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VIA E-MAIL

Courtney Johnstone
Florida Department of Environmental Protection
Division of Waste Management, Voluntary Cleanup Tax Credit
2600 Blair Stone Road, MS 4535
Tallahassee, Florida 32399-2400
VCTC@FloridaDEP.gov
Courtney.Johnstone@FloridaDEP.gov

Re: Chapter 62-788, Florida Administrative Code – Rulemaking Comments from Florida Brownfields Association

Dear Ms. Johnstone:

The Florida Brownfields Association ("FBA") provides the following comments on the Florida Department of Environmental Protection's ("FDEP") proposed amendments to the Voluntary Cleanup Tax Credit Rule in Chapter 62-788, F.A.C.

While FBA appreciates FDEP's desire to add clarity to the Voluntary Cleanup Tax Credit Rule and process, as discussed below, FBA has significant concerns regarding FDEP's currently proposed amendments to Chapter 62-788.

I. Many Proposed Rule Amendments Exceed FDEP's Limited Statutory Rulemaking Authority.

FBA's position is that many of the proposed amendments to Chapter 62-788 exceed FDEP's limited rulemaking authority provided by statute and would not withstand a legal challenge on this basis. Such proposed amendments should be eliminated or modified, as appropriate.

A. FDEP Only Has Rulemaking Authority As Provided By Statute.

FDEP, as a state agency, only has authority as conferred by the Florida Legislature pursuant to statute. *WHS Trucking LLC v. Reemp. Assistance Appeals Comm'n*, 183 So. 3d 460, 462 (Fla. 1st DCA 2016) ("Florida agencies are creatures of statute and only have the authority and jurisdiction conferred by statutes."); *Agency for Persons with Disabilities v. Meadowview Progressive Care Group Home*, 340 So. 3d 547, 551 (Fla. 1st DCA 2022) ("An

administrative agency has only such power as granted by the Legislature and may not expand its own jurisdiction.").

Similarly, FDEP does not have inherent rulemaking authority. § 120.54(1)(e), Fla. Stat. ("No agency has inherent rulemaking authority…."). FDEP instead must derive such rulemaking power from statute. *Grove Isle, Ltd. v. State Dep't of Envt'l Regul*., 454 So. 2d 571, 573 (Fla. 1st DCA 1984) ("[A]dministrative bodies have no inherent power to promulgate rules and must derive that power from a statutory base.").

In short, FDEP "may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute." § 120.52(8)(f), Fla. Stat. (emphasis added). The following limitations apply: "[s]tatutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute." *Id*.

An agency must be careful to avoid an invalid exercise of delegated legislative authority. An agency performs an invalid exercise of delegated legislative authority if: (1) the agency exceeds its grant of rulemaking authority; (2) the "rule enlarges, modifies, or contravenes the specific provisions of the law implemented"; or (3) the rule is vague or "fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency." § 120.52(8)(b)-(d), Fla. Stat.

FBA is concerned that many of the proposed rule amendments, if adopted, would be an invalid exercise of FDEP's delegated legislative authority.

B. The Enabling Statute Only Provides FDEP With Narrow Rulemaking Authority To Adopt Rules To Prescribe Necessary Forms And To Provide Administrative Guidelines And Procedures.

In FBA's view, the enabling statute cited in FDEP's proposed rule amendments – Section 376.30781, Fla. Stat. – does not come close to providing FDEP with the rulemaking authority necessary to make many of the proposed rule changes. FBA is unaware of any other source of statutory rulemaking authority that would allow for such sweeping amendments that impose substantive requirements on tax credit applicants well beyond those contained in the applicable statutes. The recently enacted CS/HB 733 (2025) does not provide FDEP with any additional rulemaking authority.

Section 376.30781(12) provides FDEP with ***limited*** rulemaking authority: "The Department of Environmental Protection may adopt rules ***to prescribe the necessary forms required to claim tax credits under this section and to provide the administrative guidelines and procedures*** required to administer this section" (emphasis added). Accordingly, FDEP has the option to promulgate rules, but only if such rules pertain to necessary forms or to administrative guidelines and procedures.

FDEP's rulemaking effort far surpasses promulgating rules relating to necessary forms or administrative guidelines and procedures. This proposed rulemaking seeks to impose many new, substantive requirements in the Chapter 62-788 that go well beyond FDEP's rulemaking authority.

The proposed changes to Chapter 62-788 impose additional tax credit eligibility requirements and categorical exclusions not authorized, or contemplated, by the text of Section 376.30781. FBA's objections to the proposed rule changes as exceeding FDEP's rulemaking authority include, without limitation, the amendments proposed in the following Rules:

- Rule 62-788.201(4) – adding definition of "Redevelopment" for exclusion from tax credit eligibility
- Rule 62-788.301(4) – adding exclusions to tax credit eligibility
- Rule 62-788.301(4)(c) – adding exclusions to tax credit eligibility
- Rule 62-788.301(4)(m) – adding exclusions to tax credit eligibility
- Rule 62-788.301(4)(m)1. – adding exclusions to tax credit eligibility
- Rule 62-788.301(4)(m)2. – adding exclusions to tax credit eligibility
- Rule 62-788.301(4)(m)3. – adding exclusions to tax credit eligibility
- Rule 62-788.301(4)(m)4. – adding exclusions to tax credit eligibility
- Rule 62-788.401(4) – adding requirements for tax credit eligibility

These proposed amendments do much more than prescribe necessary forms or provide administrative guidelines and procedures; they instead impose new, substantive requirements for a tax credit applicant without sufficient delegated rulemaking authority.

In addition, the core statutory eligibility test for site rehabilitation Voluntary Cleanup Tax Credits is that the work must be "integral to site rehabilitation" under Section 376.30781, which is defined in the statute as "work that is necessary to implement the requirements of chapter 62-785 or chapter 62-782, Florida Administrative Code." The current version of Rule 62-788.201(2) includes a similar definition: “Integral to site rehabilitation” means work that is necessary to implement the requirements of Chapter 62-780, F.A.C." FDEP cannot now impose substantive tax credit eligibility requirements and exclusions through rulemaking that are more burdensome those contained in the statute. FDEP lacks such power, and FBA requests that the above proposed Rule sections be eliminated or modified, as appropriate, to fall within the ambit of FDEP's delegated rulemaking authority.

II. FBA Opposes The Following Proposed Rule Changes On Additional Grounds.

In addition to the substantial rulemaking authority concerns discussed above, FBA has further comments and objections regarding specific provisions in the proposed Rule amendments.

- **Lines 72-74**: "'(4) Redevelopment' means construction activities occurring at the Brownfield or drycleaning site that are not necessary to implement the requirements of Chapter 62-780, F.A.C., and therefore are not eligible for tax credit consideration."

    - FBA has substantial concerns regarding this proposed amendment and asserts that this definition of "redevelopment" is unnecessary and, at best, overly restrictive. The state Brownfields Redevelopment Act embraces the concept of redevelopment being a primary driver of site rehabilitation. *See* § 376.78(1), (8), Fla. Stat. ("The reduction of public health and environmental hazards on sites proposed to be rehabilitated and redeveloped is vital to their use and reuse as sources of employment, housing, recreation, and open space areas. … Brownfields redevelopment, properly done, can be a significant element in community revitalization…."). Without the prospect of successful redevelopment, many sites would never be rehabilitated and would remain idled and underused. Site rehabilitation and site redevelopment are often inextricably intertwined.

    - To the extent FDEP does seek to include such a definition, FBA requests that it include the following language (or similar): "'Redevelopment' means the process of revitalizing, repurposing, or rehabilitating existing properties or areas to enhance their utility, aesthetics, or economic viability. This work may involve demolishing or renovating old structures, changing land use, or introducing new development or structures. These activities may be integral to site rehabilitation under Chapter 62-780, F.A.C., and may be eligible for tax credit consideration."

- **Lines 173-175**: "(4) … Costs for work undertaken at a contaminated or Brownfield site that meets the definition of 'redevelopment' as defined in Rule 62-788.201, F.A.C., are categorically ineligible for site rehabilitation tax credit consideration."

    - FBA opposes this proposed amendment. As noted above, the state Brownfields statutes embrace the concept of redevelopment as being a primary driver of site rehabilitation. In many instances, without site redevelopment there would not be site rehabilitation. Site rehabilitation and site redevelopment are often inextricably intertwined. A categorical tax credit exclusion for redevelopment ignores these concepts and should not be included in the rules.

- **Lines 183-184**: "(c) … Cost to address contamination that did not result from the polluting activity at, or is not emanating from, the applicant's contaminated site …."

    - FBA is concerned that the undefined term "polluting activity" is overly vague and may cause confusion in instances where the impacts are anthropogenic and not tied to a regulated discharge or release. It is often unclear or difficult to determine the

source of such impacts without a costly and arduous background study. FBA is aware of many sites with such impacts unrelated to a regulated discharge or release – typically involving polycyclic aromatic hydrocarbons (PAHs) or benzo(a)pyrene (BaP) – where rehabilitation and redevelopment efforts would address direct exposure to impacts with engineering controls. FBA requests that clarifying text be inserted to ensure that engineering control costs are VCTC-eligible site rehabilitation costs in such situations.

- **Lines 199-203:** "(m) Costs for installation of pervious or impervious surfaces beyond what is necessary for an effective engineering control. Remedial action plan approvals issued pursuant to Chapter 62-780, F.A.C., are alone insufficient for a determination whether the claimed costs for the installation of pervious or impervious surfaces are integral to site rehabilitation as defined in Rule 62-788.201(2), F.A.C. Costs for the installation of pervious or impervious surface engineering control components will be deducted, excluded, or reduced by proration as follows: …."

    - FBA has numerous concerns with this language. The undefined words "beyond what is necessary" and "in excess" are ambiguous and subjective. It is unclear who will be the person to decide what is "beyond what is necessary" and "in excess." It is equally ambiguous as to what parameters would be used, including the specific engineering design factors that may lead to such decision.

      Further, it is unclear why a professional engineer's signed and sealed Remedial Action Plan is not sufficient to ascertain that an engineering control, as designed by a professional engineer and following standard engineering practice, is an integral part of site rehabilitation. The proposed language immediately triggers legitimate questions. For instance, will the FDEP Brownfields Section professional engineer issue a signed and sealed professional engineer's opinion to the contrary? If so, and in challenging a signed a sealed professional engineering opinion, FDEP's professional engineer is expected to strictly adhere to the practice of engineering provided in Chapter 471, Florida Statutes (that is, and upon request by the applicant and/or Court, all calculations, documents, and notes performed by the professional engineer must be provided to the applicant and must support the professional engineer's decision). Also, this proposed language leaves FDEP's professional engineering staff with potentially having to be challenged in court.

      A Remedial Action Plan submitted, signed, sealed by a professional engineer must adhere to Chapter 62-780, F.A.C. If a challenge is made by an FDEP professional engineer on the adequacy of an engineering control's design and objective, and FDEP fails to produce documentation supporting such a challenge, then FDEP's professional engineer may be referred to the Board of Professional Engineers for possible professional malpractice. This potential outcome emphasizes the point that a denial of tax credits based on disputing the adequacy of an engineering control may go beyond a mere difference of professional opinion and tax credit eligibility.

Given the above points, the following language is offered for consideration:

(m) Costs for pervious or impervious surfaces (such as building foundations, slabs, and other pervious or impervious structures) that are not integral to site rehabilitation. Engineering controls that are designed following standard professional engineering practice and are submitted under a Professional Engineer's signed and sealed site Remedial Action Plan pursuant to Chapter 62-780, F.A.C., and addresses the reduction or elimination of the potential for migration of, or exposure to, soil and/or groundwater contaminants as set forth in an approved Site Assessment performed under Chapter 62-780, F.AC., shall be eligible for tax credits.

- **Lines 214-220**: "1. The Department will reduce by proration building slab and foundation installation costs in relation to what is integral to site rehabilitation for the pervious or impervious surface to be effective to reduce or eliminate potential for migration of, or exposure to, contaminants per Chapter 62-780, F.A.C., and will exclude any costs associated with the slab or foundation that are in excess of what is required to be an engineering control. In addition, costs for thicker sidewalks or parking lots, rebar reinforcement, excess subbase material, building footers or stem walls that are associated with redevelopment and are not necessary to reduce or eliminate potential for migration of or exposure to contaminants per Chapter 62-780, F.A.C., will also be excluded."

    - FBA recognizes that similar language exists in the current Chapter 62-788, but FBA nonetheless has significant concerns regarding this proposed amendment. It is unclear from the proposed text who will determine whether the engineering control is "effective to reduce or eliminate potential for migration of, or exposure to, contaminants" (i.e., will it be the design engineer or an administrator at FDEP?). FBA acknowledges the need for reasonableness when performing an assessment of the engineering control's necessity and effectiveness relative to the site conditions and impacts. However, this proposed rule language, without further parameters or constraints, leaves too much discretion to FDEP and risks inconsistent application across sites.

- **Lines 221-227**: "2. The Department will reduce by proration installation costs for pervious and impervious surfaces in relation to the known, and not inferred, horizontal extent of soil contamination as identified during site assessment conducted in accordance with Rule 62-780.600, F.A.C. If soil contamination is being moved for consolidation and creates a larger contaminated soil area than previously identified during site assessment, the applicant may only claim costs for pervious and impervious surfaces for an area equivalent to the known original horizontal extent of soil contamination. The Department will exclude all costs for the installation of pervious and impervious surfaces that exceed the area of known original horizontal extent of the soil contamination identified during site assessment."

    - FBA is concerned how "the known, and not inferred" horizontal extent of soil will be applied. If a site has documented contamination at the interior of the site and clean perimeter samples, then often the contamination extent is inferred to extend

from the contaminated sample(s) out to the clean sample locations. If there are several hundred feet or more between the contaminated interior and clean perimeter samples, FDEP should not prohibit recovery of VCTCs in that area inferred to be contaminated. This proposed amendment places too much emphasis on what is "known" and ignores practical realities of delineation techniques.

- FBA also objects to this language as being overly restrictive by excluding costs for surfaces that exceed the area of the "known" original horizontal extent of the soil contamination identified during site assessment. As discussed above, the horizontal extent of contamination may be inferred in some instances and should be eligible for tax credits.

- FBA additionally opposes the language regarding creating a larger contaminated soil area than was previously identified during site assessment. This language is duplicative to the extent that existing rules already prohibit the exacerbation of a release or causing a new release.

- **Lines 228-233**: "3. The Department will prorate installation costs for pervious or impervious surfaces to exclude those costs incurred by the applicant to replace previous pervious or impervious surfaces serving as engineering controls. Previously existing pervious or impervious surfaces are considered effective engineering controls, regardless of whether they were relied upon for site rehabilitation completion under Rules 62-780.680(2) or (3), F.A.C., unless the applicant demonstrates the previous pervious or impervious surface fails to meet the definition of an engineering control."

    - FBA has numerous concerns with this proposed language. First, there should not be an unlimited timeframe of when a previous surface may have been present at the site. The language should be modified to say surfaces that functioned as effective ECs "immediately" prior to redevelopment (or similar). Property owners and stakeholders do not have the ability to determine if a surface seen on historical aerial photographs was an effective engineering control – i.e., the surface could have been full of potholes or the structure could have simply been a pole barn with no slab. Second, it would be impossible to know whether a previously existing pervious surface was serving as an engineering control, unless sampling of the upper 2 feet of soil had been performed. It is incorrect to assume that a previously existing surface, let alone pervious surface, was an effective engineering control. Third, this proposed amendment place an unnecessary burden on the applicant to demonstrate that the previous surface fails to meet the definition of an engineering control. Historical information, data, and photographs may be sparse or non-existent, which would substantially hamper such efforts. If FDEP seeks to show that a previous surface served as an engineering control, then FDEP should bear that burden.

- **Lines 238-240**: "4. The Department will exclude all costs for the installation of pervious or impervious surfaces in areas where soil contamination was not identified as being present during site assessment conducted pursuant to Rule 62-780.600, F.A.C."

- FBA opposes this language because it is too limiting. This language (and other such references throughout) should be clarified to include situations where additional contamination is documented during construction (i.e. post-SAR submittal/approval) or other post-site assessment activities. Site rehabilitation is not a static process; data collection does not necessarily end at the site assessment stage and those realities should be taken into account.

III. FBA Requests That The Amendments To The Solid Waste Rules Accurately Reflect The Requirements In CS/HB 733.

CS/HB 733 (2025), which was passed by the Florida Legislature and became effective on July 1, 2025, eliminated the requirements in Section 376.30781(3)(e) that an applicant seeking solid waste removal tax credits submit an affidavit stating the applicant had consulted with appropriate local government officials and FDEP, and to the best of the applicant's knowledge, based on such consultation and available historical records, that the brownfield site was never operated as a permitted solid waste disposal area or was never operated for monetary compensation.

Despite this statutory change, Rule 62-788.341(2), as proposed to be amended, would still require a "statement" indicating the tax credit applicant "consulted with" the appropriate local government official and FDEP, and to the best of the applicant's knowledge, the brownfield site was never operated as a permitted solid waste disposal area. Form 62-788.101(1), as proposed to be amended, also would still require the applicant to include the name and title of the consulted government official and consulted FDEP representative.

FBA respectfully requests that FDEP review Rule 62-788.341(2) and Form 62-788.101(1) and conform them to the requirements in CS/HB 733 (2025). Consultation with local government officials or FDEP in this regard are no longer required by statute, and Chapter 62-788 and Form 62-788.101(1) should reflect this change.

IV. FBA Does Not Oppose Amending Chapter 62-788 To Conform To The Recent Statutory Amendments Pursuant To CS/HB 733.

FBA does not oppose FDEP amending Chapter 62-788 to make changes that are reasonably necessary to conform the Rule with the statutory changes enacted pursuant to CS/HB 733 (2025), as long as such amendments otherwise comply with FDEP's delegated rulemaking authority.

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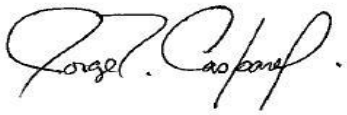
FBA and FDEP have worked together effectively on program improvements for decades. In a recent rulemaking example, FBA coordinated with FDEP over a year in advance of presenting its petition for rulemaking for Rule 62-524, F.A.C. Further, within the Brownfield Redevelopment Act itself, certain provisions of CS/HB 733 were included at the request of FDEP (dating back to meetings in 2019) in direct response to administrative and interpretation challenges faced by the FDEP. Moving forward with this rulemaking for the VCTC rule, FBA looks forward to our

meeting on November 6, 2025 and continuing our collegial relationship to improve Florida's Brownfield Program. We appreciate FDEP's willingness to extend the comment period and look forward to a fruitful rulemaking process where all stakeholder input is fully considered.

On behalf of the FBA and its Board of Directors,



Jorge R. Caspary, P.G.
2025 FBA President

Michael J. Larson, Esq.
2025 FBA President-Elect

cc: Tim Bahr, Director, Division of Waste Management, FDEP
Scott Sweeney, Brownfields Program Manager, FDEP
FBA Board of Directors