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THE FLORIDA LEGISLATURE
**JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE**

March 17, 2010

Mr. Justin Wolfe
Assistant General Counsel
Department of Environmental Protection
Marjory Stoneman Building
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3000

**Re: Department of Environmental Protection
Proposed Amendments to Rule Chapter 62-640, F.A.C.**

Dear Mr. Wolfe:

I have completed a review of the above-referenced rule package, which was advertised in the Florida Administrative Weekly on **November 6, 2009**. The following comments are for your consideration and response:

- 62-640.200(28)** This rule defines "liquid biosolids" and, in doing so, incorporates the "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods" (EPA Pub. No. SW-846.) Incorporation of materials by reference must include the date of such materials and instructions explaining how a copy of such material can be obtained, as required by rule 1B-30.005(2), F.A.C.
- 62-640.210(1)** This rule states that copies of the publications are on file with the Joint Administrative Procedures Committee of the Florida Legislature. Although this Committee reviews forms and other material incorporated by reference in rules, the Committee is not an official repository of such material and may not retain copies of such material. The rule should not indicate to readers that they can rely on the Committee to have copies of any incorporated forms or materials.
- 62-640.210(2)** This rule states that the listed forms and instructions are incorporated in this rule. Subparagraph 120.55(1)(a)4., F.S., states, in part, "Any form or instruction which meets the definition of 'rule' provided in s. 120.52 shall

be incorporated by reference into the *appropriate* rule.” (e.s.) The same chapter law that added this provision, Ch. 84-203, L.O.F., repealed a portion of s. 120.53(1)(b), F.S., which required that all forms used by an agency were to be listed in a single rule. That statute included all of the requirements for incorporation of forms now required in s. 120.55(1)(a)4., F.S. This combination of legislative actions is interpreted to mean that forms are not to be incorporated in a list of forms, but rather in the “appropriate” rule, the rule which requires the use of the form.

62-640.300(1) This rule requires facilities receiving or generating biosolids to have a valid Department permit. One of the laws being implemented by this rule, s. 403.087(5), F.S., states, in part:

The department shall issue permits to construct, operate, maintain, expand, or modify an installation which may reasonably be expected to be a source of pollution only when it determines that the installation is provided or equipped with pollution control facilities that will abate or prevent pollution to the degree that will comply with the standards or rules adopted by the department

Because the law implemented requires the permitted installation to be equipped with pollution control facilities, please explain where this requirement is found in these rules.

62-640.300(2)(a) This rule requires use of the Treatment Facility Biosolids Plan, Form 62-640.210(2)(a). For the reasons stated in my comment to rule 62-640.210(2) above, the form should be incorporated in this rule.

62-640.300(3)(c) For the reasons stated in my comment to the proposed amendments to rule 62-640.210(2) above, form 62-640.210(2)(d) should be incorporated in this rule.

62-640.300(3)(d) This rule states that expansions or changes to the physical boundaries of the application areas of a permitted application site and changes to the agricultural operations at the site require a “minor permit modification.” The rule, however, does not include instructions on how such a permit modification is to be obtained or a reference to another rule that includes such instructions.

62-640.400(2) This rule states that land application of biosolids shall not result in a violation of “Florida water quality standards.” The failure to specifically identify the referenced standards renders the rule impermissibly vague.

- 62-640.400(9)** This rule prohibits Class A and Class B biosolids from being spilled or tracked off the treatment facility site or land application site by the hauling vehicle. Please explain how this prohibition will be enforced. Without further explanation, it is impossible to determine whether the rule is “a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule,” as required by s. 120.545(1)(h), F.S.
- 62-640.500(1)** This rule requires permit applicants to submit a “site-specific NMP [nutrient management plan] . . . to the Department with the permit application for an agricultural site.” Please provide and explain the specific statute being implemented by this rule.
- 62-640.500(2)** This rule requires compliance with several listed nutrient management standards and guidelines that are incorporated in the rule. The incorporation language, however, fails to include the effective date of the incorporated materials or instructions on how copies of the materials can be obtained, as required by rule 1B-30.005, F.A.C.
- 62-640.650(1)** This rule states, “the minimum requirements in this chapter for monitoring, record keeping, or reporting by a permittee may be increased or reduced by the Department depending upon site-specific requirements” Use of the word “may” necessarily implies that the department either may or may not choose to change the reporting, monitoring or record keeping requirements based upon whim or caprice. This constitutes an arrogation of unbridled discretion to the department. See, Barrow v. Holland, 125 So. 2d 749 (Fla. 1960). Section 120.52(8)(d), F.S., defines invalid exercise of delegated legislative authority as the vesting of unbridled discretion in an agency by rule.
- In addition, please provide and explain the rational basis for requiring a change in the reporting, record keeping or monitoring requirements without a corresponding change in the conditions or circumstances of the permitted activity.
- 62-640.650(3)(a)1.** This rule incorporates the POTW Sludge Sampling and Analysis Guidance Document, but does not appear to include the effective date of that document, or instructions on how a copy of the document can be obtained, as required by rule 1B-30.005, F.A.C.
- 62-640.650(3)(b)1.** See comment to rule 62-640.650(3)(a)1. Above, as it applies to the incorporation of UF/IFAS publications in this rule.
- 62-640.700(8)(a)1.** The last sentence of this rule does not appear to be complete.

- 62-640.700(8)(a)2.** The identifier “(b)” in this rule should be struck through.
- 62-640.700(8)(a)4.** This rule prohibits biosolids from being stored or stockpiled “at a land application site within 1320 feet of a building occupied by the general public.” Please provide the rational basis for specifying a distance of 1320 feet.
- The rule also states, “This distance [of 1320 feet] may be decreased if the owner of the building provides written consent.” Please provide the specific law implemented and the rational basis for authorizing the building owner to amend the protections established by the department in this rule.
- 62-640.700(8)(b)1.** This rule prohibits biosolids from being applied within 300 feet of a building occupied by the general public. Please provide the rational basis for specifying a distance of 300 feet.
- The rule also states, “This distance [of 300 feet] may be reduced to 100 feet . . . if written permission is obtained from the building owner.” Please provide the specific law implemented and the rational basis for authorizing the building owner to amend the protections established by the department in this rule.
- 62-640.700(8)(b)2.** This rule prohibits biosolids from being applied within 75 feet of property lines, unless applied to the medians or roadway shoulders of restricted public access roads. Please provide the rational basis for specifying a distance of 75 feet.
- 62-640.850(2)** This rule states that biosolids may only be distributed and marketed as a fertilizer in accordance with Chapter 576, F.S., and Chapter 5E-1, F.A.C. Because this rule specifically includes statutory requirements and requirements of other rules, those requirements are incorporated in and made part of this rule. Rule 1B-30.005, F.A.C., requires rules incorporating materials by reference to include the effective date of those materials and instructions on how a copy of the materials can be obtained.
- 62-640.850(3)(b)1.** This rule requires any treatment facility producing or distributing biosolids in Florida to provide to the Department the fertilizer license number assigned in accordance with Chapter 576, F.S., and Chapter 5E-1, F.A.C. See comments to rule 62-640.850(2) as it applies to the incorporation of materials in this rule.
- 62-640.850(3)(b)5.** This rule requires any treatment facility producing or distributing biosolids in Florida to provide to the Department a copy of the label or information sheet that will be provided at the time of distribution and marketing of the

biosolids, in accordance with Chapter 576, F.S., and Chapter 5E-1, F.A.C. See comments to rule 62-640.850(2) as it applies to the incorporation of materials in this rule.

62-640.850(7) This rule requires any person shipping biosolids to Florida for distribution and marketing to submit to the Department a copy of the EPA facility annual biosolids report required by 40 CFR 503.18. Because this rule includes requirements of 40 CFR 503.18, the federal regulation becomes part of this rule and must be incorporated here. See comments to rule 62-640.850(2) as it applies to the incorporation of materials in this rule.

Finally, on November 27, 2009, a “Good Faith Written Proposal for a Lower Cost Regulatory Alternative” was filed with the Department on behalf of Shelley’s Septic Tanks, Inc. d/b/a Shelley’s Environmental Systems. Paragraph 120.541(1)(b), F.S., requires agencies that have already prepared a statement of estimated regulatory costs receiving such a proposal to respond by revising its prior statement of estimated regulatory costs, and either adopting the alternative submitted or giving a statement of the reasons for rejecting the alternative in favor of the proposed rule. Failure to prepare or revise the statement of estimated regulatory costs is a material failure to follow the applicable rulemaking procedures of requirements set forth in Chapter 120, F.S.

These comments have been provided for your consideration and response. Final notice of any substantive change must be noticed in the FAW and filed with this Committee no later than 21 days prior to the date these rules are filed for adoption. Notices of technical change or no change must be submitted to this Committee no later than 7 days prior to adoption. Therefore, if you could provide me with a response within two to three weeks of the date of this letter in the form of corrections, explanations, or additional authority it will help us to meet these deadlines.

Sincerely,



Suzanne G. Printy
Chief Attorney