized by Section 1.4 of NFPA 30, (2000 edition), adopted by Rule 69A-3.012, *Florida Administrative Code*, which authorizes the authority having jurisdiction to “allow alternative methods that will secure equivalent fire safety, but in no case shall the alternative afford less fire safety than, in the judgment of the authority having jurisdiction, that which would be provided by compliance with the provisions contained in this Code.”<sup>2</sup>

7. The authority having jurisdiction determined that Petitioner’s proposed installation did not afford the same fire safety as the requirements contained in the above-referenced Department rule.

8. Petitioner asserts that the permanent waiver of NFPA 30, Section 2.3.2.3.3 is appropriate because subsequent versions of NFPA 30, not yet adopted by the State Fire Marshal, permit double-walled aboveground tanks in excess of 12,000 gallons, but require a dike field area beneath the tanks.

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<sup>1</sup> NFPA 30 (2000 edition), Section 2.3.2.3.3, adopted in Rule 69A-3.012, *Florida Administrative Code*.

<sup>2</sup> Pursuant to Section 633.022, *Florida Statutes*, local fire officials are responsible for enforcement of the Department’s rules, including the granting of equivalences and alternatives, within their local jurisdictions.

9. In addition, Petitioner argues that Sections 376.317 and 376.326, *Florida Statutes*, preempt spill prevention regulation in favor of the Florida Department of Environmental Protection (“DEP”), and that DEP Rule 62-762.501(2)(c), *Florida Administrative Code*, allows the storage tanks Petitioner intends to install without a dike area. Further, Petitioner argues that the storage tanks Petitioner purchased should provide a greater measure of release detection and prevention than single-walled tanks. Thus, Petitioner contends that it would be unfair not to allow Petitioner to install tanks that DEP has determined provide adequate spill protection, and to instead, require Petitioner to install what amounts to tertiary containment, as opposed to secondary containment required by DEP.

10. Finally, Petitioner argues that the purpose of the Department’s rules is to provide for fire safety. The Department is authorized to adopt National Fire Codes to specifically address Florida conditions. In this case, NFPA 30 contains spill prevention standards that are stricter than DEP spill prevention standards. However, DEP spill prevention standards are meant to apply statewide in accordance with Sections 376.317 and 376.326, *Florida Statutes*. The granting of the waiver does not affect the Department’s ability to regulate fire safety issues, while giving effect to DEP’s regulation of aboveground storage tanks.

#### DISCUSSION

11. The Department has authority pursuant to Section 120.542, *Florida Statutes*, to grant or deny waivers and variances of its rules when:

the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, ‘substantial hardship’ means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, ‘principles of fairness’ are violated when the literal application of a rule affects a particular person in a manner

significantly different from the way it affects other similarly situated persons who are subject to the rule.

12. NFPA 30, “Flammable and Combustible Liquids Code” (2000 edition), Section 2.3.2.3.3, adopted in Rule 69A-3.012, *Florida Administrative Code*, provides:

Where a secondary containment tank is used to provide spill control, the tank shall meet all of the following requirements: (a) [t]he capacity of the tank shall not exceed 12,000 gal (45,420 L).

To be clear, the provision presently adopted by the Department by rule, does not allow any secondary containment tank used to provide spill control in excess of 12,000 gallon capacity, whether single-walled, double-walled, or diked.

13. The statutes underlying the rule are Sections 633.022 and 633.01, *Florida Statutes*.

Section 633.022, *Florida Statutes*, provides:

The legislature hereby determines that to protection the public health, safety and welfare it is necessary to provide for firesafety standards governing the construction and utilization of certain buildings and structures. The Legislature further determines that certain buildings or structures, due to their specialized use or to the special characteristics of the person utilizing or occupying these buildings or structures, should be subject to firesafety standards reflecting these needs as may be appropriate.

Section 633.01(2), *Florida Statutes*, expresses the Legislature’s intent that “the State Fire Marshal shall have the responsibility to minimize the loss of life and property in this state due to fire.”

14. The statute underlying Rule 62-762.501(2)(c), *Florida Administrative Code*, empowers DEP to establish rules to implement the intent of Section 376.30, *Florida Statutes*, to protect the public health and environment through the preservation of surface and ground waters.

Section 376.317(1), *Florida Statutes*, provides:

If any provision of ss. [376.30](#)-376.317 or of the rules developed pursuant to such sections, which provision pertains to a facility maintained for the purpose of the underground storage of petroleum products for use as fuel in vehicles, including, but not limited to, those vehicles used on and off roads, aircraft, watercraft, and rail, is in conflict with any other provision, limitation, or restriction which is now in effect under any law of this state or

any ordinance of a local government, political subdivision, or municipality, or any rule or regulation adopted thereunder, the provisions of ss. [376.30-376.317](#) shall control, except as provided in subsection (3).

Subsection 376.317, *Florida Statutes*, authorizes county governments to adopt countywide ordinances that regulate underground storage tanks if they are the same as, or more stringent or extensive than, any state law or rule regulating such tanks. Section 376.326, *Florida Statutes*, extends the provisions of the foregoing statutes to cover aboveground storage tanks.

15. The Petitioner has failed to demonstrate that the purpose of the Sections 633.01 and 633.022, *Florida Statutes*, will be achieved by the alternative means proposed. The purpose of the cited statutes is to minimize the loss of life and property in this state due to fire. Compliance with a DEP rule, the purpose of which is to preserve the public health and environment through the preservation of surface and ground waters, does not demonstrate that loss of life and property due to fire will be minimized in this instance. If, in fact, more recent NFPA standards (not yet adopted by rule in Florida) allow tanks such as Petitioner's proposed installation to exceed the 12,000 gallon capacity, such would be a relevant consideration.<sup>3</sup> However, according to Petitioner, those more recent NFPA standards still require the installation of a dike, and it is that requirement that Petitioner wants waived.

16. As to Petitioner's preemption argument, it is determined that the Department's rule is not in conflict with DEP's rule. Further, even if the Department's rule was in conflict with DEP's rule, such conflict would not provide the basis for the Department to grant the Petitioner's request for permanent waiver, because it does not demonstrate that the purpose of Sections 633.01 and 633.22, *Florida Statutes*, will be achieved by the alternative means proposed, or that

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<sup>3</sup> The most recent edition of NFPA 30, available to the Department is the 2003 edition. Section 4.3.2.3.3 continues to prohibit any secondary containment tank used to provide spill control in excess of 12,000 gallon capacity, whether single-walled, double-walled, or diked.

the application of a rule would create a substantial hardship, or that the application of the rule affects Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.<sup>4</sup>

17. Additionally, the Petitioner has failed to demonstrate that the application of the Department's rule would create a substantial hardship, meaning a demonstrated economic, technological, legal, or other type of hardship to the person requesting the waiver. The Department could infer that compliance with the Department's rule would cost more than compliance with DEP's rule, but that alone does not create a substantial hardship.

18. The Petitioner has likewise failed to demonstrate that the application of the Department's rule would violate principles of fairness, meaning that the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. If the Petitioner is correct that DEP's rule preempts the Department's rule, the application of the rule would affect everyone similarly situated who is subject to the rule in the same way. If Petitioner is correct that DEP's rule provides the equivalent protection as the Department's rule which prohibits any above ground storage tanks in excess of 12,000-gallon capacity (and Petitioner has not provided any evidence other than the mere assertion of the fact), then the application of the Department's rule would affect everyone similarly situated who is subject to the rule in the same way.

19. In order to grant the Petition for Waiver of the Department's rule, the Department must find that Petitioner has demonstrated proof of two of three following statutory standards.<sup>5</sup> Thus, the Petitioner must demonstrate that proposed installation meets the level of fire protection intended by the underlying statute, and that the application of the Department's rule would either

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<sup>4</sup> Section 120.542, *Florida Statutes*

<sup>5</sup> Section 120.542, *Florida Statutes*

create a substantial hardship on the Petitioner, or would affect Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. The Petitioner has failed to demonstrate its entitlement to a waiver of NFPA 30 (2000 edition), Section 2.3.2.3.3, adopted by Department rules, by standards set forth in Section 120.542, *Florida Statutes*.

NOW, THEREFORE, in accordance with the foregoing, and the statutes and rules cited therein, the Petition herein is DENIED.

NOTICE OF RIGHTS

You have the right to request a proceeding to contest this action by the Department pursuant to Sections 120.569 and 120.57, *Florida Statutes*, and Rule 28.107, *Florida Administrative Code*. The proceeding request must be in writing, signed by you, and must be filed with the Department within twenty-one (21) days of your receipt of this notice. Completion of the attached Election of Proceeding form and/or a petition for administrative hearing will suffice as a written request. The request must be filed with the General Counsel as acting Agency Clerk, at the Florida Department of Financial Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0333. The Department must receive your written response no later than 5:00 p.m. on the twenty-first day after your receipt of this notice. Mailing the response on the twenty-first day will not preserve your right to a hearing.

**YOUR FAILURE TO RESPOND IN WRITING WITHIN TWENTY-ONE (21) DAYS OF YOUR RECEIPT OF THIS NOTICE WILL CONSTITUTE A WAIVER OF YOUR RIGHT TO REQUEST A PROCEEDING ON THE MATTERS ALLEGED HEREIN AND AN ORDER OF REVOCATION WILL BE ENTERED AGAINST YOU.**

If you request a proceeding, you must provide information that complies with the requirements of Rule 28-107.004, *Florida Administrative Code*. As noted above, completion of

the attached Election of Proceedings form conforms to these requirements. Specifically, your response must contain: The name and address of the party making the request, for purpose of service; a statement that the party is requesting a hearing involving disputed issues of material fact, or a hearing not involving disputed issues of material fact; and a reference to the notice, order, administrative complaint, or other communication that the party has received from the agency.

If a hearing of any type is requested, you have the right to be represented by counsel or other qualified representative at your expense, to present evidence and argument, to call and cross-examine witnesses, and to compel the attendance of witnesses and the production of documents by subpoena.

If a proceeding is requested and there is no dispute of material fact, the provisions of section 120.57(2), *Florida Statutes*, apply. In this regard, you may submit oral or written evidence in opposition to the action taken by the Department or a written statement challenging the grounds upon which the Department has relied. While a hearing is normally not required in the absence of a dispute of fact, if you feel that a hearing is necessary, one will be conducted in Tallahassee, Florida, or by telephonic conference call upon your request.

Failure to follow the procedure outlined with regard to your response to this Order may result in the request being denied. All prior oral communication or correspondence in this matter shall be considered freeform agency action, and no such oral communication or correspondence shall operate as a valid request for an administrative proceeding. Any request for an administrative proceeding received prior to the date of this Order shall be deemed abandoned unless timely renewed in compliance with the guidelines as set out above. No Department attorney will discuss this matter with you until your election of proceedings is filed, or the time

to do so has expired. Mediation of this matter pursuant to Section 120.573, *Florida Statutes*, is not available.

ENTERED in the City of Tallahassee, Leon County, Florida, this \_\_\_\_\_ day of \_\_\_\_\_ 2007.

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Eric Miller  
Deputy Chief Financial Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing ORDER DENYING PETITION FOR WAIVER has been furnished to Robert D. Fingar, Frank, Gramling & Fingar, 1607 Village Square Boulevard, Suite 1, Tallahassee, Florida 32309 by U.S. Certified Mail this 2nd day of November, 2007.

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Lesley Mendelson, Assistant General Counsel  
Florida Department of Financial Services  
Division of Legal Services  
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(850) 413-4110  
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STATE OF FLORIDA  
DEPARTMENT OF FINANCIAL SERVICES

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COMBS OIL COMPANY

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ELECTION OF PROCEEDING

I have received and have read the ADMINISTRATIVE COMPLAINT filed against me, including the Notice of Rights contained therein, and I understand my options. I am requesting disposition of this matter as indicated below. (Choose one)

1.  I do not dispute any of the Department's factual allegations and I do not desire a hearing. I understand that by waiving my right to a hearing, the Department may enter a final order revoking my licenses and appointments as may be appropriate.
  
2. I do not dispute any of the Department's factual allegations and I hereby elect a proceeding to be conducted in accordance with Section 120.57(2), *Florida Statutes*. In this regard, I desire to (Choose one):
  - Submit a written statement and documentary evidence in lieu of a hearing; or
  - Personally attend a hearing conducted by a department hearing officer in Tallahassee; or
  - Attend that same hearing by way of a telephone conference call.
  
3.  I do dispute one or more of the Department's factual allegations. I hereby request a hearing pursuant to Section 120.57(1), *Florida Statutes*, to be held before the Division of Administrative Hearings.

TO PRESERVE YOUR RIGHT TO A HEARING, YOU MUST FILE YOUR RESPONSE WITH THE DEPARTMENT OF FINANCIAL SERVICES WITHIN TWENTY-ONE (21) DAYS OF YOUR RECEIPT OF THE ADMINISTRATIVE COMPLAINT. THE RESPONSE MUST BE RECEIVED BY THE DEPARTMENT NO LATER THAN 5:00 P.M. ON THE TWENTY-FIRST DAY AFTER YOUR RECEIPT OF THE ADMINISTRATIVE COMPLAINT.

The address for filing is: General Counsel as acting agency clerk, Florida Department of Financial Services, 612 Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0333.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

Date: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
Phone No.: \_\_\_\_\_

