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Florida Department of Environmental Protection

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SENT VIA EMAIL

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In re: Lee County
Petition for Variance
Fort Myers Beach Wastewater Treatment Plant
Fiesta Village Wastewater Treatment Plant

OGC File No. 17-0966

Submitted by:

Pamela Keyes, P.E.
Utilities Director
Lee County Utilities
1500 Monroe Street, Third Floor
Fort Myers, FL 33901

Email: pkeyes@leegov.com

FINAL ORDER GRANTING PETITION FOR VARIANCE FROM RULE 62-610.466, F.A.C.

On August 16, 2017, a petition for variance from requirements in Rule 62-610.466 of the Florida Administrative Code (F.A.C.), under §120.542 of the Florida Statutes (F.S.) and Rule 28-104.002, F.A.C., was filed by the Lee County Utilities ("Petitioner"), for the Fort Myers Beach Wastewater Treatment Plant located at 17155 Pine Ridge Road, Fort Myers Beach, Florida, and the Fiesta Village Wastewater Treatment Plant located at 1366 San Souci Drive, Fort Myers, Florida; both facilities are located in Lee County.

The petition is for a variance from Rule 62-610.466(9)(b)1.a., F.A.C., which states that "...The parameters listed as primary drinking water standards shall be applied as maximum single sample permit limitations." The Petitioner requested a permanent variance from the requirement to meet primary drinking water standards of specific parameters in reclaimed water prior to injection at the Aquifer Storage and Recovery (ASR) wellheads. The specific parameters are:

- Total Coliform
- Total Trihalomethanes
- Five Haloacetic Acids
- Di(2-ethylhexyl)phthalate
- Nitrate
- Nitrite

The Petitioner requested a variance to avoid the substantial economic hardship of providing additional treatment between the water treatment plants and the ASR wells. A notice of receipt of the petition was published in the Florida Administrative Register on August 22, 2017. The Department did not receive any public comments.

1. Petitioner's business address is: Lee County Utilities, 1500 Monroe Street, Third Floor., Fort Myers, Florida.
2. The operation of the Petitioner's Fort Myers Beach Wastewater Treatment Plant is authorized by the DEP domestic wastewater facility permit number FLA144215.
3. The operation of the Petitioner's Fiesta Village Wastewater Treatment Plant is authorized by the DEP domestic wastewater facility permit number FL0039829.
4. An application for an underground injection control (UIC) permit to construct the Fort Myers Beach ASR well system was received by the Department's Aquifer Protection Program (UIC permit application numbers 352523-001 though -006).
5. Rule 62-610.466(9)(b)1.a., F.A.C., requires parameters listed as primary drinking water standards shall be applied as maximum single sample permit limitations.
6. Rule 62-528.630(3), F.A.C., requires that a Class V well may not "...cause[] or allow[] movement of fluid containing any contaminant into underground sources of drinking water, and the presence of that contaminant may cause a violation of any primary drinking water regulation under Chapter 403, F.S., and Chapter 62-550, F.A.C., or which may adversely affect the health of persons."
7. The purpose of the underlying statutes 403.021, 403.085, 403.086 403.087, and 403.088 is to:
 - conserve the waters of the state;
 - protect, maintain, and improve the quality thereof for public water supplies and the propagation of wildlife and fish and other aquatic life;
 - provide that no wastes be discharged into any waters of the state without first being given the degree of treatment necessary to protect the beneficial uses of such water;
 - treatment plants which discharge effluent through disposal wells shall provide for secondary waste treatment and, in addition thereto, advanced waste treatment as deemed necessary and ordered by the Department of Environmental Protection;
 - facilities for sanitary sewage disposal constructed after June 14, 1978, shall dispose of any wastes by deep well injection without providing for secondary waste treatment and, in addition thereto, advanced waste treatment deemed necessary by the Department to protect adequately the beneficial use of the receiving waters.

The Petitioner provided the following information:

1. data demonstrating that the expected maximum concentrations of the referenced parameters in the injectate will exceed the primary drinking water standards
2. affirmative demonstration that the receiving ground water in the Lower Hawthorn aquifer contains between 1,000 and 3,000 milligrams per liter (mg/ L; inclusive) of total dissolved solids
3. the lower Hawthorn aquifer is not currently used as a source of potable water supply within one mile of the proposed ASR wells
4. the receiving ground water is not reasonably expected to be used as a potable water supply in the future because Lee County established an institutional control in its Land Development Code, Chapter 14 Article III, that prohibits the construction of a potable well to a depth that intercepts the storage zone water within 0.5 mile of an ASR well.

The Petitioner has demonstrated that the underlying statutes will be achieved through other means:

1. The lower Hawthorn aquifer within 1.0 mile of the proposed ASR wells is being used as a source of irrigation water only.
2. The reclaimed water injected into the aquifer by Petitioner will meet or exceed the standards for high level disinfection.
3. Ground water quality standards as demonstrated by the ground water monitoring wells will be met as required by regulation.
4. Public health will not be adversely affected by the operation of the ASR well system.
5. Public welfare will not be adversely affected. The public benefits from the operation of the ASR wellfield that meets all underlying water quality regulations.
6. Petitioner shall construct and operate the ASR wellfield to store and recover high quality reclaimed water for periods of higher demand.
7. Requiring compliance with the rules for which this variance is sought will create a financial hardship for the Petitioner by resulting in approximately \$20,000,000 in construction costs and \$700,000 per year of additional operation and maintenance costs related to additional treatment needed to comply with the rule as written.
8. The middle Hawthorn aquifer is the primary groundwater source for users in the area. It is confined from the underlying lower Hawthorn aquifer by the lower Hawthorn confining zone.

For the foregoing reasons, the Department has determined that the Petitioner has met the requirements for a variance from Rule 62-610.466(9)(b), F.A.C. The Department hereby grants a permanent variance, subject to the six conditions below:

1. Ground water quality criteria, per Chapter 62-520, F.A.C., shall be met at the ASR monitoring wells.
2. The quality of the injectate prior to injection shall be monitored and shall meet the following limits:
 - i. Routine injectate water samples shall be taken daily, when discharging, and sampled for total coliform. The routine injectate water sample taken following a total coliform positive sample shall be used as the repeat injectate water sample. If any routine or repeat sample is total coliform positive, the permittee shall analyze that sample for presence of E. coli. An E. coli exceedance of the primary drinking water standard occurs if:
 - 1) A routine sample is positive for both total coliform and E. coli and the repeat sample (the next day's sample) is also positive for total coliform,
 - 2) A routine sample is positive for total coliform and the repeat sample is positive for both total coliform and E. coli,
 - 3) A repeat injectate water sample is not taken following an E. coli positive routine sample (if discharge does not occur on the day following an E. coli routine sample, the first routine sample taken when discharge resumes shall be used as the repeat sample), or
 - 4) A confirmation test for E. coli is not conducted following a total coliform positive repeat sample.
 - ii. The petitioner needs only demonstrate that the drinking water standards are met on a less stringent running annual average (see Rule 62-550.500(7)(a)). This variance allows the same protective measures as given to the potable water suppliers.
 - 1) The annual average for Total Trihalomethanes shall not exceed 80 µg/L.
 - 2) The annual average for Five Haloacetic Acids shall not exceed 60 µg/L.

- 3) The annual average for Di(2-ethylhexyl)phthalate shall not exceed 6 µg/L
 - 4) The annual average for Nitrate shall not exceed 10 mg/L.
 - 5) The annual average for Nitrite shall not exceed 1 mg/L.
3. This variance does not relieve the Petitioner from liability for harm or injury to human health or welfare, animal, or plant life, or property, or from penalties therefore; nor does it allow pollution in contravention of Florida Statutes or Department rules.
 4. The Department hereby expressly reserves the right to initiate appropriate legal action to address any violations of statutes or rules administered by the Department.
 5. If any potable supply well is constructed within one mile of the proposed injection system in the lower Floridan Aquifer, the Petitioner will provide additional treatment consisting of reverse osmosis or higher treatment level on the potable supply well.
 6. The Petitioner agrees to record deed restrictions on the water reclamation facility that would prohibit the construction of potable wells into the lower Hawthorn aquifer on the property.

RIGHTS

This order will become final unless a timely petition for an administrative proceeding is filed pursuant to the provisions of sections 120.569 and 120.57 of the Florida Statutes. Any person whose substantial interests are affected by the Department's action may file such a petition. The petition must contain the information set forth below and must be filed (received) in the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS 35, Tallahassee, Florida 32399-3000.

Petitions filed by the Petitioner or any of the parties listed below must be filed within 21 days of receipt of this order. Petitions filed by any other person must be filed within 21 days of publication of the public notice or within 21 days of receipt of this order, whichever occurs first. Under section 120.60(3), however, any person who asked the Department for notice of agency action may file a petition within 21 days of receipt of such notice, regardless of the date of publication.

A petitioner must mail a copy of the petition to Pamela Keyes, Utilities Director, Lee County Utilities, 1500 Monroe Street, Third Floor, Fort Myers FL 33901, at the time of filing. The failure of any person 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 of the Florida Statutes, or to intervene in this proceeding and participate as a party to it. Any subsequent intervention will only be at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

A petition that disputed the material facts on which the Department's action is based must contain the following information:

- (a) The name, address and telephone number of each petitioner; the Department case identification number and the county in which the subject matter or activity is located;
- (b) A statement of how and when each petitioner received notice of the Department action;
- (c) A statement of how each petitioner's substantial interests are affected by the Department action;
- (d) A statement of the material facts disputed by the petitioner, if any;
- (e) A statement of facts that the petitioner contends warrant reversal or modification of the Department action;
- (f) A statement of which rules or statutes the petitioner contends require reversal or modification of the Department 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 wants the Department to take with respect to the proposed action.

A petition that does not dispute the material facts on which the Department's action is based shall state that no such facts are in dispute and otherwise contain the same information as set forth above, as required by Rule 28-106.301, F.A.C.

Because the administrative hearing process is designed to formulate final agency action, the filing of a petition means that the Department final action may be different from the position taken by it in this order. Persons whose substantial interests will be affected by any such final decision of the Department on the petitions have the right to petition to become a party to the proceeding, in accordance with the requirements set forth above.

Mediation under section 120.573 of the Florida Statutes is not available for this proceeding.

This action is final and effective on the date filed with the Clerk of the Department unless a petition is filed in accordance with the above.

A party to this order has the right to seek judicial review of it under section 120.68 of the Florida Statutes, by filing a notice of appeal under Rule 9.110 of the Florida Rules of Appellate Procedure with the clerk of the Department in the Office of General Counsel, Mail Station 35, 3900 Commonwealth Boulevard, 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 must be filed within thirty days after this order is filed with the clerk of the Department.

DONE AND ORDERED this 16th day of March, 2018, in Fort Myers, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Jon M. Iglehart
Director of District Management
South District

FILING AND ACKNOWLEDGMENT FILED, on this date, pursuant to s. 120.52, Florida Statutes, with the designated Agency Clerk, receipt of which is hereby acknowledged. All copies were mailed before the close of business on the date below to the persons listed.



Clerk

March 16, 2018
Date

Attachments: Notice of Rights of Substantially Affected Persons
Notice for Optional Publication

Copies furnished to:

Lyssa Lott, P.E., llott@leegov.com
William D. Beddow, P.E., bill.beddow@ch2m.com
Jeff Pearson, jpearson@capecoral.net
Meg Taylor, megt@hgslaw.com
James P. Guida, P.G., jguida@prowatersource.com
Joint Administrative Procedures Committee, joint.admin.procedures@leg.state.fl.us

NOTICE OF RIGHTS OF SUBSTANTIALLY AFFECTED PERSONS

This determination is final and effective on the date filed with the Clerk of the Department unless a timely and sufficient petition for an administrative hearing is filed under sections 120.569 and 120.57 of the Florida Statutes as provided below. If a sufficient petition for an administrative hearing is timely filed, this determination automatically becomes only proposed agency action subject to the result of the administrative review process. Therefore, on the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. The procedures for petitioning for a hearing are set forth in Rules 28-106.201-.202 and 62-110.106, F.A.C., and are summarized below.

Be advised that, under Florida law, your neighbors and other parties who may be substantially affected by this determination have a right to request an administrative hearing. Because the administrative hearing process is designed to re-determine final agency action, the filing of a petition for an administrative hearing may result in a final determination different from this determination. Generally speaking, the 21-day period for filing a petition begins to run on the date of publication of the notice (if published) or the date a person receives actual notice, whichever occurs first (see below).

The Department will not publish notice of this determination. Publication of notice by you is optional and is not required for you to proceed. However, in the event that an administrative hearing is held and the Department's determination is reversed, proceeding with the proposed activity before the time period for requesting an administrative hearing has expired would mean that the activity was conducted without the required permit or authorization. In cases where notice is not published, there may be instances in which a substantial amount of time could pass before an affected person receives notice of the agency action.

If you wish to limit the time within which all substantially affected persons may request an administrative hearing, you may elect to publish, at your own expense, the notice specified below in the legal advertisement section of a newspaper of general circulation in the county where the activity is to take place. A single publication will suffice.

If you wish to limit the time within which any specific person(s) may request an administrative hearing, you may provide direct notice to such person(s), by certified mail and enclosing a copy of this determination.

For the purposes of publication, a newspaper of general circulation means a newspaper meeting the requirements of sections 50.011 and 50.031 of the Florida Statutes. In the event you do publish this notice, within seven days of publication, you must provide to the following address proof of publication issued by the newspaper as provided in section 50.051 of the Florida Statutes. If you provide direct written notice to any person as noted above, you must provide to the following address a copy of the direct written notice: Florida Department of Environmental Protection, P.O. Box 2549, Fort Myers, FL 33902-2549; Attn: Nolin Moon.

NOTICE
STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

The Department of Environmental Protection gives notice that a variance has been granted to Lee County Utilities, Pamela Keyes, Utilities Director, 1500 Monroe Street, Third Floor, Fort Myers, Florida, to provide relief for the Aquifer Storage and Recovery system (ASR) located on the north side of Summerlin Road across Safety Road, from Rule 62-610.466(9)(b), F.A.C., which requires parameters listed as primary drinking water standards shall be applied as maximum single sample permit limitations. The variance grants permanent relief, by conditionally requiring the injected water to meet alternative limits and that groundwater quality criteria to be met at the ASR monitoring wells.

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 of the Florida Statutes. The petition must contain the information set forth below and 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. Mediation is not available.

If a timely and sufficient petition for an administrative hearing is filed, other persons whose substantial interests will be affected by the outcome of the administrative process have the right to petition to intervene in the proceeding. Intervention will be permitted only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205 of the Florida Administrative Code (F.A.C.).

In accordance with Rules 28-106.111(2) and 62-110.106(3)(a)(4), F.A.C., petitions for an administrative hearing must be filed within 21 days of publication of the notice or receipt of written notice, whichever occurs first. 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 before the applicable deadline. A timely request for extension of time will toll the running of the time period for filing a petition until the request is acted upon. Upon motion by the requesting party showing that the failure to file a request for an extension of time before the deadline was the result of excusable neglect, the Department may also grant the requested extension of time.

The petitioner shall mail a copy of the petition to the applicant at the address indicated above at the time of filing. The failure of any person to file a petition for an administrative hearing within the appropriate time period shall constitute a waiver of that right.

A petition that disputes the material facts on which the Department's action is based 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, and telephone number of the petitioner; 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 are or 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 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.

A petition that does not dispute the material facts on which the Department's action is based shall state that no such facts are in dispute and otherwise shall contain the same information as set forth above, as required by Rule 28-106.301, F.A.C.

Under sections 120.569(2)(c) and (d) of the Florida Statutes, a petition for administrative hearing shall be dismissed by the agency if the petition does not substantially comply with the above requirements or is untimely filed.

Complete copies of all documents relating to this determination are available for public inspection during normal business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, at Florida Department of Environmental Protection, 2295 Victoria Avenue, Suite 364, Fort Myers, FL 33901. The contact person is Nolin Moon at 239-344-5672.