

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In re: Fuji Clean USA, LLC

OGC Case No. 21-0817

Petition for Variance from provisions of:

- Subsection 62-6.013(4) and paragraph 62-6.013(4)(c);
- Paragraphs 62-6.013(2)(f), 62-6.013(2)(i), 62-6.013(10)(d); and
- Paragraph 62-6.013(6)(b); and subparagraphs 62-6.013(6)(b)1., 62-6.013(6)(b)2., 62-6.013(6)(b)3., Florida Administrative Code (F.A.C.)

ORDER GRANTING PETITION FOR VARIANCE

On August 23, 2021, Fuji Clean USA, LLC (Fuji Clean), filed a Petition with the Florida Department of Environmental Protection (Department) requesting a section 120.542, Florida Statutes, (F.S.), variance from the requirements of subparagraph 62-6.013(6)(d)(4), Florida Administrative Code, (F.A.C.). Fuji Clean amended their Petition to include all rule subsections, paragraphs and subparagraphs referenced above. These rule provisions require annual onsite sewage treatment and disposal systems (OSTDS) tank manufacturer inspections, and specify requirements for tank inlet and outlet devices, sealants for joints of receptacles, materials testing and water tightness testing. Fuji Clean seeks a variance to sell and distribute in Florida their treatment tanks identified as models CE5, CE7 and CEN5 assembled at their Brunswick, Maine facility now and additional United States assembly operations in the future.

The Department made timely requests for additional information on September 22, 2021, December 12, 2021, August 8, 2022, October 21, 2022, November 28, 2022 and December 20, 2022. In response Fuji Clean provided additional information to the Department on November 12, 2021, July 8, 2022, September 22, 2022, October 31, 2022, December 1, 2022 and December 21, 2022.

The Department acknowledges that Fuji Clean previously received a permanent variance on November 13, 2015 from the Florida Department of Health (DOH) prior to the transfer on July 1, 2021 of the OSTDS program to the Department, pursuant to the Florida Clean Waterways Act, for subparagraph 64E-6.013(1)(b)1, paragraphs 64E-6.013(2)(a), 64E-6.013(2)(i), 64E-6.013(2)(j), subparagraph 64E-6.013(3)(a)1, paragraph 64E-6.013(3)(g), subsection 64E-6.013(4), paragraph 64E-6.013(6)(b), subparagraphs 64E-6.013(6)(b)1, 64E-6.013(6)(b)2, 64E-6.013(6)(b)3, 64E-6.013(6)(b)4, 64E-6.013(6)(d)4, and paragraph 64E-6.013(10)(d), F.A.C., granting the sale and distribution of their tanks in Florida that are assembled in their Japan factory. As part of the OSTDS program transfer to the Department these rules were transferred and numbered within Chapter 62-6, F.A.C. This current Order Granting Petition for Variance does not nullify or supersede the November 13, 2015 permanent variance except as specified herein.

Notices of receipt of the original Petition and amended Petition were published in the Florida Administrative Register on September 2, 2021 and January 5, 2023. No public comment was received.

BACKGROUND AND APPLICABLE REGULATORY CRITERIA

Fuji Clean requests a state-wide permanent variance from rule provisions requiring annual onsite sewage treatment and disposal systems (OSTDS) tank manufacturer inspections, and specify requirements for tank inlet and outlet devices, sealants for joints of receptacles, materials testing and water tightness testing. Fuji Clean seeks a variance to sell and distribute in Florida their treatment tanks identified as models CE5, CE7 and CEN5 assembled at their Brunswick, Maine facility now and additional United States assembly operations in the future.

The applicable rules state in pertinent part:

Paragraph 62-6.013(2)(f), F.A.C.:

The inlet and outlet devices must be located at opposite ends of the tank so as to be separated by the maximum distance practical and must be in accordance with ASTM C-923/C-923M-20, Standard Specification for Resilient Connectors Between Reinforced Concrete Manhole Structures, Pipes, and Laterals (2020)...

Paragraph 62-6.013(2)(i), F.A.C.:

Joints of tanks, including mid-seams, risers, and lids must be sealed using a bonding compound that meets ASTM C-990-09R19, Standard Specification for Joints for Concrete Pipe, Manholes, and Precast Box Sections using Preformed Flexible Joint Sealants (2019)...

Subsection 62-6.013(4) and paragraph 62-6.013(4)(c), F.A.C.:

(4) Onsite sewage tank manufacturer's yearly inspection – Yearly inspection of the manufacturer's facility must consist of the following:

...

(c) Verify that the necessary tests are being conducted by a certified testing lab or by a technician certified by the ACI. The preparation of the test specimens must be performed by certified third party testing laboratory personnel; or manufacturers, or their employees, that have successfully passed the ACI certification program. Each manufacturer must submit a minimum of three cylinders per year. The specimens must be taken from a production mix.

Paragraph 62-6.013(6)(b), and subparagraphs 62-6.013(6)(b)1. through 62-6.013(6)(b)3., F.A.C.:

(b) Fiberglass tanks must be constructed so that all parts of the tank meet the following mechanical requirements. A test report from an independent testing laboratory is required to substantiate that individual tank designs and material formulations meet these requirements.

1. Ultimate tensile strength – minimum 12,000 psi when tested in accordance with ASTM D-638-14, Standard Test Method for Tensile Properties of Plastics (2014), herein adopted and incorporated by reference...

2. Flexural strength – minimum 19,000 psi when tested in accordance with ASTM D-790-17, Standard Test Methods for Flexural Properties of Unreinforced and Reinforced Plastics and Electrical Insulating Materials (2017), herein adopted and incorporated by reference...

3. Flexural modulus of elasticity – minimum 800,000 psi when tested in accordance with ASTM D-790-17 Standard Test Methods for Flexural Properties of Unreinforced and Reinforced Plastics and Electrical Insulating Materials, incorporated by reference...

Paragraph 62-6.013(10)(d):

Cast in place tanks or tanks manufactured with water stops below the invert of the outlet, and tanks with seams below the invert of the outlet must be watertightness tested in accordance with ASTM C-1227-20, Standard Specification for Precast Concrete Septic Tanks, paragraph 9.2.2, after installation in the field...

**THE VARIANCE OR WAIVER WILL MEET THE UNDERLYING
PURPOSE OF THE STATUTE**

Section 120.542(2), F.S., 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.” The variance procedure is intended to provide relief from unreasonable, unfair, and unintended results in unique cases.

Rule 62-6.013, F.A.C., implements Section 381.0065(3)(a), F.S., which states the Department shall adopt rules to administer ss. 381.0065-381.0067, F.S., including requirements for “the design and construction of any component part of an onsite sewage treatment and disposal system”. This includes standards and approvals for tank construction materials and standards.

The underlying purpose of the statute is stated in paragraph 381.0065(1)(b), F.S., “... It is further in the intent of the Legislature that the installation and use of onsite sewage treatment and disposal systems not adversely affect the public health or significantly degrade the groundwater or surface water.”

Without meeting required construction materials and standards for tanks, a product might fail to work properly. A product that fails to work properly could result in discharge of sewage on the ground or within an occupied structure and contamination of groundwater or surface water, adversely affecting public health or degrading groundwater or surface water, which are all in violation of section 381.0065, F.S.

Specific facts that demonstrate the underlying purpose of the statute will be met include the following:

Paragraph 62-6.013(2)(f), F.A.C., requires that inlet and outlet seals meet ASTM C-923/923M-20. Fuji Clean proposes that in lieu of using inlet and outlet seals meeting rule requirements, they use inlet and outlet pipes affixed rigidly to the treatment receptacles and use resilient Fernco fittings between the rigid pipes and the connecting pipes. The Fernco fittings meet and provide the required flexibility provided by seals meeting ASTM C923/923M-20, which would prevent damage to inlet/outlet pipes when the tank settles after installation. Fernco fittings meet ASTM C-1173-22, Standard Specification for Flexible Transition Couplings for Underground Piping Systems and ASTM D-5926-20, Standard Specification for Poly (Vinyl Chloride) (PVC) Gaskets for Drain, Waste, and Vent (DWV), Sewer, Sanitary, and Storm Plumbing Systems. Therefore, based on the foregoing, Fuji Clean demonstrated that the purpose of the underlying statute will be achieved.

Paragraph 62-6.013(2)(i), F.A.C., requires joints of tanks, including mid-seams, risers, and lids to be sealed using a bonding compound that meets ASTM C-990-09R19, Standard Specification for Joints for Concrete Pipe, Manholes, and Precast Box Sections using Preformed

Flexible Joint Sealants (2019). Fuji Clean uses a sealant to glue the two halves of their tank together. In 2015, Fuji Clean was granted a variance to allow them to use a non-compliant sealant at their Japan manufacturing and assembly facility. This sealant cannot be used in the United States. In lieu of using a sealant meeting the standard in this rule paragraph and in lieu of using glue that was documented in the 2015 variance granted to Fuji Clean for use at their Japan manufacturing facility, Fuji Clean proposes to use Penguin Seal 560 for tanks assembled in the United States. Fuji Clean claims Penguin Seal 560 is functionally equivalent to the glue used in Japan and provided testing results of Penguin Seal 560 in accordance with Japanese Industrial Standards (JIS) standards and Fuji Clean's protocols to demonstrate the quality of the glue. Therefore, based on the foregoing, Fuji Clean demonstrated that the purpose of the underlying statute will be achieved.

Subsection 62-6.013(4), F.A.C., requires tank manufacturers to be inspected annually and paragraph 62-6.013(4)(c), F.A.C., requires tank manufacturers to provide annual materials testing. Fuji Clean was granted a variance to these rule provisions in 2015 based on information provided on Fuji Clean's manufacturing and assembly practices at their Japan facility and annual reporting requirements that provided assurances that tanks meet the standards proposed in their 2015 Petition.

Fuji Clean indicates that tanks will be assembled at their Maine and future additional United States facilities with documented assembly procedures and quality assurance procedures identical to those used in Japan, which previously were granted a variance in 2015. Fuji Clean provided documentation of their assembly practices and quality assurance practices used at their Maine facility to demonstrate that these are established and followed by technicians both in Japan and the United States. These manufacturing instructions may be improved over time but will be documented and will remain the same in Japan and at the Maine and future additional United States facilities. Tank assembly consistency will be achieved by the following: training U.S. assembly personnel initially by Fuji Clean Japan engineers; the presence of a qualified representative from Fuji Clean Japan at the Maine and future additional United States facilities to observe assembly processes on a daily or weekly basis; biannual visits to the Maine or future additional United States facilities from Fuji Clean Japan's engineering team to observe the assembly process and document the evaluation on a factory audit form; and evaluation and approval by Fuji Clean Japan's engineering team for any process adjustment that may deviate from Fuji Clean Japan's process. In addition, tanks will be assembled in accordance with Fuji Clean's tank assembly procedures and all tank assemblies will be documented using the standard Fuji Clean assembly check sheet. Fuji Clean asserts that tanks assembled in the Brunswick, Maine, facility have been used without incident in other states for approximately three years.

Fuji Clean will provide the results of annual materials testing by Fuji Clean Japan, in lieu of independent testing. For the required testing, Fuji Clean will provide the results of tests on material made using the matched metal die process, and material made using the glass spray up process, using ASTM standards (see below, addressing paragraph 62-6.013(6)(b), F.A.C.). The results will include one sample from a compartment wall, and one sample from the tanks' outside wall. Fuji Clean will provide an annual statement certifying that the tanks are manufactured in Japan and within the United States in accordance with the procedures and standards approved by the Department. Therefore, based on the foregoing, Fuji Clean demonstrated that the purpose of the underlying statute will be achieved.

Paragraph 62-6.013(6)(b), and subparagraphs 62-6.013(6)(b)1. through 62-6.013(6)(b)3., F.A.C.,

provides requirements for fiberglass tank standards for ultimate tensile strength when tested in accordance with ASTM D-638-14 and standards for flexural strength and the flexural modulus of elasticity when tested in accordance with ASTM C-790-17. The rule also requires testing to be conducted by an independent laboratory. The variance granted in 2015 allowed that in lieu of meeting this requirement, Fuji Clean would provide annual testing from Fuji Clean Japan, rather than an independent laboratory, which met the Japanese Industrial Standards K 7164 and K 7107. The Japanese standards are similar to the required ASTM standards. Fuji Clean will report results of annual testing of tanks reported from Fuji Clean Japan which show tanks meet the following standards:

- Minimum ultimate tensile strength of 8,700 psi when tested according to ASTM D638-14 (subparagraph 62-6.013(6)(b)1., F.A.C., requires a minimum of 12,000 psi).
- Minimum flexural strength of 8,700 psi when tested according to ASTM D790-17 (subparagraph 62-6.013(6)(b)2., F.A.C., requires a minimum of 19,000 psi).
- Minimum flexural modulus of elasticity of 1,305,300 psi (tanks constructed using matched metal dies) and 928,200 psi (tanks constructed by glass resin spray) (subparagraph 62-6.013(6)(b)3., F.A.C., requires a minimum of 800,000 psi).

These measures do not constitute a change in material strength standards relative to the 2015 variance granted, which required similar strength standards in Japanese Industrial Standards, but measured in different units. Fuji Clean performed successful structural proof testing of its receptacles prior to approval pursuant to the 2015 variance granted. Therefore, based on the foregoing, Fuji Clean demonstrated that the purpose of the underlying statute will be achieved.

Paragraph 62-6.013(10)(d), F.A.C., requires that tanks manufactured with seams below the invert of the outlet must be watertightness tested in accordance with ASTM C-1227-20, Standard Specification for Precast Concrete Septic Tanks, paragraph 9.2.2, after installation in the field. The variance granted to Fuji Clean in 2015 allowed them to watertightness test all of their tanks at Fuji Clean's manufacturing facility in Japan. Fuji Clean agrees, as a part of their current Petition that all tanks assembled at Fuji Clean's Maine and future United States facilities will also be watertightness tested using the same watertightness testing procedures provided with their current Petition, which are the same procedures used in Japan and are substantively the same as those required by the rule to be conducted in the field. Therefore, based on the foregoing, Fuji Clean demonstrated that the purpose of the underlying statute will be achieved.

SUBSTANTIAL HARDSHIP TO THE PETITIONER

“Substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. Section 120.542, F.S.

Fuji Clean demonstrated that strict application provisions of the following would result in substantial and technological hardships:

- subsection 62-6.013(4) and paragraph 62-6.013(4)(c);
- paragraphs 62-6.013(2)(f), 62-6.013(2)(i), 62-6.013(10)(d); and
- paragraph 62-6.013(6)(b); and subparagraphs 62-6.013(6)(b)1. through 62-6.013(6)(b)3., F.A.C.

Fuji Clean indicates they have developed the capacity to assemble tanks at its facility in Brunswick, Maine, and will develop this capacity in additional facilities in the United States. Using the

same documented Quality Assurance/Quality Control procedures under the control of Fuji Clean Japan they will achieve the same level of quality and performance for their United States facilities as tanks assembled in Japan. Requiring Fuji Clean to conduct additional expensive testing procedures for products made or assembled in the United States which are functionally equivalent to approved parts and products made in Japan would represent an economic and technological hardship to Fuji Clean.

Current worldwide economic conditions have strained supply chains, resulting in increased shipping costs and delays in shipping schedules. Fuji Clean's North American subsidiary can only mitigate these high costs and delayed schedules by performing assembly in the United States with component parts manufactured in Japan. Fuji Clean asserts that its North American subsidiary cannot remain independently viable unless it assembles tanks in the United States. Assembly at facilities in the United States also requires changing the conditions upon which the 2015 variance was granted. Yearly manufacturing inspections by the Department are not feasible given the distance between Fuji Clean's current United States facilities from Florida. Strict adherence to the rules and the 2015 variance would impose an economic hardship by precluding Fuji Clean from establishing assembly facilities in more cost-effective distance from customers.

Complying with Florida's inlet and outlet seal standards would constitute a technological and economic hardship. Fuji Clean's tanks are engineered to include inlet and outlet subassemblies and use integrated inlet and outlet stubs to prevent free insertion that could damage the subassemblies. Complying with the rule would require development of an expensive adaptor solely for Florida.

Requiring a rule-compliant sealant that does not provide the required rigidity for the tank, or requiring the glue allowed in the 2015 variance which is not available in the United States, while a functionally equivalent glue is available that provides the same performance would constitute a technological or economic hardship from resulting in inferior tanks or precluding the cost savings associated with assembly in the United States.

Performing watertightness testing after field installations on tanks that have already been watertightness tested after manufacture and assembly by the manufacturer under stringent quality control conditions would impose an economic and technical hardship on Fuji Clean and its customers.

THEREFORE, IT IS ORDERED:

Based on the foregoing reasons, Fuji Clean demonstrated that it has met the requirements for a variance from the following:

- subsection 62-6.013(4) and paragraph 62-6.013(4)(c);
- paragraphs 62-6.013(2)(f), 62-6.013(2)(i), 62-6.013(10)(d); and
- paragraph 62-6.013(6)(b); and subparagraphs 62-6.013(6)(b)1. through 62-6.013(6)(b)3., F.A.C.

PETITIONERS REQUEST FOR A VARIANCE IS GRANTED WITH THE FOLLOWING CONDITIONS:

This variance is granted only as it relates to the conditions under which Fuji Clean treatment tanks currently assembled at their Brunswick, Maine facility may be sold and distributed.

Fuji Clean shall provide annually, by January 31st of each year, a certification that the treatment receptacles continue to be manufactured in accordance with the approved procedures and standards. The future requirements for these reports supersede the requirements stated in the 2015 variance.

Requirements include:

- A certified statement that the manufacturing and assembly of Fuji Clean tanks has not changed since this variance was granted. Before implementation, any proposed changes must be evaluated and approved by Fuji Clean Japan and provided to the Department for review and approval and evaluation whether or not they would change the conditions upon which this variance is granted.
- As part of the annual certification, Fuji Clean must provide two results of quality control testing, taken during the previous calendar year during the annual certification period. The results, one for each tank type (matched metal die and glass spray), one compartment wall, one tank outside wall, must confirm that material properties meet consistently the requirements of this variance (minimum ultimate tensile strength of 8,700 psi when tested according to ASTM D638-14; minimum flexural strength of 8,700 psi when tested according to ASTM D790-17; minimum flexural modulus of elasticity of 1,305,300 psi (tanks constructed using matched metal dies) and 928,200 psi (tanks constructed by glass spray).
- As part of the required annual certification and quality control testing is incorporated the proviso of the 2015 variance granted regarding the glass content for each tank. Fuji Clean is required to test and ensure glass content meets an average of 22% with no individual test results less than 21%. All properties must be measured directly, not estimated or assumed. At a minimum, at least one sample must be tested for each tank type (matched metal die and glass spray). If multiple sample results are provided, the testing results of each measurement and specific details indicating which tank the measurements are from must be provided.

If Fuji Clean intends to perform assembling at other facilities in the United States, they must apply for review and approval by the Department prior to selling and distribution of Fuji Clean treatment tanks assembled at a facility other than the Brunswick, Maine facility. They must provide at a minimum, the tank models to be assembled at the new location, Quality Assurance/Quality Control procedures, audit procedures and legending procedures. Differences between how tanks are assembled at the additional facility in the United States compared to assembly at Fuji Clean Japan, must be documented in the request for review and approval by the Department.

In the event Fuji Clean chooses to assemble other models of their tanks in a United States facility, in addition to the CE5, CE7 and CEN5, they must request approval, at least 90 days prior to manufacturing and assembly, from the Department prior to selling and distributing other products in Florida. Such requests shall include the model specific assembly and Quality Assurance/Quality Control procedures consistent with those provided in this Petition.

This variance shall remain in effect permanently.

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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 Rule 28-106.201, 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, telephone number, and any e-mail address of the petitioner; the name, address, telephone number, and any e-mail address 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 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 AgencyClerk@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 must be filed within 21 days of receipt of this written notice. 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.

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, before the applicable 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

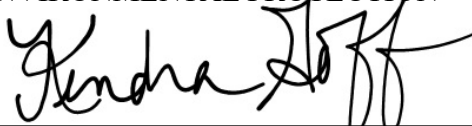
Mediation is not available in this proceeding.

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 20th day of March 2023 in Leon County, Florida.

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION



Kendra F. Goff, PhD, DABT, CPM, CEHP
Deputy Director
Division of Water Resources Management

Copies furnished to:
Fuji Clean USA, LLC
Joint Administrative Procedures Committee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on 20th day of March, to the above 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.

Stacey Shuler
Clerk

03/20/2023
Date