STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOSEPH GLISSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 11-0584**
	)	**DOAH CASE NO. 11-2953**
CITY OF TALLAHASSEE AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
_____/		

FINAL ORDER

On October 5, 2011, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") in the above captioned administrative proceeding to the Department of Environmental Protection ("Department"). (The RO is attached hereto as Exhibit A). The RO indicated that copies were served to the Petitioner, Joseph Glisson, and to counsel for the Co-Respondents City of Tallahassee ("the City") and the Department. The parties did not file any Exceptions to the RO. This matter is now before me as Secretary of the agency for final agency action.

BACKGROUND

The City of Tallahassee owns and operates a sanitary sewer wastewater collection system that collects and processes all discharges to the City's sanitary sewer collection system. The City's sanitary sewer wastewater treatment facilities include the Thomas P. Smith Water Reclamation Facility (TPS), the Lake Bradford Road

Wastewater Treatment Plant (LBR), the Tram Road Reuse Facility, the Southeast Farm, and the Southwest Sprayfield. (RO ¶ 1).

On March 24, 2010, the City submitted applications for minor permit revisions to the permits and associated administrative orders under which it operates TPS and LBR. TPS, the City's primary wastewater treatment plant, is located at 4505 Springhill Road, Tallahassee, Florida, and LBR, an older and much smaller treatment facility is located at 1815 Lake Bradford Road, Tallahassee, Florida. (RO ¶ ¶ 3, 4).

On April 7, 2011, the Department issued its Consolidated Notice to Issue Minor Permit Revisions. The Petitioner challenged the Notice and the Department referred his amended petition to DOAH to conduct an evidentiary hearing.

The ALJ held the final hearing on August 16, 2011, in Tallahassee, Florida. Thereafter, the parties submitted their proposed recommended orders, which the ALJ considered. Subsequently, the ALJ submitted his RO on October 5, 2011.

RECOMMENDED ORDER

The ALJ recommended that the Department enter a final order issuing the minor permit revisions at issue in the case. The RO contains the ALJ's factual findings and legal conclusions.

The City requested the following minor permit revisions to the compliance schedules: (1) a 12-month extension to install the new biosolids dryer; (2) a 12-month extension to each of the installation dates for the new treatment trains; and (3) indefinite deferral of the construction upgrades at LBR. (RO ¶ 29).

The petitioner contends that (1) the proposed revisions to the permits are substantial revisions rather than minor revisions; and (2) the City has not provided

reasonable assurance that the proposed permit revisions will not "cause or exacerbate" pollution of Wakulla Springs and the Wakulla River. (RO ¶ 47). The ALJ concluded that, regarding the first issue, the proposed revisions "extend compliance dates and are not expected to lead to a substantially different environmental impact," and thus fall within the definition of minor modifications and revisions. (RO ¶ ¶ 48, 63). Moreover, the ALJ found that DEP had "processed the minor permit revisions at issue using essentially the same process used for substantial permit revisions," and that Petitioner had not demonstrated that he was "adversely affected by the distinction between a minor and major permit revision." (RO ¶ 49). With regard to the second issue, the ALJ found that the Petitioner did not put on any "testimony or evidence demonstrating adverse impacts associated with the permit revisions at issue," and did not demonstrate "how the permit revisions at issue would impact Wakulla Springs." (RO ¶ ¶ 50-53).

The ALJ found that the City's request for a 12-month extension to install the new biosolids dryer and to extend the treatment train construction was because of financial and construction scheduling concerns. (RO ¶ 34). The City's request to indefinitely defer the upgrades at LBR was based on: "(1) the City's re-assessment of forecasted wastewater flow projections; (2) updated cost projections for the upgrades at LBR; and (3) a technical evaluation concluding that the City can achieve the 4.5 MGD of treatment capability previously provided by LBR through more cost-effective means at future date." (RO ¶ 31). The ALJ found that the City's wastewater flow projections were "independently confirmed and represent sound engineering practice." (RO ¶ 32).

The ALJ found that "the City did not ask to alter the total nitrogen reduction requirements in the January 29, 2008, permits and administrative orders." (RO ¶ 36).

The ALJ determined that, in fact, "the City has achieved the total nitrogen reductions ahead of schedule, reaching an annual average below 9 mg/L (the currently applicable interim limitation) more than one year ahead of the January 2011 compliance deadline." (RO ¶ 36). The ALJ further found that "the City has not asked to change any of the other environmental performance requirements in the TPS and LBR permits and administrative orders." (RO ¶ 37). The ALJ also found that the permit revisions at issue "do not ask to change the presently-permitted hydraulic loading rates at the Southeast Farm or Southwest Sprayfield." (RO ¶ 38). He further found that "the nitrogen limits and other concentration limits in the January 2008 permits and administrative orders can be achieved despite deferring upgrades at the LBR and postponing the construction of the treatment train upgrades by 12 months." (RO ¶ 41).

In sum, the ALJ found that the City provided reasonable assurances that the requested permit revisions: would not negatively impact the environmental performance requirements in the January 2008 permits and administrative orders; would not adversely affect the City's compliance with the nitrogen concentration limits or increase hydraulic loading rates; would not increase nutrient concentrations or the volume of effluent applied at the City's Southeast Farm or Southwest Sprayfield; would not impact Wakulla Springs or the Wakulla River; and would not hinder the City's ability to provide public access reuse water. (RO ¶ ¶ 40-46, 65, 66, 67).

The ALJ concluded that the permit revisions at issue were minor permit revisions. (RO ¶ 63). The ALJ further concluded that the "Petitioner did not carry his burden of proving, through competent substantial evidence, that the Department should not issue the proposed minor permit revisions." (RO ¶ ¶ 60-61, 67).

CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So. 2d 540, 542 (Fla. 4th DCA 2003).

Even when no exceptions are filed, an agency head may, *sua sponte*, make corrections to a scrivener's error contained in a RO. The RO, ¶ 60, mistakenly refers to "120.569(1)(p)" instead of "120.569(2)(p)," and this Final Order hereby corrects that scrivener's error. Having considered the applicable law in light of the findings and conclusions set forth in the ALJ's Order, and being otherwise duly advised, it is ORDERED that:

A. The Recommended Order (Exhibit A), with the corrected scrivener's error as discussed above, is adopted in its entirety and incorporated by reference herein.

B. Respondent City of Tallahassee's applications for the minor permit revisions at issue in this case are GRANTED, and the Department shall issue the minor permit revisions at issue in this case.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of 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 Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 18th day of November, 2011, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

HERSCHEL T. VINYARD JR.
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Lea Crandall 11/21/11
CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by

United States Postal Service to:

James S. Alves, Esquire
Brooke E. Lewis, Esquire
Hopping, Green & Sams, P.A.
119 South Monroe Street, Suite 300
Tallahassee, FL 32301

Joseph Glisson
198 Mount Zion Road
Wakulla, FL 32327

by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Francine M. Ffolkes, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 21st day of November, 2011.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH GLISSON, Petitioner, vs. CITY OF TALLAHASSEE AND DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	Case No. 11-2953

RECOMMENDED ORDER

On August 16, 2011, an administrative hearing was held in this case in Tallahassee before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Joseph Glisson, pro se
198 Mount Zion Road
Wakulla, Florida 32327

For Respondent Department of Environmental Protection:

Francine M. Ffolkes, Esquire
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

EXHIBIT "A"

For Respondent City of Tallahassee:

James S. Alves, Esquire
Brooke E. Lewis, Esquire
Hopping, Green & Sams, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection (DEP or the Department) should allow the City of Tallahassee to revise its domestic wastewater facility permits for Thomas P. Smith Water Reclamation Facility (TPS) and Lake Bradford Road Wastewater Treatment Plant (LBR).

PRELIMINARY STATEMENT

On March 24, 2010, the City of Tallahassee submitted applications for minor permit revisions to the permits and associated administrative orders under which it operates TPS and LBR. On April 7, 2011, the Department issued its Consolidated Notice to Issue Minor Permit Revisions. On June 13, 2011, the Department referred Joseph Glisson's Amended Petition for Administrative Hearing (Amended Petition) to DOAH for appropriate proceedings under chapter 120, Florida Statutes. An administrative hearing was held on August 16, 2011.

During the hearing, the City of Tallahassee called three witnesses: Robert McGarrah, an expert in construction management, environmental management, and permitting; Sondra Lee, P.E., an expert in wastewater treatment plant engineering

and permitting; and Eldon "Don" C. Blancher, Ph.D., an expert in water quality and ecosystem analysis and assessment, and aquatic toxicology. The City had its Exhibits 1-13, 15, 17-21, and 23 admitted in evidence.

The Department called William A. Evans, P.E., an expert in industrial and domestic wastewater permitting and civil and environmental engineering. The Department had its Exhibit 1 admitted in evidence.

Petitioner testified as a lay witness and called two other witnesses: Todd Kincaid, Ph.D.; and Gareth Davies. Petitioner offered his Exhibits 2, 7, and 8 in evidence. Exhibit 7 was admitted in evidence. Ruling was reserved on objections by the City and Department to Petitioner's Exhibits 2 and 8. The objections are overruled, and those exhibits also are admitted in evidence.

The Transcript of the administrative hearing was filed, and the parties submitted proposed recommended orders, which have been considered.

FINDINGS OF FACT

1. The City of Tallahassee owns and operates a sanitary sewer wastewater collection system that collects and processes everything that is discharged to the City's sanitary sewer collection system. The City's collection system has approximately 900 miles of gravity pipes and 100-200 pumping

stations serving approximately 230,000 customers. The City's sanitary sewer wastewater treatment facilities include TPS, LBR, the Tram Road Reuse Facility, the Southeast Farm, and the Southwest Sprayfield.

2. Petitioner resides at 198 Mount Zion Road in incorporated Wakulla County. He contends that the revised permits will result in environmental degradation of Wakulla Springs and the Wakulla River.

A. The City's Sanitary Sewer Treatment System

3. TPS, located at 4505 Springhill Road, is the City's primary wastewater treatment plant, with a design treatment capacity of 26.5 million gallons per day (MGD). The annual average amount of sewage treated at TPS over the past five years is approximately 17.5 MGD, leaving approximately 9 MGD of unutilized treatment capacity.

4. LBR is an older treatment facility with design treatment capacity of 4.5 MGD. LBR is located at 1815 Lake Bradford Road, approximately 3 miles from TPS. Pipes connect LBR to TPS.

5. Design treatment capacity is the amount of sewage that a treatment facility can adequately handle over a period of time and still easily meet environmental performance standards required for treating wastewater. If a treatment facility reaches its design treatment capacity on an annual average

basis, it becomes more difficult to adequately treat wastewater to environmental standards.

6. As currently permitted, the combined effluent from TPS and LBR is transmitted to the Southeast Farm or to the Southwest Sprayfield for agricultural reuse. The biosolids from both TPS and LBR are treated at TPS.

7. The Southeast Farm is a 4,000-acre restricted access reuse facility, with approximately 1,900 acres of non-edible crops under slow-rate irrigation. Reclaimed water that meets DEP's Part II Reuse Standards (Part II reclaimed water), as set forth in Florida Administrative Code chapter 62-610, which apply to slow-rate irrigation of non-edible crops, can be used at the Southeast Farm. Applicable requirements include basic level disinfection and secondary treatment.

8. The Southwest Sprayfield is a 65-acre area at the TPS facility also available for land application of Part II reclaimed water.

9. The Tram Road Reuse Facility, with a capacity of 1.2 MGD, provides public access reuse water meeting Part III Reuse Standards (Part III reclaimed water), as set forth in chapter 62-610, to customers in the Southwood area of Tallahassee. Under chapter 62-610, Part III standards apply to application in areas accessible to the public. Among other things, tertiary treatment and high level disinfection are required.

B. The History of the Advanced Wastewater Treatment (AWT) Project

10. On February 11, 2004, the City applied to DEP to renew its permit to operate the TPS domestic wastewater treatment plant and associated sprayfields. DEP issued its intent to renew the permit on February 13, 2006.

11. Petitioner, along with others, filed petitions for an administrative hearing in March 2006 to contest the renewal permit. The common element emphasized in all of the petitions was a concern that the proposed permit did not adequately protect Wakulla Springs from environmental degradation resulting from nutrients in the effluent applied at the City's sprayfields.

12. In 2006 and 2007, the Florida Geological Survey, the United States Geological Survey, and others conducted studies that traced groundwater flow paths from the Southeast Farm sprayfield to Wakulla Springs. The studies determined that there is a greater hydraulic connection between the Southeast Farm and Wakulla Springs then previously understood. As a result, the City agreed to settle the cases and propose advanced wastewater treatment (AWT) upgrades to its facilities.

13. On December 19, 2006, the parties to the administrative proceeding entered into a Settlement Agreement.

14. The Settlement Agreement was the basis for what the City would include in amended permit applications for TPS and LBR and articulated the process by which DEP would review the amended applications for those facilities.

15. Under the terms of the Settlement Agreement, the City committed "to filing an amended permit application" in which it would seek authorization to "upgrade its entire wastewater treatment system" to meet AWT standards. The permit application would request authorization to implement certain "physical upgrades" at the TPS and LBR treatment plants to meet the specified treatment standards with "continued utilization of the Southeast Sprayfield and Southwest Sprayfield" for land-application of the treated wastewater, and with certain operational changes in the sprayfields and a commitment to evaluate other wastewater reuse opportunities. The Settlement Agreement provided that "[t]he City's amended application will also commit to develop and utilize other additional public access reuse sites in appropriate areas in order to reduce the hydraulic loading at the Southeast Sprayfield and Southwest Sprayfield and distribute the public access reuse water."

16. Under the Settlement Agreement, the City also agreed to propose a specific implementation schedule for enumerated physical upgrades to the LBR and TPS treatment facilities and a schedule of specific nitrogen reductions that would occur over

time. More specifically, the amended application would propose achieving a nitrogen concentration of 12.0 milligrams per liter (mg/L) within six months after DEP issued amended permits and further reductions over time that would conclude in meeting 3.0 mg/L within six years.

17. In January 2007, the City submitted amended permit applications as agreed in the Settlement Agreement. On January 29, 2008, DEP issued Permit Nos. FLA010139 (for TPS) and FLA010140 (for LBR), and corresponding Administrative Orders AO051NW (for TPS) and AO050NW (for LBR), which authorized continued operation of the TPS and LBR facilities with substantial modifications to the existing treatment systems and gradual reductions in nitrogen concentrations, as well as other requirements, in accordance with the Settlement Agreement. The permits incorporated by reference the corresponding administrative orders which, among other things, established a schedule for achieving compliance with the permit conditions.

18. All parties to the Settlement Agreement agreed that the permits and administrative orders issued by DEP were consistent with the Settlement Agreement. No party challenged the permits or asserted that they did not adequately implement the Settlement Agreement.

19. Under the January 2008 permits and administrative orders, the City is required to: reduce nitrogen levels

incrementally down to 3 milligrams per liter (mg/L) by 2014; meet concentration limits for total phosphorous, carbonaceous biochemical oxygen demand, and total suspended solids by 2014; produce all Part III quality reclaimed water; and upgrade its biosolids processing to produce all Part AA biosolids. The AWT Project has a total budget of $227 million.

20. At the time of issuance of January 2008 permits and administrative orders, the effluent applied at the Southeast Farm had a concentration of 13 mg/L of total nitrogen. Under the compliance schedule in the January 2008 permits and administrative orders, total nitrogen concentrations cannot exceed: 12 mg/L annual average daily flow (AADF) beginning in July 2008; 9 mg/L AADF beginning in January 2011; 6.5 mg/L AADF beginning in January 2013; and 3 mg/L AADF beginning in January 2014.

21. In light of these nitrogen reductions, it has been projected that the nitrate load to the land surface at the Southeast Sprayfield will be reduced to approximately 98,000 kilograms per year in 2018, compared with a high of approximately 600,000 kilograms per year in the 1980s. By way of comparison, it has been projected that the nitrate load from

septic tanks will be approximately 350,000 kilograms per year in 2018.

22. With regard to biosolids (the solid material separated from the sewage stream during the wastewater treatment process), the January 2008 permits and administrative orders eliminated the City's authorization to land-apply Class B biosolids. All biosolids are required to meet Class AA requirements, with off-specification material sent to an appropriately licensed landfill for disposal. The elimination of land application of Class BB biosolids reduces the nitrate load to the land surface by approximately 200,000 kilograms per year.

23. The January 2008 permits and administrative orders also required the City to undertake a Reuse Feasibility Study and submit the study to the Department. The City did so in 2009. In addition, the January 2008 permits and administrative orders authorized new public access reuse service areas. More specifically, the TPS permit authorized the new public access service area identified as R-006 and the LBR permit authorized R-005. Geographically, the R-005 and R-006 service areas are identical.

24. The permits do not require the City to develop additional reuse sites or additional reuse customers. The LBR permit states that "[t]he construction date of R-005 is to be determined following a feasibility study to ascertain the

demand, potential users, and costs for the system," and that "[r]eclaimed water in excess of the demand by the new Part III Reuse Area, can be stored in the Reclaimed Water Storage Tank or diverted to an existing Part II slow-rate restricted access system, the Southeast Farm . . . ." The TPS permit states that the new service area, users, and demand for R-006 "are to be determined."

25. The City's Reuse Feasibility Study did not commit to any specific outcomes concerning development of additional reuse sites or additional reuse customers. While the study recognized the potential environmental benefits of additional reuse sites, it also indicated that "[t]he combined possible impact of the Unified Stormwater Rule and [Total Maximum Daily Load] requirements should be evaluated prior to the implementation/design of any reuse system."

26. The City commissioned the 1.2 MGD Tram Road public access reuse facility in 2008 and is currently expanding the distribution system from that facility. The City has no means to require customers to accept reuse water. At present, the City's 1.2 MGD Tram Road public access reuse facility is approximately ten percent utilized.

C. The Permit Revisions

27. The City filed applications in December 2008 requesting minor revisions to the January 2008 permits and

corresponding administrative orders for LBR and TPS. The City requested a 12-month extension of the compliance schedule for upgrading biosolids treatment equipment; a six-month extension for construction of the treatment trains; and a 24-month extension on completion and start-up of the LBR facility. The requested revisions were largely a result of damage to the City's system from Tropical Storm Fay. The City did not request any changes to the environmental performance requirements contained in the 2008 permits.

28. In March 2009, DEP issued a Consolidated Notice of Permit Revision approving the City's applications for minor revisions. No third party challenged those revisions.

29. The City applied for the minor permit revisions at issue in this proceeding on March 24, 2010. The City requested the following revisions to the compliance schedules: (1) a 12-month extension to install the new biosolids dryer; (2) a 12-month extension to each of the installation dates for the new treatment trains; and (3) indefinite deferral of the construction upgrades at LBR. The City also identified differences in the final design from what was outlined in the TPS Preliminary Design Report submitted to DEP in 2007.

30. On May 14, 2010, Petitioner filed a complaint in circuit court asserting that the Settlement Agreement was still a controlling document that prohibited revisions to the permits

unless the City first obtained Petitioner's agreement in writing. On January 25, 2011, the court entered a final summary declaratory judgment finding that the December 2006 Settlement Agreement "is moot having been satisfied upon the issuance of the permits and administrative orders at issue."

31. With regard to the revisions at issue in this proceeding, the City's request to indefinitely defer the upgrades at LBR is based on: (1) the City's re-assessment of forecasted wastewater flow projections; (2) updated cost projections for the upgrades at LBR; and (3) a technical evaluation concluding that the City can achieve the 4.5 MGD of treatment capability previously provided by LBR through more cost-effective means at future date.

32. More specifically, in 2009, the City analyzed its forecasted flow projections for its wastewater treatment system. Based on that analysis, the City determined that, for planning purposes: (1) the per capita to daily wastewater flow rate should be adjusted downward from 100 to 94 gallons per capita per day; and (2) the population forecasts should be reduced based on the latest population forecasts prepared by the Tallahassee-Leon County Planning Department. Given these new population growth and water use rate projections, the City determined that the 4.5 MGD treatment capacity of the smaller LBR facility is not necessary at this time. The 26.5 MGD TPS

facility has the capacity to handle and meet all of the area wastewater needs for the reasonably foreseeable future. The City's wastewater flow projections were independently confirmed and represent sound engineering practice.

33. In addition, as the engineering efforts progressed on the AWT project, the City identified that, as an alternative to upgrading LBR to AWT, the same treatment capacity and treatment levels could be achieved at TPS at a savings of over $30 million. The City has proposed that it will move forward with design, permitting, and construction of the additional 4.5 MGD of capacity at TPS in the future, closer to the time when the capacity is needed.

34. The City requested the 12-month extension to install the new biosolids dryer because of financial and construction scheduling concerns. Similarly, the 12-month extension to the treatment train construction schedule is a result of construction schedule projections from the project contractor showing completion of the upgrades outside of the current dates in the TPS permit and administrative order.

35. The identified design differences from the preliminary design report are largely a result of additional knowledge gained as the design of the Project progressed. Several of the revisions relate to upsizing infrastructure at TPS to allow for future capacity increases at TPS to replace the treatment

capacity associated with the LBR facility if and when that capacity is needed.

36. The City did not ask to alter the total nitrogen reduction requirements in the January 29, 2008, permits and administrative orders. Thus far, the City has achieved the total nitrogen reductions ahead of schedule, reaching an annual average below 9 mg/L (the currently applicable interim limitation) more than one year ahead of the January 2011 compliance deadline.

37. The City has not asked to change any of the other environmental performance requirements in the TPS and LBR permits and administrative orders.

38. The permit revisions at issue do not ask to change the presently-permitted hydraulic loading rates at the Southeast Farm or Southwest Sprayfield.

39. The Department issued its Consolidated Intent to Issue Minor Permit Revisions on April 7, 2011. The City published newspaper notice of the Department's Consolidated Notice of Intent in the Tallahassee Democrat on April 9, 2011.

D. Effects of the Permit Revisions

40. The City provided reasonable assurances that, with the requested revisions, it will continue to efficiently and reliably meet the environmental performance requirements in the January 2008 permits and administrative orders. The City

provided reasonable assurances that the permit revisions will not adversely affect the City's compliance with the nitrogen concentration limits and other environmental performance requirements in the January 2008 permits and administrative orders, or increase hydraulic loading rates.

41. Biowin modeling demonstrated that the nitrogen limits and other concentration limits in the January 2008 permits and administrative orders can be achieved despite deferring upgrades at LBR and postponing the construction of the treatment train upgrades by 12 months.

42. The City provided reasonable assurances that the permit revisions at issue will not increase the nutrient concentrations or the volume of effluent applied at the City's Southeast Farm or Southwest Sprayfield. For this reason, it is not necessary to conduct studies evaluating the impacts of these permit revisions on Wakulla Springs. The permit revisions will not impact Wakulla Springs or the Wakulla River.

43. The deferral of upgrades at LBR will not result in an increase in effluent applied at the Southeast Farm or Southwest Sprayfield. Whether or not the City upgrades at LBR, the unutilized Part III reuse water would have to be transported to the Southeast Farm for agricultural reuse, which is authorized by the existing LBR permit.

44. The deferral of upgrades at LBR will not hinder the City's ability to provide public access reuse water. By September 2011, the City will produce Part III public access reuse water from TPS just as it would have at LBR. The required water quality will be available should customers be identified in the future. Regardless whether the reuse apply comes from LBR or TPS, the City will need to install new public access reuse distribution facilities when customers are identified.

45. The distance between TPS and LBR does not affect the City's ability to provide public access reuse water when customers are identified. Depending upon where a future reuse customer is located, it could prove easier and more cost-effective to provide the reuse water directly from TPS. If a new customer is identified near the LBR facility, the existing pipes connecting TPS and LBR can be used to deliver the reuse water to the LBR facility for ultimate distribution to the reuse customer.

46. The City provided reasonable assurances that the 12-month extension in the deadline for installation of the biosolids dryer will not have any adverse environmental consequences for Wakulla Springs. The City has purchased the new biosolids dryer, and it has been delivered to the site. The City's existing biosolids dryer is performing well and making Class AA biosolids. In the infrequent cases when the existing

dryer is not performing as desired, the City disposes of the off-specification biosolids in an appropriately-licensed landfill in accordance with the 2008 permit requirements.

F. Petitioner's Contentions

47. Petitioner essentially raised two issues in this proceeding: (1) the proposed revisions to the permits are substantial revisions rather than minor revisions; and (2) the City has not provided reasonable assurance that the proposed permit revisions (in particular, delaying compliance schedules for treatment process upgrades, abandoning commitments to treatment process upgrades, and retreating from the commitment to reduce hydraulic loading of up to 4.5 MGD) will not "cause or exacerbate" pollution of Wakulla Springs and the Wakulla River.

48. Regarding the first issue, the proposed revisions extend compliance dates and are not expected to lead to a substantially different environmental impact.

49. In any event, DEP processed the minor permit revisions at issue using essentially the same process used for substantial permit revisions. For example, the Department requested additional information prior to deeming the application complete and required newspaper publication of its proposed agency action with actual notice to interested parties. With the exception of the application fee, the minor revision was processed in the same manner as a substantial revision. Petitioner made no

demonstration that he was adversely affected by the distinction between a minor and major permit revision.

50. With regard to Petitioner's second issue, Petitioner put on no testimony or evidence demonstrating adverse impacts associated with the permit revisions at issue. Two hydrogeologists testified regarding groundwater studies they conducted in 2006 and 2007, which identified a connection between the City's Southeast Sprayfield and Wakulla Springs. As a result of this work, the City agreed to the more stringent AWT standards in the 2008 permits and administrative orders. This testimony did not address whether the permit revisions at issue would adversely affect Wakulla Springs or Wakulla River.

51. Petitioner did not demonstrate how the permit revisions at issue would impact Wakulla Springs. The permit revisions will not increase the hydraulic loading at the Southeast Farm or change the quality of the effluent being applied for irrigation at the Southeast Farm.

52. Petitioner's contentions that delaying the schedule for treatment upgrades at TPS and deferring upgrades at LBR will impact Wakulla Springs or the Wakulla River are not supported by the evidence. Deferring the upgrades at LBR and delaying the schedule for the treatment upgrades at TPS, as proposed in the minor permit revisions, will not adversely impact the City's

ability to meet the environmental performance requirements in the existing permits and administrative orders.

53. Petitioner's contention that the minor permit revisions will adversely impact Wakulla Springs and the Wakulla River because they represent a retreat from a commitment to reduce the hydraulic loading at the Southeast Farm by 4.5 MGD is unsupported by the evidence. Petitioner's argument is based on his assertion that the January 2008 permits and administrative orders require the City to divert 4.5 MGD of effluent from the Southeast Farm by distributing all of the treated wastewater from LBR to public access reuse customers. The January 2008 permits and administrative orders authorized a new public access reuse area; they did not require the City to locate sufficient public access reuse customers to take all or any portion of the 4.5 MGD from LBR. Moreover, reuse water is as readily accessible from TPS as from LBR.

54. Petitioner relies on the following clause in the attachment to the LBR administrative order (AO050NW) to support his argument that the permit revisions will increase hydraulic loading at the Southeast Farm: "All or part of the influent flow can be directed to the T.P. Smith Water Reclamation Facility or Treatment." Petitioner argues that this authorization implies that the City cannot direct flow from LBR to the Southeast Farm beyond the 36-month compliance timeline in

the LBR administrative order. This argument ignores the plain language of the LBR permit itself, which expressly allows land application at the Southeast Farm of all effluent from LBR in excess of public access reuse demand.

55. Petitioner also relies on language in the 2006 Settlement Agreement as imposing an obligation on the City to identify additional public access reuse customers. The 2006 Settlement Agreement was fulfilled upon issuance of the permits and administrative orders in January 2008 and is now moot. Further, the permits and administrative orders do not impose public access reuse requirements on the City beyond submittal of the Reuse Feasibility Study.

CONCLUSIONS OF LAW

56. In addition to the administrative agency making the decision (in this case, DEP), and under section 120.52(13)(a), Florida Statutes, a "specifically named" person whose substantial interests are being determined by the agency in the proceeding (in this case, the City), section 120.52(13)(b) provides that the term "party" includes "[a]ny other person . . . whose substantial interests will be affected by proposed agency action . . . ."

57. For years, what a person seeking standing under what is now section 120.52(13)(b) had to allege and prove was determined under the standard set out in Agrico Chem. Co. v.

Dep't of Envtl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981):

> [B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Although Agrico was decided on the second prong of the test, its first prong also has been applied to make standing determinations.

58. More recent appellate decisions have clarified the first prong of the Agrico test. In order for a third party to have standing as a petitioner to challenge agency action in an administrative proceeding, the evidence must prove that the petitioner has substantial rights or interests that reasonably could be affected by the agency's action. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011); Palm Beach Cnty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); Reily Enters., LLC v. Fla. Dep't of Envtl. Prot., 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008). See also § 403.412(5), Fla. Stat. ("A citizen's substantial interests will be considered to

be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter . . . . A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.")

59. The parties have stipulated that Petitioner has substantial interests that reasonably could be affected by the City's permit revisions. For this reason, Petitioner has standing to contest the permit revisions.

60. Under newly-enacted section 120.569(1)(p), the City has the burden to present a prima facie case demonstrating entitlement to these permit revisions, and Petitioner "has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition . . . ."

61. Under rule 62-620.325(1)(f), "[w]hen a permit is revised, only the conditions subject to revision are reopened. All other requirements and conditions of the existing permit shall remain in effect until the permit expires." A revision to a permit does not subject the entire permit to challenge; the challenge is limited to the proposed revisions. See Friends of the Everglades, Inc. v. Dep't of Envtl. Reg. 496 So. 2d 181, 183

(Fla. 1st DCA 1986)(applicant for a permit revision did not have to provide "'reasonable assurances' anew with respect to the original project").

62. Revisions to domestic wastewater treatment permits are governed by rule 62-620.325. Under that rule, revisions may be substantial or minor.

63. Under rule 62-620.200(24) and (25), minor modifications and revisions include, among others, those that are not expected to lead to a substantially different environmental impact and extension of compliance dates and construction schedules. The permit revisions at issue fall within this definition. Conversely, they do not fall within the rule definition of substantial modifications and revisions. See Fla. Admin. Code R. 62-620.200(49)-(50).

64. Sections 403.086, 403.087, and 403.088, and Florida Administrative Code chapters 62-302, 62-600, 62-601, 62-610, 62-620, 62-640, and 62-699 govern the issuance of domestic wastewater treatment plant construction and operation permits.

65. Under rule 62-620.320(1), a permit revision shall be granted if the "applicant affirmatively provides the Department with reasonable assurance . . . that the . . . modification . . . will not discharge or cause pollution in contravention of Chapter 403, F.S., and applicable Department rules." The 2008 permits and administrative orders for TPS and LBR included

numerous environmental performance requirements necessary for the City's wastewater treatment facilities to demonstrate compliance with Department standards and rules. The City has provided reasonable assurance that the permit revisions at issue do not revise those environmental performance requirements or result in environmental impacts. The City has provided reasonable assurance that, with the proposed revisions, it will be able to meet the environmental performance requirements in the 2008 permits and administrative orders. The City has provided reasonable assurance that the revisions will not "discharge, emit, or cause pollution in contravention of Department standards or rules."

66. Under rule 62-600.400(1)(a), "modifications of existing [wastewater treatment] plants shall be designed in accordance with sound engineering practice." The City has provided reasonable assurance through expert testimony, modeling, and analysis that the minor permit revisions are in accord with sound engineering practice.

67. Petitioner did not carry his burden of proving, through competent substantial evidence, that the Department should not issue the proposed minor permit revisions. While there is a connection between the City's Southeast Sprayfield and Wakulla Springs, Petitioner did not demonstrate that the proposed minor permit revisions will have any adverse impact on

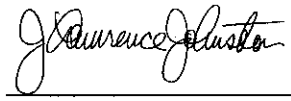
Wakulla Springs or the Wakulla River. All testimony from experts knowledgeable about the minor permit revisions at issue established that the minor permit revisions will not impact Wakulla Springs or the Wakulla River.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department enter a final order issuing the minor permit revisions at issue in this case.

DONE AND ENTERED this 5th day of October, 2011, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.