

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Rules Committee

BILL: SB 2130

INTRODUCER: Commerce and Tourism Committee

SUBJECT: Ratification of Rules

DATE: February 23, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Juliachs	Phelps	RC	Favorable
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

SB 2130 ratifies a rule adopted by the Department of Agriculture and Consumer Services that updates the minimum standards for the storage and handling of liquefied petroleum gases pursuant to s. 527.06, F.S. As evidenced by the Department of Agriculture and Consumer Services' Legislative Ratification Request, Rule 5F-11.002, F.A.C., *Standards of National Fire Protection Association Adopted*, would have a specific, adverse economic effect or would increase regulatory costs exceeding \$1 million over the first 5 years the rule was in effect. Accordingly, the rule must be ratified by the Legislature before it may enter into effect.

This bill creates general law not contained in a designated section of the Florida Statutes.

II. Present Situation:

Overview

The Department of Agriculture and Consumer Service (department) is the primary agency charged with the regulation of liquefied petroleum gas (LP gas) wherever the product is stored, distributed, transported, and used in Florida. The department also has statutory authority over the licensing, inspection, enforcement, accident investigation, and training of persons and firms

involved in the LP gas industry in the state.¹ As of December 7, 2011, there were 13,558 LP gas licensees in Florida.²

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

Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms.⁵ Rulemaking authority is delegated by the Legislature⁶ through statute and authorizes an agency to “adopt, develop, establish, or otherwise create” a rule.⁷ Agencies do not have discretion whether to engage in rulemaking.⁸ To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.⁹ The grant of rulemaking authority itself need not be detailed.¹⁰ However, the specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.¹¹

An agency begins the formal rulemaking process by filing a notice of the proposed rule.¹² The notice is published by the Department of State in the Florida Administrative Weekly¹³ and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC), if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting

¹ Chapter 527, F.S.

² The information derives from the December 7, 2011, request submitted by the Florida Department of Agriculture and Consumer Services for Legislative Ratification of Adopted Rule 5F-11.002, F.A.C., filed July 7, 2011 (on file with Senate Committee on Commerce and Tourism).

³ Section 527.06(2), F.S.

⁴ Section 527.06(3)(a), F.S.

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

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

⁷ Section 120.52(17), F.S.

⁸ Section 120.54(1)(a), F.S.

⁹ Sections 120.52(8) and 120.536(1), F.S.

¹⁰ See *Save the Manatee Club, Inc.*, 773 So. 2d at 599; See also *Florida Dep’t Bus. and Prof’l Regulation, Div. of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 384 (Fla. 1999).

¹¹ See *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008) (citing *Fla. Dep’t of State, Div. of Elections v. Martin*, 916 So. 2d 763, 770 (Fla. 2005)).

¹² Section 120.54(3)(a), F.S.

¹³ Section 120.55, F.S.

a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.¹⁴

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. As such, the following must be determined: a rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment;¹⁵ the likely adverse impact on business competitiveness,¹⁶ productivity, or innovation; and any likely increase in regulatory costs, including any transactional costs.^{17, 18} If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million, in the aggregate, for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

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

Storage and Handling of LP Gas²¹

On July 7, 2011, the department adopted a rule that updated the minimum standards required for the storage and handling of LP gas, pursuant to s. 527.06, F.S., by stipulating that the *LP Gas Code Handbook*, NFPA 58, 2011 edition (NFPA 58), and the *National Fuel Gas Code Handbook*, NFPA 54, 2006 edition (NFPA 54), are to be utilized by the department as a guide in interpreting the provisions of ch. 527, F.S. This rule was submitted by the department for ratification on December 7, 2011.

Accordingly, the code change with the most substantial economic impact on industry licensees is found in NFPA 58, which requires the installation of a cathodic protection system²² for

¹⁴ Section 120.541(2)(a), F.S.

¹⁵ Section 120.541(2)(a)1., F.S.

¹⁶ Business competitiveness includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets. *See* s. 120.541(2)(a)2., F.S.

¹⁷ Section 120.541(2)(a) 3., F.S.

¹⁸ Transactional costs are direct costs that are readily ascertainable based upon standard business practices and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, and the cost of monitoring and reporting. *See* s. 120.541(2)(d).

¹⁹ Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State. *See* s. 120.54(3)(e)6., F.S.

²⁰ Section 120.54(3)(e), F.S.

²¹ *See supra*, note 2.

²² A cathodic protection system consists of a sacrificial anode(s) or an impressed current anode. The anode is installed in the same hole dug for the container installation (although located away from the container) and involves no additional labor other than attaching the anode to the container via a wire nut and ensuring that dirt covering the anode is tamped-down. The only other cost to be incurred by businesses installing underground containers is the purchase of a voltmeter and a ½ cell that will be used to conduct mandatory testing of the cathodic protection system. The voltmeter and ½ cell are typically sold as a kit. One kit will last several years and perform testing of thousands of installations. Note that the cost of the kits is not reoccurring and will not be carried over to subsequent years.

underground steel LP gas containers. Provisions in the updated code now require that all new underground installations be protected from corrosion damage by use of a cathodic protection system.²³ The department projects this enhanced protection will increase the useful life of underground tanks by approximately 300 percent, prolonging the need to purchase replacements. However, because the projected impact in transactional costs for businesses will exceed \$1 million in the aggregate for a 5 year period, ratification by the Legislature is required for this rule to become effective.

Presently, there are 13,558 licensed LP gas entities that are required to comply with NFPA 58. However, of that number, only 525 of the current licensees install underground tanks and would be subject to the additional code requirements. This number takes into account both LP gas dealers and LP gas installers.

The SERC prepared by the department projects that the revised standards found in NFPA 58 will result in increased transaction costs for these licensees, in the aggregate, of \$2,731,154 in the first year and approximately \$2,464,200 in each subsequent year.²⁴ This is a conservative estimate using the projected cost of a larger anode and initial costs for required voltage testers. The department notes many licensees already install cathodic protection systems in order to comply with the requirements of tank manufacturers.

III. Effect of Proposed Changes:

Section 1 ratifies Rule 5F-11.002, F.A.C., relating to the implementation of the most recent version of the NFPA's LP gas code. This act solely and exclusively exists for the purpose of ratifying the above referenced rule and shall not be codified in the Florida Statutes.

Section 2 provides that this act shall take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

²³ A cathodic protection system prevents corrosion by reversing the outflow of electrons from the object being protected. This is done by attaching a separate anode by wire to the underground tank, making the tank a *cathode* and, thus, protected from corrosion. Mississippi Department of Environmental Quality, *Guidelines for the Evaluation of Underground Storage Tank Cathodic Protection Systems* (July, 2002), available at http://www.deq.state.ms.us/MDEQ.nsf/page/UST_Publications?OpenDocument (last visited February 16, 2012).

²⁴ Note that the estimated total first –year cost increase for an individual dealer that installs an average 100 LP gas containers annually is \$9,975.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

According to the Department of Agriculture and Consumer Services, state revenue will increase related to standard sales tax imposed on all sales of anodes and test kits purchased within the state. Additionally, the amount of revenue generated from sales tax on underground container installed packages will also increase by way of increased item cost. Lastly, any county taxes assessed related to these sales would generate additional revenues to the assessing county.²⁵

B. Private Sector Impact:

According to the Department of Agriculture and Consumer Services, the proposed rule is likely to increase transactional costs borne by all licensed businesses that are required to comply with the changes to NFPA 58.²⁶

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²⁵ See *supra*, note 2.

²⁶ *Id.*