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THE FLORIDA LEGISLATURE
**JOINT ADMINISTRATIVE
PROCEDURES COMMITTEE**

June 28, 2010

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

**Re: Department of Environmental Protection
Proposed Amendments to Rule Chapter 62-640, F.A.C.
OGC No.: 09-3841; Ctl. #146120**

Dear Mr. Wolfe:

Upon further review of the proposed rule amendments referenced above, I have the following additional concerns:

- 62-640.700(6)(b)** This rule states that the Class A and B biosolids application area "may" be decreased to the setback distance provided by subparagraph 62-640.700(8)(b)2., F.A.C., (75 feet) if the affected adjacent property owner provides written consent. Use of the word "may" necessarily implies that the department either may or may not choose to allow the setback distance to be decreased, even with the written consent of the affected adjacent property owner, 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.
- 62-640.700(8)(a)1.** This rule states that the Class A or B biosolids land application zone setback distance from certain surface water "may" be reduced from 200 to 100 feet if the biosolids are injected or incorporated into the soil. Again, use of the word "may" necessarily implies that the department may or may not choose to allow the setback distance to be decreased based upon whim

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or caprice. This constitutes an arrogation of unbridled discretion to the department.

62-640.700(8)(a)4. This rule states that the setback distance from a building occupied by the general public for a Class A or B biosolids storage area “may” be decreased to the setback distance provided by subparagraph 62-640.700(8)(b)1., F.A.C., (100 feet) if the building owner provides written consent. Use of the word “may” necessarily implies that the department either may or may not choose to allow the setback distance to be decreased, even with the written consent of the building owner, based upon whim or caprice. This constitutes an arrogation of unbridled discretion to the department.

62-640.700(8)(b)1. This rule states that the setback distance from a building occupied by the general public within which Class B biosolids may be applied “may” be reduced from 300 to 100 feet if the biosolids are injected into the soil or if written permission is obtained from the building owner. Use of the word “may” necessarily implies that the department either may or may not choose to allow the application distance to be reduced, even with the injection of the biosolids or the written consent of the building owner, based upon whim or caprice. This constitutes an arrogation of unbridled discretion to the department.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Suzanne G. Printy". The signature is written in a cursive style with a large initial 'S'.

Suzanne G. Printy
Chief Attorney