

Backflow Valve Update # 19

September 15, 2011

This is Update # 19. The full series is available at www.backflowvideos.org

Florida Supreme Court's decision about OFARR

When Florida's governor took office in January, his first official act was to issue an Executive Order which required agencies to obtain formal approval from his Office of Fiscal Accountability and Regulator Reform (OFARR) prior to publishing rulemaking notices – such as those for the revision of the backflow valve regulations (62-555.360, F.A.C.). The Order was part of fulfilling his campaign promise to stimulate growth by eliminating burdensome regulations.

In a politically motivated lawsuit, the governor's authority to direct rulemaking, instead of the Legislature, was challenged as a violation of the separation of power. In a 5-2 opinion, the court agreed that OFARR did not have the authority. However, the court did not lift the order, but simply noted that it wasn't to be enforced against an agency. The Court left open the option that the Legislature could grant OFARR that authority, if they so desired.

Governor Scott was disappointed with the decision and pointed out that the Secretaries of the agencies do report to him and that directing their rulemaking should logically be part of his supervisory role.

Following the Court's decision, the Governor's office issued an "Interim Guidance" document to all agency heads. It is attached to this Update.

As for the revision of the Backflow Valve rules, the DEP has noted that

“The Department of Environmental Protection, as with all other state agencies, is in the process of developing plans and priorities for all of our proposed new and revisions to existing agency rules. This includes determining which steps and methods of rule adoption must be followed. Hence at present we have not finalized a schedule for adoption of our Cross Connection Control revisions.”

And in another email, the DEP noted:

“Amendment of Rule 62-555.360, Florida Administrative Code, is included in the Florida Department of Environmental Protection’s 2011-2012 Regulatory Plan along with amendments to many other rules, repeal of many rules, etc. We are working on all of these, but the agency is focusing first on rule repeals.”

Stay tuned!

As usual, I appreciate your positive responses to these Backflow Valve Updates.

The Florida Supreme Court’s full fifty-page decision is available at www.backflowvideos.org/decision.pdf

OFARR’s “Interim Guidance” document follows below...

Thank you,



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¹ Please note that for these Updates, I am “just” a concerned citizen. I do not speak for the DEP. Nor do I speak for the Hillsborough County Cross-connection & Backflow Control Board, of which I am the Citizen Representative.



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MEMORANDUM

TO: Agency Heads
FROM: Stephen R. MacNamara
Chief of Staff to Governor Rick Scott
DATE: August 19, 2011
RE: Interim guidance regarding the Office of Fiscal Accountability and Regulatory Reform

On August 16, 2011, a five-member majority of the Florida Supreme Court issued an unsigned opinion in the *Whiley v. Scott* case, holding that the Governor may not, pursuant to Executive Order 11-72, require agencies to obtain formal approval from the Office of Fiscal Accountability and Regulatory Reform (OFARR) prior to publishing rulemaking notices. While the Governor firmly believes that the majority opinion is illogical and grossly misreads the Florida Constitution, OFARR will nonetheless adjust its policies and procedures to comply with the Court's ruling. These changes will be memorialized in a forthcoming executive order, but this memorandum will serve as interim guidance for agencies.

Pursuant to the Governor's prior delegation and instruction, as well as statutory mandates, OFARR will continue to advise the Governor on agency rulemaking. In so doing, OFARR will advance the mission it was charged with in Executive Orders 11-01 and 11-72—to make regulation less burdensome on citizens, taxpayers, and businesses; to ensure that agencies operate more efficiently and cooperatively; and to aid the Governor in taking care that agency rulemaking faithfully executes legislative enactments. To advance these objectives, OFARR will continue to require each agency to provide information about its rulemaking activities and will continue to provide advice and commentary on proposed rulemaking actions.

OFARR will return all pending rule authorization requests to their respective agencies. Agencies, if they so choose, may proceed to publish these notices in accordance with Section 120.54, Florida Statutes. With respect to any requests for authorization that OFARR had previously denied, agencies may proceed with such rulemaking if they so choose, but agencies should note that OFARR's previously expressed guidance with respect to such proposed rulemaking represents the strongly held views of the Office of the Governor as to the efficacy and propriety of the proposed action.

MEMORANDUM TO AGENCY HEADS

August 19, 2011

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As Executive Order 11-72 explains, the Governor has the constitutional authority to “require information in writing from all executive or administrative state ... officers upon any subject relating to the duties of their respective offices.” Art. IV, § 1(a), Fla. Const. Accordingly, for any rulemaking notices that an agency plans to publish between today and the date of the new executive order, the agency should continue to transmit to OFARR the previously requested documentation. For these purposes, OFARR will provide a Rulemaking Notification Form in place of the Rulemaking Authorization Form. The requested information should be submitted to OFARR prior to submission for publication. Formal authorization by OFARR to publish, however, is not required.

Office of Fiscal Accountability and Regulatory Reform

Rulemaking Notification Form

To: Patricia Nelson, Deputy Director, OFARR

Submitted [Name, Title]

by: [Agency]
[Phone Number]

Re: Rulemaking Notification for Rule [number or chapter]

Date: [Insert date request submitted]

Proposed Rulemaking Activity (please attach a copy of each notice):

Rule Number	Rule Title	Rulemaking Category*	Rulemaking Action **	Identified in Regulatory Plan (Y/N)***

***If not identified in Regulatory Plan, please be sure to include a justification for why rulemaking is necessary at this time in your explanation below.

Detailed Explanation

For each rule, explain in detail either how it alleviates unnecessary, disproportionate, or adverse affects to business or, alternatively, why it is necessary (including an explanation of why the rulemaking is necessary when not identified in the Regulatory Plan). You should address all relevant considerations, including: restriction on entry into a profession; affect on availability of services to public; affect on job retention; restriction on employment seekers; imposition of burdensome costs; cost-effectiveness vs. economic impact of rule.

Rule Number	Explanation

Special Considerations (e.g., legislative ratification required):

***Rulemaking Categories (include all that apply):**

- | | |
|---|--|
| <ul style="list-style-type: none"> 1. Rule Requires Ratification by Legislature 3. Rule Alleviates Unnecessary, Disproportionate, or Adverse Affects to Businesses 5. Rule is Necessary to Implement a Federal Program | <ul style="list-style-type: none"> 2. Rule to be Withdrawn or Repealed 4. Rule May or May Not be Beneficial to Business, but Mandatory by Statute or Necessary to Protect the Public |
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****Rulemaking Action:**

- | | |
|---|--|
| <ul style="list-style-type: none"> A. Notice of Rule Development C. Notice of Change E. Continue Rulemaking after a Rejection of Lower Cost Regulatory Alternative G. Other (explain) | <ul style="list-style-type: none"> B. Notice of Proposed Rule D. Notice of Emergency Rule F. Notice of Intent to Adopt Rule |
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