Florida Department of
Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Charlie Crist
Governor

Jeff Kottkamp
Lt. Governor

Michael W. Sole
Secretary

January 17, 2008
Via facsimile transmission

Suzanne Printy, Esq.
Joint Administrative Procedures Committee
Holland Building, Room 120
Tallahassee, Florida 32399-1300

Re: Rule No. 62-620.620 (Guidelines for Establishing Specific Permit Conditions; OGC No. 07-0073

Dear ~~Ms. Printy~~ Suzanne:

The Department received your letter regarding rule 62-620.620, F.A.C., in which you identified concerns that the committee has to the Department's proposed amendments. This letter serves to respond to the various issues raised in your letter.

Rule 62-620.620(3)(g)2.b., F.A.C.

You noted that this rule incorporates materials by reference without dating them; and that the material should be dated to ensure proper identification.

RESPONSE: The Department will amend this rule, as follows, to include the dates:

> b. Test species, procedures, and quality assurance criteria shall be in accordance with *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms*, 3rd ed., October 2002, EPA-821-R-02-014, incorporated herein by reference; or *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms*, 4th ed., October 2002, EPA-821-R-02-013, incorporated herein by reference.

Rule 62-620.620(3)(g)2.c., F.A.C.

You noted that this rule requires compliance with EPA methods #1007.0 and #1006.0, which must be incorporated by reference. You further noted that "[i]f they are included in the materials already incorporated by reference, the materials in which they are located should be properly identified."

RESPONSE: EPA methods #1007.0 and #1006.0 are contained within documents are were previously incorporated in rule 62-620.620(3)(g)2.b. To address your concern that the rule clearly identify where these EPA methods are located, the Department will amend this rule provision as follows:

> c. The permittee shall conduct 7-day chronic toxicity tests for survival and growth with the mysid shrimp, *Americamysis (Mysidopsis) bahia*, EPA Method #1007.0 and the inland silverside, *Menidia beryllina*, EPA Method #1006.0, concurrently, if the effluent salinity is 1.0 part per thousand or greater measured as conductivity and the discharge is to predominantly marine waters, as defined in Rule 62-302.200, F.A.C. EPA Methods #1007.0 and #1006.0 are located in *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms*, 3rd ed., October 2002, EPA-821-R-02-014.

Rule 62-620.620(3)(g)2.d., F.A.C.

You noted that this rule requires compliance with EPA methods #1002.0 and #1000.0 which must be incorporated by reference. You further noted that "[i]f they are included in the materials already incorporated by reference, the materials in which they are located should be properly identified."

RESPONSE: EPA methods #1002.0 and #1000.0 are contained within documents are were previously incorporated in rule 62-620.620(3)(g)2.b. To address your concern that the rule clearly identify where these EPA methods are located, the Department will amend this rule provision as follows:

> d. The permittee shall conduct 7-day chronic toxicity tests for survival and reproduction with the daphnid, *Ceriodaphnia dubia*, EPA Method #1002.0, and for survival and growth with the fathead minnow, *Pimephales promelas*, EPA Method #1000.0, concurrently, if the effluent salinity is less than 1.0 part per thousand measured as conductivity or when the discharge is to predominantly fresh waters, as defined in Rule 62-302.200, F.A.C. EPA Methods #1002.0 and #1000.0 are located in *Short-term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms*, 4th ed., October 2002, EPA-821-R-02-013.

Rule 62-620.620(3)(h)2.b., F.A.C.

You noted that this rule incorporates materials by reference without dating them; and that the material should be dated to ensure proper identification.

RESPONSE: The Department will amend this rule, as follows, to include the dates:

> b. Test species, procedures, and quality assurance criteria shall be in accordance with *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms*, 5th ed., October 2002, EPA-821-R-02-012, incorporated herein by reference.

Rule 62-620.620(3)(i), F.A.C.

You noted that "[t]his rule allows a permittee whose routine test fails the toxicity limits in Rule 62-4.241, to conduct additional follow-up tests until presumably the toxicity limits are met, or a plan approved byte Department is completed or terminated," but that the rule "does not require the Department to deny the renewal or issuance of the discharge permit" as s. 403.088(2)(e), F.S., appears to require. You have requested that we explain why this rule does not contravene this statute.

RESPONSE: In accordance with our conversation on January 14, 2008, you acknowledged that your letter contained a typographical error and that you meant to ask that we explain why this rule provision does not contravene the requirements of s. 403.088(2)(d), F.S. Section 403.088(2)(d), F.S., states that "[n]o operation permit shall be renewed or issued if the department finds that the discharge will not comply with permit conditions or applicable statutes and rules." Section 403.088(2)(f), F.S, then authorizes the Department to issue, renew or reissue an industrial or domestic permit pursuant to section 403.088(2)(e), even though the facility's discharge does not meet its permit conditions or applicable statutes or rules, if it is accompanied by an order establishing a schedule for achieving compliance with all permit conditions. The Department's guidelines for establishing specific permit conditions regarding toxicity in subsection 62-620.620(3), F.A.C., are to be read in conjunction with the various provisions of section 403.088, F.S. If a permittee's effluent is found to be toxic upon issuance or renewal of its permit (namely the facility's samples violate the definition of either acute or chronic toxicity in section 62-302.200, F.A.C.), then the Department shall either deny the permit application under section 403.088(2)(d), or issue or renew it under section 403.088(2)(e) with a consent order or administrative order containing a schedule to bring the facility into compliance pursuant to section 403.088(2)(f), F.S.

Rule 62-620.620(3)(i)4.b.

You noted that this rule requires the Department to approve the permittee's plan for correction of the effluent toxicity, but does not provide the criteria or procedure for approval. Without such information, you note that this rule vests unbridled discretion in the Department to approve or deny the plan.

RESPONSE: The Department agrees to amend this rule provision to include the following criteria for approval of the permittee's plan:

b. The plan shall be reviewed and approved by the Department before initiation. The Department shall approve the plan provided the study design is of sufficient scope and sensitivity to potentially identify and correct the toxicity.

Rule 62-620.620(3)(i)5.

You note that this rule states that implementation of the follow up tests and plan do not preclude enforcement action. You request that this rule cross reference the rule number for the enforcement action.

RESPONSE: As we explained during our discussion on January 14, 2008, the Department's industrial and domestic wastewater rules do not contain specific rules on enforcement. However, the Department has agreed to amend the rule to cross reference our statutory enforcement authority as follows:

> 5. The additional follow-up testing and the plan required in Rule 62-620.620(3)(i)3 and 4, F.A.C., do not preclude the Department from pursuing an enforcement action in accordance with sections 403.121, 403.131, , 403.141, or 403.161, F.S.

Pursuant to our discussion, you requested that we explain how failure to contain specific rule provisions regarding when the Department shall take enforcement does not provide the Department with unbridled discretion. As we explained on January 14th, the Department is authorized to take enforcement against any wastewater facility that does not meet state surface water quality standards set forth in chapter 62-302, F.A.C. In addition, rule 62-620.620(3), clearly spells out the criteria that staff shall use to establish the permit conditions for each individual permit. If the facility's effluent is found to violate the definition of acute or chronic toxicity in chapter 62-320, F.A.C., or if the facility fails to comply with the conditions set forth in its permit, then the Department may take enforcement. Since the Department may only take enforcement in these instances, the Department's enforcement discretion is not "unbridled."

Furthermore, whether the Department takes enforcement against the facility must be decided on a case-by-case basis, and thus does not constitute an agency statement of general applicability that must be adopted as a rule under chapter 120, F.S. Lastly, federal and state case law provides state agency's prosecutorial discretion regarding when and whether to take enforcement. See Heckler v. Chaney, 470 U.S. 821 (1985)(courts have long recognized that an agency's decision not to take enforcement

action is generally within absolute discretion of the agency)[1]; Brewer v. Insurance Comm'r and Treasurer, 392 So.2d 593, 595 (Fla. 1st DCA 1981)(insurance agent argued that Florida's Insurance Commissioner had unbridled discretion to arbitrarily set penalties. The court found that the "legislature may enact a law complete in itself, which leaves some discretion in the operation and enforcement of the law with an administrative official"); Christensen v. Dep't of Envtl. Protection, 96 ER FALR 126 (Department of Environmental Protection 1996)(agency should be afforded discretion on whether and when to take enforcement based on a complicated balancing of factors set forth in the U.S. Supreme Court case of Heckler v. Chaney); Sarasota County v. Dep't of Envtl. Regulation, 9 FALR 1822, 1825 (Department of Environmental Regulation 1987)(The Department must have discretion in the allocation of its enforcement resources).

Rule 62-620.620(3)(k), F.A.C.

You note that this rule authorizes the Department to increase or decrease the whole effluent toxicity test requirements in the rule, taking certain listed factors into consideration. You have requested that the Department explain why this rule provision does not contravene the law implemented contained in s. 403.088(2)(b), and 403.088(2)(d), F.S.

RESPONSE: Section 403.088(2)(d), F.S., states that "[n]o operation permit shall be renewed or issued if the department finds that the discharge will not comply with permit conditions or applicable statutes and rules." As you point out in your letter, one of these statutes is Section 403.088(2)(b), F.S., requiring the Department to deny a permit if the "discharge will reduce the quality of the receiving waters below the classification." Rule 62-620.620(3)(k), F.A.C., only authorizes the Department to increase or decrease the test requirements set forth in subsection 62-620.620(3), based on a list of factors. Rule 62-620.620(3)(k), F.A.C., does not authorize changes to the definitions of acute and chronic toxicity (the water quality standard), which are found in another chapter, 62-302, F.A.C. If the Department increases or decreases any of the test requirements set forth in this rule, then the Department will modify the conditions of the permit. Upon modification of the permit, the permittee's facility will be required to comply with the Department's rule provisions and its revised permit conditions. Because modifications to testing requirements will not have any affect on reducing the

[1] Agency discretion is required because an agency decision regarding enforcement often involves "a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing." Heckler v. Chaney, 470 U.S. at 831.

quality of the receiving waters, Rule 62-620.620(3)(k), F.A.C., will not contravene the requirements of Section 403.088, F.S.

Rule 62-620.620(2) though (4) renumbered (3) through (5) No change.

You noted that because a new subsection (3) is being added that the notice should be rewritten as (3) through (5) renumbered (4) through (6) No change.

RESPONSE: The Department will correct this error in the Notice of Change for this proposed rulemaking.

Statement of Facts and Circumstances Justifying the Rule

You have expressed a concern that the Statement of Facts and Circumstances Justifying the Rule appears to summarize each rule paragraph instead of explain why the rule is being amended in the specific way proposed.

RESPONSE: The Department attempted to provide an explanation for why the rule sections are being amended; however, we will provide a revised Statement of Facts and Circumstances Justifying the Rule to more clearly delineate "why." The Department is currently scheduled to bring this rule chapter (along with the proposed amendments to chapter 62-620, F.A.C.) before its Environmental Regulation Commission (ERC) on January 29, 2008. We plan to file a Notice of Change for this rule chapter with JAPC in early February. I anticipate that we will file the revised Statement of Facts and Circumstances Justifying the Rule shortly after the ERC meeting on January 29th or when we file the Notice of Change with JAPC.

Statement Comparing the Proposed Rule to Federal Standards

You noted that the Department's Statement Comparing the Proposed Rule to Federal Standards states that there are no comparable Federal standards or rules. Because this rule incorporates several federal documents, you question whether there are some Federal standards or rules which relate to the proposed rule amendment.

RESPONSE: The Department's Statement Comparing the Proposed Rule to Federal Standards states that there are no comparable Federal standards or rules, because the Environmental Protection Agency (EPA) does not adopt Federal standards or rules for surface water quality criteria. Instead, EPA authorizes each state to adopt its own state surface water quality criteria, which then must be submitted to EPA for review and approval. EPA periodically comes out with recommendations for surface water quality criteria, which the states may adopt, adopt with significant modifications or adopt alternative criteria that EPA finds scientifically acceptable.

Because of your expressed concern, the Department will modify its Statement Comparing the Proposed Rule to Federal Standards to identify how the Department's proposed rule amendments relate to EPA's federal recommendations on toxicity. We will file this updated statement when we file the revised Statement of Facts and Circumstances Justifying the Rule.

If you have any remaining questions or concerns, please call me at (850) 245-2219 at your earliest convenience. Thank you for your swift review of this complex rule.

Sincerely,

Stacey D. Cowley

Stacey D. Cowley
Senior Assistant General Counsel

SDC/sc
cc: Nancy Ross
Justin Wolfe, Esq.