

STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the matter of a request  
for waiver by:  
CARACARA, LLC  
First Avenue Exxon  
3061 1<sup>st</sup> Avenue North  
St. Petersburg, Florida, 33713

OGC Case No.: 19-1418  
DEP Facility ID: #52/8623586

**ORDER DENYING PETITION FOR WAIVER**

The Department of Environmental Protection (Department) hereby gives notice that it is denying a waiver to CaraCara, LLC (Petitioner) pursuant to Section 120.542, Florida Statutes, (F.S.), for the First Avenue Exxon Facility, located at 3061 1<sup>st</sup> Avenue North, St. Petersburg, Florida. The petitioner has requested a waiver from the requirements of Rules 62-761.800(2) and (3)<sup>1</sup>, Florida Administrative Code (F.A.C.) (2019).

**FINDINGS OF FACT**

1. Petitioner is the owner of the First Avenue Exxon Facility located at 3061 1st Avenue North, St. Petersburg, Florida. The First Avenue Exxon Facility is a “Facility” as defined by Section 376.301(19), F.S.

2. On or about April 2017, Petitioner installed new dispenser sumps to replace the dispenser pans at the facility. Dispenser sumps are storage tank system components per rule 62-761.200(57), F.A.C.

3. Petitioner’s consultant, Applied Science and Engineering, Inc. filed a Limited Closure Summary Report dated July 10, 2017, with DEP’s contracted local program. Petitioner did not perform a Closure Integrity Evaluation as pursuant to subsections 62-761.800(2) and (3), F.A.C.

4. On August 6, 2019, CaraCara, LLC, Petitioner, filed a petition with the Department requesting a section 120.542, Florida Statutes, waiver from the requirements of Rules 62-761.800(2) and (3), Florida Administrative Code (F.A.C.). Rules 62-761.800(2),(3), and (3)(a)6., F.A.C., state as follows:

*(2) Closure of storage tank systems.*

*(a) The following storage tank systems must be closed in accordance with the provisions of this subsection:*

*1. A storage tank system that fails to meet or, if required, is not*

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<sup>1</sup> Petitioner’s Petition for Waiver states that they would like a waiver from rules 62-761.800(2),(3), and (6), F.A.C.; however, 62-761.800(6), F.A.C. does not exist. The Department believes that Petitioner intended to cite to 62-761.800(3)(a)6., F.A.C. Accordingly, this Order will address the request for a waiver from the requirements of 62-761.800(2) and (3), F.A.C., in their entirety.

*modified to meet the Storage Tank System Requirements of Rule 62-761.500, F.A.C., within 90 days of discovery.*

*2. A storage tank system that requires repair pursuant to Rule 62-761.700, F.A.C., but is not repaired within 90 days to operate in accordance with the requirements of this chapter shall be taken out-of-service. If the system is not repaired within 365 days after being taken out-of-service, it shall be permanently closed.*

*3. A storage tank system where financial responsibility is not maintained and demonstrated, pursuant to rule 62-761.420, F.A.C., within 90 days of termination of the financial mechanism.*

*(b) Closure of storage tank systems shall be performed by:*

*1. Conducting a Closure Integrity Evaluation as defined in subsection 62-761.200(10), F.A.C., and completing the Closure Integrity Evaluation Report Form for USTs 62-761.900(7) (Closure Integrity Report), incorporated by reference in paragraph 62-761.405(2)(c), F.A.C. The form shall be submitted in writing or electronic format to the appropriate county.*

*\*\*\**

*(3) Closure Integrity Report, Closure Report, and Limited Closure Report Requirements.*

*(a) Closure Integrity Report.*

*1. A Closure Integrity Evaluation, as defined in subsection 62-761.200(10), F.A.C., must be performed no more than 45 days prior to closure, replacement, or change in service from a regulated substance to a non-regulated substance for all double-walled storage tanks, double-walled integral piping, piping sumps, dispenser sumps, and spill containment systems that are in contact with the soil. A Closure Integrity Report must be completed to document the findings of the Closure Integrity Evaluation.*

*2. A Closure Integrity Evaluation requires a visual assessment of the interstitial space of double-walled tanks, integral piping, piping sumps, dispenser sumps, and spill containment systems that are in contact with the soil to determine if there are any products or pollutants or any water other than condensate present within the interstice. For storage tank system components where the interstitial space cannot be visually inspected, other methods approved by the manufacturer, PEI RP 1200-17, or the Department such as vacuum, pressure, or inert gases may be used instead of visual observations.*

*3. A Closure Integrity Evaluation for single-walled piping sumps, dispenser sumps, and spill containment systems that are in contact with the soil requires a hydrostatic test or another test approved by the manufacturer.*

*4. The county must be provided with a copy of the Closure Integrity Report as part of the notification process pursuant to subsection 62-761.405(2), F.A.C.*

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6. *The owner or operator who does not or elects not to conduct a Closure Integrity Evaluation, in accordance with paragraph 62-761.800(3)(a), F.A.C., before the storage tank system or system component has been removed or closed in-place, regardless of the date of installation of the storage tank system or system component, shall conduct an investigation at the time of closure in accordance with Instructions for Conducting Sampling During Underground Storage Tank Closure, July 2019 Edition.*

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5. Subsections 62-761.800(2) and (3), F.A.C., require that a Closure Integrity Evaluation be completed prior to closure, replacement, or change in service of a storage tank system component such as a dispenser sump.

6. The Closure Integrity Evaluation required by Rule 62-761.800, F.A.C., is “an assessment of storage tank system integrity that is performed by a third-party inspection or testing entity at closure, replacement, or change in service from a tank containing regulated substance to a non-regulated substance. The evaluation is a physical test of interstitial tightness or visual inspection of the interstice of a secondarily contained storage tank system, secondarily contained storage tank system component, or a primary integrity test of a single-walled storage tank, or containment integrity test of a single-walled piping sump, dispenser sump, or spill containment system.”

7. Petitioner did not perform a Closure Integrity Evaluation prior to replacement of dispenser sump and seeks a waiver of that requirement.

8. A Request for Additional Information (RAI) for the Petition for Waiver was sent by the Department on September 5, 2019. Petitioner’s Response to RAI was received on October 7, 2019.

THE VARIANCE OR WAIVER WILL NOT MEET THE UNDERLYING  
PURPOSE OF THE STATUTE

9. Section 120.542(2), Fla. Stat., states “variances and waivers shall be granted 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.”

10. Section 376.303(1)(a), F.S. states that the “the Department has the power and duty to establish rules, including, but not limited to... maintenance and installation standards, and removal or disposal standards, to implement the intent of ss. 376.30-376.317 and to regulate underground and aboveground facilities and their onsite integral piping systems.” Section. 376.30, F.S. requires that those engaged in storing

pollutants reduce future threats to the environment from spills from regulated storage tanks and, if there is a discharge, prompt containment and removal of such discharges. See ss. 376.30(1)(c)-(d), (3)(a)-(b), and (4), F.S.

11. Petitioner did not conduct the Closure Integrity Evaluation as required by subsections 62-761.800(2) and (3), F.A.C. Petitioner argues that it did not need to perform a full closure integrity evaluation per rule 62-761.800, F.A.C., and instead submitted a Limited Closure Summary Report.

12. Subsection 62-761.800(3)(a)2., F.A.C, states that the Closure Integrity Evaluation requires “a visual assessment of the interstitial space of double-walled tanks, integral piping, piping sumps, dispenser sumps, and spill containment systems that are in contact with the soil to determine if there are any products or pollutants or any water other than condensate present within the interstice.”

13. Instead, petitioner submitted the Limited Closure Summary Report which does not meet Rule requirements as outlined above. The Limited Closure Summary Report is not valid if no Closure Integrity Evaluation was performed.

14. The Petitioner failed to demonstrate that the purpose of the underlying statute will be achieved or has been achieved by other means.

#### SUBSTANTIAL HARDSHIP TO THE PETITIONER and VIOLATIONS OF PRINCIPLES OF FAIRNESS

15. In accordance with Section 120.542(2), F.S., a “substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. Additionally, “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.

16. The Petitioner failed to demonstrate that strict application of the rule would result in a substantial hardship to the Petitioner or that literal application of the rule would affect the Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

17. Section 376.30716(2), F.S., states that “until the secondary containment upgrade of underground storage tanks, as required under [Chapter] 62-761, Florida Administrative Code, is complete at a site, a subsequently discovered discharge at a site is presumed to be part of the original discharge that qualifies for state funding.”

18. The Department’s Early Detection Incentive (EDI) Program states that funding does not pay to assess or remediate any discharges that have occurred after December 31, 1988. As Petitioner’s facility was upgraded to secondary containment in

accordance with Chapter 62-761, F.A.C., in August 2009, the presumption that a subsequently discovered discharge is part of the original discharge does not apply.

19. Petitioner argues that Section 376.30716(2), F.S., does not apply to its Facility as there has been no discovery of a new discharge; however, Petitioner has failed to test for a subsequent discharge. In accordance with 62-761.800(3)(a)6., F.A.C., Petitioner had the option to perform a Closure Integrity Evaluation or conduct an investigation at the time of closure by sampling for a discharge in accordance with *Instructions for Conducting Sampling During Underground Storage Tank Closure*. Petitioner did neither. The Limited Closure Summary Report does not contain data that would confirm whether a discharge has occurred at the Facility. Therefore, Petitioner is unable to state that a subsequent discharge has not occurred.

20. Financial hardship must be demonstrated as a “economic, technological, legal or other type hardship to the person requesting the variance” when the “literal application of the rule affects a particular person in a manner significantly different from the way it affects other similarly situation persons who are subject to the rule.”

21. Petitioner argues that it would have the expense of testing and the added expense of determining whether contamination is “old” or new” which is also “technologically difficult.” Petitioner failed to provide evidence verification of the technological and financial hardship that would be imposed if required to comply with the Closure Integrity Evaluation requirements of subsections 62-761.800(2) and (3), F.A.C.

22. Accordingly, the Petitioner failed to demonstrate evidence that failure to grant the waiver from the requirement to perform a Closure Integrity Evaluation would result in a financial hardship.

23. Petitioner further argues that principles of fairness will be violated if it is required to perform a Closure Integrity Evaluation as EDI eligible sites conducting a closure prior to January 11, 2017, were not required to perform the evaluation.

24. From December 10, 1990 through January 11, 2017, the Department’s Closure Requirements and guidance documents provided that a Closure Assessment was not required at sites eligible for state restoration funding assistance. However, the Rule was amended prior to removal of the dispenser, and both Petitioner and its contractor were informed of those changes before the work was performed.

25. The rule requires that all storage tank systems that have been closed in accordance with 62-761.800(2), F.A.C., to perform a Closure Integrity Evaluation per subsections 621-761.800(2) and (3), F.A.C. Petitioner has failed to establish that the rule affects them in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. Therefore, Petitioner has not established that principles of fairness have been violated per section 120.542(2), F.S.

THEREFORE, IT IS ORDERED:

Based on the foregoing reasons, the Petitioner has demonstrated that it has not met the requirements for a waiver of 62-761.800(2) and (3),  
F.A.C. PETITIONERS REQUEST FOR A WAIVER IS DENIED.

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the request for a variance or waiver.

PETITION FOR ADMINISTRATIVE HEARING

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. Pursuant to Rules 28-106.201 and 28-106.301, F.A.C., a petition for an administrative hearing must contain the following information:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

The petition must be filed (received by the Clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida

32399-3000, or via electronic correspondence at Agency\_Clerk@dep.state.fl.us. Also, a copy of the petition shall be mailed to the applicant at the address indicated above at the time of filing.

### TIME PERIOD FOR FILING A PETITION

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing by the applicant and persons entitled to written notice under Section 120.60(3), F.S., must be filed within 21 days of receipt of this written notice. Petitions filed by any persons other than the applicant, and other than those entitled to written notice under Section 120.60(3), F.S., must be filed within 21 days of publication of the notice or within 21 days of receipt of the written notice, whichever occurs first. You cannot justifiably rely on the finality of this decision unless notice of this decision and the right of substantially affected persons to challenge this decision has been duly published or otherwise provided to all persons substantially affected by the decision. While you are not required to publish notice of this action, you may elect to do so pursuant Rule 62-110.106(10)(a).

The failure to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will be only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C. If you do not publish notice of this action, this waiver may not apply to persons who have not received a clear point of entry.

### EXTENSION OF TIME

Under Rule 62-110.106(4), F.A.C., a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, or via electronic correspondence at Agency\_Clerk@dep.state.fl.us, before the deadline for filing a petition for an administrative hearing. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

### MEDIATION

Mediation is not available in this proceeding.

JUDICIAL REVIEW

Once this decision becomes final, any party to this action has the right to seek judicial review pursuant to Section 120.68, F.S., by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this action is filed with the Clerk of the Department.

DONE AND ORDERED this 6<sup>th</sup> day of January 2020 in Leon County, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



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Tim Bahr, P.G., Director  
Division of Waste Management  
2600 Blair Stone Road  
Tallahassee, FL, 32399-2400

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on January 6, 2020, to the below listed persons.

FILING AND ACKNOWLEDGMENT

FILED, on this date, under 120.52(7) of the Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Tamela Starling  
Clerk

1/6/2020  
Date



Copies furnished to:

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