STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

G.E.L. CORPORATION, Petitioner, vs. ORANGE CITY AND DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	Case No. 01-4132

FINAL ORDER

On September 13, 2002, an administrative hearing in this case was convened in Sanford, Florida, before Daniel J. Manry, Administrative Law Judge, Division of Administrative Hearings. The administrative hearing was completed on January 25 through 27, 2005, in Sanford, Florida, before Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dennis Wells, Esquire
Webb, Wells & Williams, P.A.
994 Lake Destiny Road, Suite 102
Altamonte Springs, Florida 32714

Albert E. Ford, II, Esquire
Ford & Brueggeman, P.A.
270 Waymont Court, Suite 110
Lake Mary, Florida 32746-3569

For Respondent: Orange City	Sandra K. Ambrose, Esquire Catherine D. Reischmann, Esquire William E. Reischmann, Jr., Esquire Clayton D. Simmons, Esquire Stenstrom, McIntosh, Colbert, Whigham, Reischmann & Partlow, P.A. 200 West First Street, Suite 22 Post Office Box 4848 Sanford, Florida 32772-4848
For Respondent: Department of Environmental Protection	W. Douglas Beason, Esquire Department of Environmental Protection The Douglas Building, Mail Station 35 3900 Commonwealth Boulevard Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Petitioner, G.E.L. Corporation ("GEL"), is entitled to attorney's fees and costs pursuant to Subsection 120.595(1), Florida Statutes (2001).[1]

PRELIMINARY STATEMENT

GEL operates a construction and demolition debris ("C&D") landfill facility within the city limits of Orange City (the "City"). The facility has been in continuous operation since 1987. On August 31, 2001, the Department of Environmental Protection ("DEP") issued a Notice of Intent to Issue a permit (the "Notice") to GEL for the continued operation of its C&D landfill. On September 17, 2001, the City filed with DEP a Petition for Formal Administrative Hearing (the "Petition"), challenging the Notice and requesting the following relief:

> (a) The Petitioner requests that the permit application be denied and the Applicant be required to close the facility.

Chapter 62-4.100(2), 62-4.100(3) and 62-4.160(2), [Florida Administrative Code], allow for permit revocation for violations of Department rules and permit conditions. The Applicant has repeatedly violated Department rules regarding proper operation of a construction and demolition debris disposal facility and protection of groundwater, yet a notice of intent to issue the permit renewal was received.

(b) The Petitioner requests that the permit application be denied and the Applicant be required to properly close the facility pursuant to Chapter 62-701, [Florida Administrative Code]. Chapter 62-4.070(5), [Florida Administrative Code] requires the Department to consider an applicant's history of Department rule violations when determining if reasonable assurance that Department standards will be met has been provided. The Applicant's repeated violation of Department rules and standards shows a lack of good faith by the Applicant and does not provide reasonable assurance that standards will now be met.

(c) The Petitioner requests proper closure of both the Lake Marie and [GEL] C&D landfills, pursuant to Chapter 62-701, [Florida Administrative Code].

(d) The Petitioner requests that the permit be denied on the grounds that the Applicant has not provided reasonable assurance that continued operation of the facility will not contaminate Orange City's drinking water supply or cause pollution in contravention of Department standards or rules pursuant to Chapter 62-4.070(1), [Florida Administrative Code].

(e) The Petitioner requests that the Applicant be required to immediately initiate corrective action to remediate the groundwater contamination.

(f) At a minimum, the Petitioner requests the following partial relief.

1. Chapter 62-4.070(3), [Florida Administrative Code], allows the Department to issue a permit with specific conditions necessary to assure that Department rules can be met. Reasonable conditions necessary for this assurance, which would provide partial relief to the Petitioner, were not included. The following conditions for permit renewal are examples of such reasonable conditions:

a) Random load checks to ensure unauthorized wastes are not accepted for disposal;

b) The Applicant must follow the sequence of filling plan specified in the operations plan (this was to be revised to define a sequence);

c) Correct and maintain side slopes to be 3H:1V;

d) Applicant shall construct a visual buffer;

e) Applicant shall install Floridian aquifer monitor wells as wellhead protection wells for the City of Orange City's drinking water supply wells; and financial assurance funding shall be increased to the appropriate amount.

2. The Petitioner requests that the Applicant be required to submit plans for proposed corrective action to address rectification of the steep above grade side slopes, disposal outside of the approved footprint, disposal within the setbacks specified in the Department approved plans, and contamination of the groundwater outside the facility's [zone of discharge].

3. The Petitioner requests that the Applicant be required to provide sufficient financial assurance funding to cover the costs of proper closure, long term care, closure of the recycling area, and all requested corrective action plans.

4. The Petitioner requests that the Applicant be required to install detection wells in the Florida aquifer as well head protection for the City of Orange City's drinking water supply wells.

5. The Petitioner requests that the Applicant be required to visually screen the facility to the extent possible. Continued violation of the facility's Department approved plans has left the Petitioner to tolerate the view of a mountain of uncovered waste.

6. The Petitioner requests that the Applicant be required to install a semi-impervious cap upon closure of the facility to reduce the infiltration of stormwater into the waste, and therefore, reduce the amount of leachate entering the aquifer.

7. The Petitioner requests that additional permit conditions be required to provide reasonable assurances that Department rules and standards will be met.

On October 22, 2001, DEP forwarded the Petition to the Division of Administrative Hearings ("DOAH") for the assignment of an Administrative Law Judge and the conduct of a formal hearing. The case was initially set for hearing on January 28 through 31, 2002, later amended to February 18 through 22, 2002.

Following two continuances, the case was set for hearing on June 3 through 6, 2002.

On May 30, 2002, at 4:59 p.m., the City filed its Notice of Voluntary Dismissal of the Petition, on the basis of the Department's filing of a "Second Notice of Amended Agency Action" that the City concluded would provide some protection to its interests and those of its individual citizens.

Also, on May 30, 2002, at 4:57 p.m., two minutes before the City's dismissal of its Petition, GEL filed a Motion for Attorney's Fees and Costs (the "Motion"), seeking attorney's fees and costs pursuant to Subsection 120.595(1)(c), Florida Statutes. Based on oral notice that the City intended to withdraw its Petition, GEL claimed that it was the prevailing party, that the City had no basis to press for denial or modification of the proposed permit, and that the City pursued the Petition solely for an improper purpose.

On June 10, 2002, the City filed a suggestion of lack of subject matter jurisdiction, based upon the following language from Subsection 120.595(1)(c), Florida Statutes: "In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose. . . ." The City suggested that the dismissal of its Petition meant there was no longer any "proceeding" and, therefore, that the DOAH no longer had

jurisdiction to award attorney's fees pursuant to Subsection 120.595, Florida Statutes. By order dated July 8, 2002, Judge Manry denied the City's Motion to Dismiss for Lack of Jurisdiction, noting that GEL's Motion was filed before the City's Notice of Voluntary Dismissal.

On September 13, 2002, Judge Manry convened the formal hearing on GEL's Motion. The single day scheduled for the hearing proved insufficient, and the parties agreed to a continuance. During the hearing, several legal issues were raised by the parties that Judge Manry agreed to address by Order prior to rescheduling the formal hearing. On October 22, 2002, Judge Manry issued two Orders, a Final Order dismissing GEL's Motion for attorney's fees based on Section 57.111, Florida Statutes, and a Recommended Order of dismissal of GEL's Motion pursuant to Section 120.595, Florida Statutes. Only the Recommended Order is still relevant to the case.

In the Recommended Order, Judge Manry concluded that DOAH lacked subject matter jurisdiction to hear GEL's Motion. His reasoning was set forth as follows:

> 5. Jurisdiction. The ALJ has jurisdiction to determine sua sponte whether he has subject matter jurisdiction in this case for reasons not asserted by Petitioner in its suggestion of lack of subject matter jurisdiction. The ALJ concludes that he does not have statutory authority under Section 120.595 to issue a recommended order limited to the findings authorized in

Subsection 120.595(1)(c) and (d) when the ALJ has not issued a recommended order adjudicating the merits of the underlying case following a hearing conducted pursuant to Section 120.57(1).

a. Subsection 120.595(1)(b) authorizes the Department to issue a final order that awards fees and costs but does not authorize the ALJ to issue a recommended order. Subsections 120.595(1)(c) and (d) limit the ALJ's authority to that required to make prescribed factual determinations that the ALJ must include in the recommended order. The recommended order to which Subsections 120.595(1)(c) and (d) refer is a recommended order that adjudicates the merits of the underlying case following a hearing conducted pursuant to Section 120.57(1). Subsections 120.595(1)(c) and (d) do not authorize the ALJ to issue a recommended order that is limited to the factual determinations authorized in those subsections when the ALJ has not heard the evidence required to adjudicate the merits of the underlying case.

b. A contrary ruling arguably would lead to an absurd result in this case. The parties settled the underlying case without an administrative hearing in which the ALJ would have otherwise heard all of the relevant evidence and adjudicated the disputed factual and legal issues in an adversarial proceeding. The ALJ has no evidentiary and legal basis upon which to resolve the issue of whether there were any justiciable issues of law or fact present in the underlying case. If Section 120.595 were construed to authorize the ALJ to issue a recommended order limited to the determinations authorized in Subsections 120.595(1)(c) and (d), the ALJ arguably would be required to hear all of the substantive evidence that the parties are no longer required to present in order to determine whether any justiciable issue of

> fact or law would have existed in the underlying case if the parties were to have litigated the issues in an adversarial proceeding. . . .

On December 3, 2002, DEP entered a Final Order adopting Judge Manry's Recommended Order of dismissal. The agency's sole ground for adopting the Recommended Order was the conclusion that DEP lacked "substantive jurisdiction" over statutory provisions of the Administrative Procedure Act dealing with entitlement to attorney's fees and costs, and, thus, was required to defer to Judge Manry's conclusions of law regarding Section 120.595, Florida Statutes. However, in detailed dicta, then-Secretary David Struhs sets forth the following grounds for disagreement with Judge Manry's reasoning, in relevant part:

> 1. The governing case law of Florida holds that agency jurisdiction over a permitting proceeding matter is acquired when the permit application is filed, and such jurisdiction is not lost by the agency merely because a party decides to dispense with a formal hearing. Neither is the discretion of the agency to continue with a formal proceeding lost by the action of a party (who is not the permit applicant) seeking to withdraw from the proceeding. Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123, 1127-1128 (Fla. 2d DCA 1993), approved, Wiregrass Ranch, Inc. v. Saddlebrook Resorts, Inc., 645 So. 2d 374 (Fla. 1994). Therefore, the fact that the permit challenger, Orange City, filed its Notice of Voluntary Dismissal in this case prior to the time that the scheduled formal hearing was held pursuant to § 120.57(1) does not, of itself,

divest this agency of jurisdiction over the administrative proceeding.

* * *

5. Orange City also contends that the ALJ's Recommended Order of Dismissal ruling on GEL's motion for attorney's fees and costs under § 120.595(1), F.S., constitutes a "final order" not subject to administrative review by the Secretary of DEP. This contention of Orange City is without merit. None of the cases cited by Orange City hold that a DOAH recommended order in a § 120.57(1) proceeding addressing a party's motion for attorney's fees and costs under § 120.595(1) is a "final order" directly reviewable by the appropriate district court of appeal. [Footnote and citations omitted]

6. The plain language of current § 120.595(1), Fla. Stat., provides that, when a motion for attorney's fees and costs have [sic] been filed under this statute in a § 120.57(1) proceeding, the primary function of the administrative law judge is to enter a recommended order determining whether a "nonprevailing adverse party" has "participated in the proceeding for an improper purpose." If the administrative law judge does determine that such a party participated in the proceeding for an improper purpose, then the recommended order should also designate the amount of the award. Subsection 120.595(1)(b) expressly states that it is the subsequent agency final order, not the preliminary DOAH recommended order, which actually awards reasonable costs and attorney's fees to the prevailing party under such circumstances.

* * *

8. I am troubled by the potential impact of this ruling of the ALJ on the environmental permitting process in this state. Based on this precedent, future petitioners in

> contested permit proceedings may avoid any possible liability for having to pay attorney's fees and costs under § 120.595(1) by simply filing notices of voluntary dismissals of their petitions immediately prior to the dates formal hearings are scheduled. This scenario could result in an increase in permit challenges initiated for the primary purpose of causing delays and increasing the costs of the permit application review process.

GEL appealed DEP's Final Order to the Fifth District Court of Appeal. In G.E.L. Corporation v. Department of Environmental Protection, 875 So. 2d 1257 (Fla. 5th DCA 2004), the court held that a full evidentiary hearing is not a jurisdictional prerequisite to an award of fees under Section 120.595, Florida Statutes. 875 So. 2d at 1260-1262. The court further agreed with DEP that it lacked substantive jurisdiction to review "technical matters of law concerning jurisdictional issues that arise under statutory provisions relating to awards of attorney's fees." 875 So. 2d at 1263. The court agreed with the City that GEL should have appealed Judge Manry's Order on attorney's fees and costs directly to the District Court of Appeal, but that GEL's failure to do so did not preclude the court from providing relief. 875 So. 2d at 1264-1265.

The court remanded the case to DOAH for the conduct of a hearing on GEL's Petition. The court's holdings regarding agency jurisdiction and the direct appeal of the ALJ's Order on attorney's fees and costs pursuant to Section 120.595, Florida

Statutes, appear to mandate that this remanded proceeding culminate in a final order by the undersigned.[2]

By Order dated November 2, 2004, Judge Manry granted GEL's Motion to Recuse,[3] and the case was reassigned to the undersigned. A case management conference was convened on November 19, 2004, and based on the issues discussed at the conference, an Order on procedural matters was issued on January 24, 2005. The final hearing was reconvened and completed on January 25 through 27, 2005.

At the hearing on September 13, 2002, GEL presented the testimony of: Robin Smith, a certified public accountant; Albert Erwin, a former mayor and city councilman of the City; George Houston, a professional geologist for DEP; James Bradner, solid and hazardous wastes program manager for DEP; Joseph A. Scarlett, III, an attorney; and James Martin Sullivan, a licensed professional engineer. At the hearing on January 25 through 27, 2005, GEL presented the testimony of James Mahoney, a former city councilman and former member of "Citizens Against Landfills in the City of Orange City," or "CALICO"; John J. McCue, city manager for the City; Thomas Bechtol, owner and principal engineer for Bechtol Engineering and Testing, Inc. ("Bechtol Engineering"); Marilyn J. Evans, mother of GEL's owner; and Milton Evans, Jr., owner of GEL. GEL Exhibits 1 through 9 were admitted at the September 13, 2002,

hearing.[4] GEL Exhibits A through L were admitted into evidence at the January 25 through 27, 2005, hearing. These exhibits included the deposition testimony of Robert Oros, a professional geologist, and Vivien Garfein, district director of DEP.

The City presented no witnesses at the September 13, 2002 hearing. At the January 25 through 27, 2005, hearing, the City presented the testimony of: V. Eugene Miller, former interim city manager for the City; Jennifer Deal, an environmental engineer for Hartman & Associates; Michael D. Sims, a professional engineer; Douglas Dufresne, a geologist for Hartman & Associates; and James E. Golden, Jr., a professional engineer. City Exhibits 1 through 17 were admitted at the September 13, 2002, hearing.[5] City Exhibits A through Y were admitted into evidence at the January 25 through 27, 2005, hearing.

Counsel for DEP participated at the hearing via cross-examination of the other parties' witnesses. DEP presented no witnesses of its own and offered no exhibits into evidence.

A Transcript of the September 13, 2002, hearing was filed on October 26, 2004. A Transcript of the January 25 through 27, 2005, hearing was filed on March 10, 2005. Two agreed Motions for Extension of Time for the filing of Proposed

Orders were granted. GEL and the City timely filed proposed orders on May 9, 2005. DEP did not file a proposed order.

FINDINGS OF FACT

1. GEL was incorporated by Milton Evans, Jr., in 1985. In that year, GEL purchased 35.2 acres of land outside Orange City. On this property, was a Class I landfill known in the area as the Lake Marie landfill.[6] Mr. Evans testified that his original intention was to move the family septic tank business to this property, because it was zoned for heavy industrial uses and was "in the woods," well outside of the City.

2. The cost of closing the Class I landfill, in accordance with DEP regulations, proved expensive. Mr. Evans testified that he retained the site's permit to operate a Class III landfill.[7] GEL began operating the Class III landfill and using the proceeds from that operation to pay for groundwater testing, and other obligations related to closure of a Class I landfill. DEP later introduced the C&D category under which the GEL landfill's permit currently operates.[8]

3. Mr. Evans testified that the City was initially enthusiastic about his operation of the landfill. Within months of GEL's purchase of the property, the City sought to annex the property and, thus, expand its tax base. GEL consented, and the GEL property was annexed into the City in April 1986.

4. GEL's relations with the City remained good until 1995, when Orange Tree Village, a manufactured housing development designed as a retirement community, was built just north of the GEL landfill. Residents of Orange Tree Village began to complain about odors coming from the landfill. CALICO, an unincorporated and informal citizens group, began its operations during 1997 to press the City for action against the landfill's odors. The record indicates that the City received several odor complaints from residents during the first quarter of 1999.

5. Residents also complained about fires at the landfill, at least some of which, Mr. Evans believed had been deliberately set by a person or persons opposed to the GEL landfill's continued operations. However, the evidence at the hearing demonstrated that such fires are not unusual at landfills, and that the same fire can smolder underground for months.

6. During 1997 and 1998, public concerns also began to be voiced about possible groundwater contamination from the GEL landfill and the old Lake Marie landfill. In late 1998, the City hired Michael Sims, an engineer, as a consultant to provide technical advice and support in its negotiations with GEL and DEP regarding permit enforcement issues and Proposed Consent Orders.

7. The record of this proceeding contains the Transcript of a public hearing held by DEP in Orlando on February 16, 1999,

regarding a Proposed Consent Order dealing with the various enforcement issues pending against GEL. Legal and technical representatives of DEP, GEL, and the City participated at this hearing, and the general public was also allowed to comment.

8. The meeting was contentious due to mutual mistrust between GEL and the City. GEL believed that the City's purpose was to close down its landfill, while the City's representatives and some citizens appeared to believe that DEP and GEL were collaborating to sweep the City's concerns about the landfill under the rug as a regulatory matter.

9. At the meeting, Mr. Sims complained about an "information vacuum" caused by GEL's refusal to allow the City to enter its property and observe the operation of the landfill at first hand. GEL's counsel responded that it was following the law by allowing DEP's inspectors on the property, and was not inclined to allow access to the City "in this politically charged atmosphere."

10. On April 30, 1999, the City issued, over the City attorney's signature, a "Notice of Violation of Agency Action by GEL Corporation" to GEL, DEP, and the Attorney General for the State of Florida. This Notice was given pursuant to Subsection 120.69(1)(b), Florida Statutes (1999), which stated:

> (1) Except as otherwise provided by statute:

* * *

> (b) A petition for enforcement of any agency action may be filed by any substantially interested person who is a resident of the state. However, no such action may be commenced:
>
> 1. Prior to 60 days after the petitioner has given notice of the violation of the agency action to the head of the agency concerned, the Attorney General, and any alleged violator of the agency action.
>
> 2. If an agency has filed, and is diligently prosecuting, a petition for enforcement.

11. In the Notice letter, the City stated its intentions as follows, in relevant part:

> Please be advised, on or after 60 days from the giving of notice hereof, the City intends to file a petition for enforcement against GEL Corporation in the name of the State of Florida on the relation of the City seeking declaratory relief, temporary and permanent injunctive relief, civil penalties as provided by Chapter 403, Florida Statutes, the costs of litigation, and reasonable attorney's fees and expert witness fees, unless [DEP] has prior thereto filed, and is diligently prosecuting, a petition for enforcement.
>
> The agency action that is the subject of this notice is a DEP general permit (#S064-281113), which renewed a previous general permit issued to the Lake Marie Landfill (#S064-190063) for a construction and demolition debris ("C&D debris") facility for GEL Corporation, acknowledged by DEP on December 21, 1995, as modified by GEL Corporation's submittal of Notification of Intent to Modify a General Permit for a Construction and Demolition Debris Disposal

Facility, received by DEP on or about March 26, 1998, and approved by DEP on April 22, 1998 (#5064-0126923-002), collectively referred to hereafter as "General Permit". . . . The General Permit is not set to expire until December 29, 2000.

* * *

GEL Corporation has violated the following General Permit conditions applicable to the facility:

1. Despite the requirements in Florida Administrative Code Rules 62-701.730(1)(a)3a and 62-701.730(4)(b), GEL Corporation has not submitted, implemented, and maintained the required ground water monitoring plan for the facility.

2. Despite the requirements in Florida Administrative Code Rules 62-701.730(1)(a)3c and 62-701.730(11), GEL Corporation has not submitted the required financial assurance documentation for the facility.

3. Despite the fact that the General Permit limits the facility to the disposal of construction and demolition debris, GEL Corporation has caused, suffered, allowed, or permitted the disposal at the facility of solid waste not classified as C&D debris, including Class I solid waste and putrescible household waste further prohibited by Florida Administrative Code Rule 62-701.730(4)(e). . . .

4. Despite the requirements in Florida Administrative Code Rules 62-4.530(2), 62-4.540(3), (4), and (7), 62-701.730(1)(b), and 62-701.730(7)(e), GEL Corporation has caused, suffered, allowed, or permitted the discharge of air pollutants from the facility which cause or contribute to an objectionable odor, in violation of Florida Administrative Code Rule 62-296.302(2). . . .

5. Despite the requirements in Florida Administrative Code Rules 62-4.530(10) and 62-701.730(18), GEL Corporation has not operated the disposal areas at the facility so that adverse effects on adjacent property and on public use of adjacent property, and on the environment, including fish, wildlife, natural resources of the area, water quality and air quality, and public health are minimized.

The injuries and threats to the City and its citizens from the above violations are further exacerbated by additional facts and circumstances.

First, the facility is located on top of a former waste disposal landfill known as the Lake Marie landfill (#S064-190063), which received among others, Class I materials until approximately 1984. This increases the potential for ground water contamination in relation to the facility. . . .

Second, the facility has been the site of major fires, occurring in November 1995 (and smoldering for several months thereafter), in January 1996 (and also smoldering for several months thereafter), and, most recently, on April 19, 1999. It is not at this time known how long the most recent fire will continue to burn, but it seems reasonably likely that associated hot spots, if not the fire itself, will continue to threaten the area for the considerable future. When fires burn at the facility, this increases the potential for both air pollution and ground water contamination in relation to the facility.

Third, the City has no basis for assuming DEP will file and diligently prosecute a petition for enforcement. Despite the violations, DEP has failed to take action to suspend or revoke the General Permit or to issue or initiate a notice of violation,

judicial action, or criminal prosecution against GEL Corporation. Instead, DEP has allowed the facility to remain out of compliance since the modification went into effect on or about March 26, 1998. Indeed, DEP approved the modification on April 22, 1998 knowing that the facility was not in compliance. The April 22, 1998, DEP approval letter reflected the absence of compliance with respect to ground water monitoring and financial assurances.

Further, when the April 22, 1998, DEP approval letter was issued, DEP was aware, or reasonably should have been aware, of the continuing objectionable odor emanating from the facility. Nonetheless, DEP chose to ignore these violations and to assist GEL Corporation in the maintenance of its illegal operation.

Now, after over a year's continuing violations, DEP is proposing that a consent order be entered with the GEL Corporation that would allow the facility still more time to give the appearance of attempting to come into compliance, and all the while allow the facility to remain in operation. DEP's consent order, if allowed to go into effect, would have the effect, if not be intentionally so designed, of shielding GEL Corporation from effective enforcement for the violations for the foreseeable future, and in all likelihood through the [remainder] of the effective term under the General Permit.

In addition, the proposed civil penalties under the draft consent order ($4,500) would not be remotely compatible with the statutory directive to set civil penalties "of such amount as to ensure immediate and continued compliance. . . ." § 403.161(6), Fla. Stat. This facility has been in flagrant violation of its General Permit for over a year, remaining in operation and making money while imposing nuisance

> conditions and substantial risks on its neighbors. Under Section 403.141(1), Florida Statutes, each offense is subject to a $10,000 civil penalty, and each day during which any portion of which such violation occurs constitutes a separate offense. Under these circumstances, GEL Corporation should pay substantial civil penalties as established by a Circuit Judge within Volusia County, where the violations have occurred and greatly impacted the community.

12. On May 19, 1999, DEP and GEL entered into a Consent Order to resolve issues regarding the improper disposal of Class I waste in GEL's C&D landfill, and the odors alleged to emanate from the GEL landfill. GEL did not admit that it had violated any state, local or federal laws or rules. The Consent Order provided, in relevant part:

> 5. On October 5, 1998, an inspection was conducted at the [GEL] facility. During the course of the inspection it was observed that the unauthorized Class I solid waste was disposed at the facility. As a result of this inspection a noncompliance letter was sent to Respondent on October 13, 1998.
>
> 6. On November 5, 1998, a follow-up inspection at the facility indicated that Class I solid waste was still being accepted and disposed at the facility.
>
> 7. On November 16, 1998, a Warning Letter (OWL-SW-98-0011) was issued to Respondent in which the Department alleged that Respondent had violated Rules 62-701.730(1)(a) and (4)(c) and Rule 62-540(11), Florida Administrative Code.
>
> * * *

9. The Department has received complaints from neighboring residents and business establishments about odors they claim to be emanating from the facility.

The alleged odors may be the result of decomposition of solid waste material disposed at the facility.

10. The Department acknowledges that Respondent has taken measures designed to control the odor problem at the facility by the installation of gas vents/flares.

11. Respondent and its representatives met with the Department on December 3, 1998, to discuss corrective actions for those issues identified in the above referenced Warning Letter.

* * *

14. THEREFORE, having reached a resolution of the matter, Department and the Respondent mutually agree and it is, ORDERED:

15. Immediately upon the effective date of this Consent Order and continuing thereafter, Respondent shall forthwith comply with all Department rules regarding solid waste management. Respondent shall implement the terms of this Consent Order within the time periods required below and shall thereafter remain in full compliance with all applicable rules in Chapter 62-701 F.A.C.

16. Respondent shall operate the facility in accordance with the approved operational plan. Respondent shall have adequately trained spotters at the working face during the operation of the facility when waste is being accepted.

17. Within 30 days of the effective date of this Consent Order, Respondent shall submit proof of financial assurance issued in favor

of the State of Florida, in the amount of the closing and long-term care cost estimates for the facility. Proof of financial assurance shall consist of one or more of the following instruments which comply with the requirements of Rule 62-701.630(6) F.A.C.: trust fund, surety bonds guaranteeing payment; surety bonds guaranteeing performance; irrevocable letter of credit; insurance; and financial test and corporate guarantee.

18. Within 30 days of the effective date of this Consent Order, Respondent shall submit all required documentation to complete the ground water monitoring plan application. Within 60 days of the approval of the groundwater monitoring plan, Respondent shall install the monitoring wells according to the approved plan, and provide a survey of the facility showing property boundaries.

19. Within 90 days of the approval of the groundwater monitoring plan, Respondent shall conduct the first semi-annual sampling event, and shall submit the laboratory analytical result to the Department within 45 days of the first sampling event.

20. Within 30 days of the effective date of this Consent Order, Respondent shall submit a proposal ("Proposal") addressing odor control methods and abatement at the facility and detailed recommendations for corrective actions to resolve the alleged odor problems. This Proposal shall be prepared, signed, and sealed by a professional engineer, registered in Florida. The Proposal shall include engineering plans and/or record drawing of the existing gas vents/flares devices and any proposed odor control systems. Respondent shall include a schedule for implementation.

21. Upon review of the Proposal the Department may request additional

information. Any additional information shall be submitted to the Department within 30 days of receipt of the Department's written request. If additional information is not submitted in a timely manner, the Department will approve or deny the Proposal as submitted. Upon approval, the Proposal shall be incorporated herein and made part of this Consent Order and the Respondent shall implement the conditions in the Proposal pursuant to an approved schedule. If the Proposal is denied Respondent shall submit a new proposal within 30 days and the review process shall continue as detailed herein.

22. Within 30 days of the effective date of this Consent Order, Respondent shall submit an acceptable "Odor Monitoring Plan" to continuously monitor Hydrogen Sulfide (H2S) and any other landfill gas that may be a potential source of odor. The Monitoring Plan shall include both on and off site locations to adequately monitor the facility. The monitoring plan shall include appropriate weather data.

23. Respondent shall submit monthly reports to the Department. The reports shall include all data collected during the continuous monitoring. The first report shall be submitted to the Department within 45 days of the effective date of the Consent Order and every 30 days thereafter.

24. Respondent shall pay the Department $5000.00 in settlement of matters addressed in this Consent Order. The amount includes $4500.00 in civil penalties for alleged violations of Chapter 403, Florida Statutes, and of Chapter 62-701, F.A.C., and $500.00 for costs and expenses incurred by the Department during the investigation of this matter and the preparation and tracking of this Consent Order. . . .

25. Respondent agrees to pay the Department stipulated penalties in the amount of $200.00 per day for each and every day Respondent fails to timely comply with any of the requirements of Paragraphs 14, 15, 16, 17, 18, 19 and 24[9] of this Consent Order . . . .

26. If any event occurs which causes delay, or the reasonable likelihood of delay, in complying with the requirements or deadlines of this Consent Order, Respondent shall have the burden of proving that the delay was, or will be, caused by the circumstances beyond the reasonable control of Respondent and could not have been or cannot be overcome by Respondent's due diligence. Economic circumstances shall not be considered circumstances beyond the control of Respondent, nor shall the failure of a contractor, subcontractor, material man or other agent (collectively referred to as "contractor") to whom responsibility for performance is delegated to meet contractually imposed deadlines be a cause beyond the control of Respondent, unless the cause of the contractor's late performance was also beyond the contractor's control. . . . If the parties can agree that the delay or anticipated delay has been or will be caused by circumstances beyond the reasonable control of Respondent, the time for performance hereunder shall be extended for a period equal to the agreed delay resulting from such circumstances. Such agreement shall adopt all reasonable measures necessary to avoid or minimize delay. . . .

27. Respondent shall remain liable to the Department for any natural resource damages resulting from the violations alleged herein and for the correction, control, and abatement of any pollution emanating from Respondent's facility.

13. On June 10, 1999, the City filed with DEP a Petition contesting the validity of the Consent Order. The City's Petition alleged that GEL had refused to execute the Consent Order, and did so only after it received the City's Notice of Violation letter. The Petition alleged that GEL executed the Consent Order only in an attempt to avoid the circuit court lawsuit that the City's Notice of Violation letter threatened. The Petition alleged that GEL was not meeting the conditions set forth in DEP's rules to qualify for a general permit for a C&D facility and was, therefore, effectively operating without a permit.

14. The petition alleged that GEL had not provided reasonable assurances that it could meet the conditions for a general permit:

> Although the consent order provides that "[i]mmediately upon the effective date of this Consent Order and continuing thereafter, Respondent shall forthwith comply with all Department rules regarding solid waste management," this requirement is modified and substantially negated by the sentence immediately following thereafter, and subsequent paragraphs, all of which make it clear that compliance will be achieved, if at all, only gradually and eventually. Emphasizing the uncertainty of GEL's willingness and/or ability to comply are the purposeful exclusions from the stipulated penalty paragraph of those requirements relating to odor control methods and abatement and the inclusion of a "delay" paragraph that could allow GEL to continue

to operate out of compliance virtually indefinitely.

15. The Petition alleged that the enforcement mechanisms contemplated by the Consent Order were insufficient to ensure GEL's immediate and continued compliance with DEP's rules, and urged rejection of the Consent Order in favor of an immediate circuit court enforcement action by DEP.

16. For reasons unexplained at the final hearing in the instant case, the City's Petition challenging the Consent Order was not forwarded to DOAH until November 2, 2000, 17 months after the Petition was filed at DEP. The matter was set for hearing on January 4, 2001.

17. GEL's permit to operate its C&D landfill was due to expire at the end of 2000. GEL's application to renew that permit was filed on October 6, 2000, and was pending before DEP. At a meeting on November 28, 2000, the City council voted to accept its attorney's recommendation that it drop its challenge to the Consent Order to focus its attention on the pending permit renewal. The City filed a Notice of Withdrawal of its Petition on December 8, 2000, and an Order closing DOAH's file in the case was entered on December 11, 2000.

18. On August 7, 2000, Mr. Sims completed a report entitled "Technical Overview, GEL Corp. C&D and Lake Marie Landfills" referred to hereafter as the "White Paper." This was

a report compiled by Mr. Sims from existing DEP records, including reports filed by Bechtol Engineering, GEL's permitting engineer. The White Paper states, "The GEL Corporation C&D landfill is constructed on top of an old landfill known as the Lake Marie landfill." Mr. Sims testified that this statement was based on historical aerial photographs and groundwater quality data found during his research, though he conceded that he found no specific test borings to confirm that the C&D landfill rested on top of the old Class I landfill.[10]

19. The chief concern expressed in the White Paper was that groundwater contamination, including lead, mercury, and PCBs, had been confirmed at monitoring wells on the GEL site as early as 1982, and that a 1984 study commissioned by DEP concluded that the contamination was attributable to the Lake Marie landfill.[11]

20. Mr. Sims concluded that the shallow groundwater aquifer below the GEL site had contained hazardous and toxic waste in concentrations above Federal and state standards for more than 20 years, and that recent information confirmed that the contamination had migrated offsite. Further, the GEL site was located within a known recharge area to the Floridian aquifer, raising the threat of contamination reaching the deep aquifer, from which the City obtains its drinking water.

21. The White Paper recommended that the existing GEL C&D operation be closed "as soon as practical," in accordance with a closure plan that should include:

> * A well-designed cap consisting of an impermeable clayey material and graded to promote maximum run-off and minimize percolation. This is standard practice for landfills and is used to minimize leaching of contaminants to the groundwater.
>
> * A comprehensive stormwater management plan incorporating best management practices (BMP) to help eliminate the concentration of stormwater into land fill areas.
>
> * Periodic inspections of the cap and stormwater system. The inspections would be to detect settlement distress in the cap, settlement of the waste, any sinkhole formation and the stormwater system integrity and performance.

22. The White Paper conceded that the current operation of the GEL landfill may not contribute to the groundwater contamination problem, but nonetheless, urged closure because continuing operations would promote the generation of leachate, the source of the contamination.[12]

23. On November 29, 2000, Mr. Sims completed a second report, "Sinkhole Assessment, GEL C&D Landfill," again, using DEP and Bechtol Engineering documents. In this report, Mr. Sims concluded that the GEL site had a high risk of sinkhole activity, including the potential exposure of the Floridian aquifer to the contaminated shallow groundwater and buried

wastes of the landfill. The risk could be minimized by properly capping the C&D landfill as recommended in the White Paper.

24. Throughout the first half of 2001, the City employed various consulting engineers, including Mr. Sims, to develop information bearing on GEL's permit renewal. John McCue, the city manager at the time, testified that he advised the city council that its efforts should focus on permit compliance issues, because it was unlikely that the Department would simply order the landfill closed.

25. Mr. McCue testified that he and the city council lacked expertise in hydrogeology, or any of the other technical areas addressed by the City's hired experts, and that they relied on the opinions of those experts in deciding to proceed with a challenge to GEL's permit renewal.

26. On February 23, 2001, the City's consultants, Hartman and Associates, sent to Mr. McCue its "Preliminary Contamination Assessment Report," co-authored by project hydrogeologist Valerie Davis and senior hydrogeologist James Golden. Mr. Golden described this report as a preliminary study to evaluate the effect of any contamination that might be flowing from the GEL landfill toward the City's public supply wells.

27. Mr. Golden testified that, because the City believed that time was of the essence, he used geoprobe wells to collect samples. This methodology involves using a drill rig to push a

well screen into the ground and collect a sample. Long-term groundwater modeling would have involved drilling permanent wells. However, Mr. Golden testified that his report was within the standards that are acceptable within the professional engineering community as a preliminary contamination assessment.

28. The Preliminary Contamination Assessment Report ("PCAR") stated the following conclusions and recommendations:

> Our Preliminary Contamination Assessment resulted in the following conclusions:
>
> * Benzene, vinyl chloride, and ammonia contaminant concentrations exceed State Primary drinking water standards MCLs or minimum criteria levels at five of the seven offsite sampling points, at least 67 feet off-site to the west of GEL and at least 290 feet north of the GEL site;
>
> * Significant benzene, vinyl chloride and ammonia contamination was detected in GP-2D at a depth of 70 feet bls, indicating vertical migration of contaminants; and,
>
> * No groundwater contamination was detected at GP-6, 185 feet west of existing GEL monitor well GEL-10, or at GP-3, 300 feet to the northwest of GEL.
>
> [Hartman and Associates] recommends the following further actions be taken:
>
> 1. Since off-site groundwater contamination has been confirmed by our PCAR, a Corrective Action Plan should be immediately developed by GEL pursuant to FAC 62-701.510(7)(b) [water quality and leachate monitoring requirements];
>
> 2. Further groundwater quality assessment should be conducted by GEL at least 100 feet

> west of their compliance wells and at least 300 feet north. The off-site contaminant levels at a 70 foot depth indicate vertical migration which threatens the underlying Floridian aquifer water quality. Therefore, shallow, intermediate and deep (Floridian) assessment monitor wells should be installed by GEL;
>
> 3. The City should install a permanent groundwater monitor well at the GP-2 location to conduct ongoing monitoring of groundwater contamination migrating onto their property;
>
> 4. The results of our PCAR should be submitted to the [DEP] Central District to assist in their ongoing assessment program at GEL.

29. On March 8, 2001, Hartman and Associates sent to Mr. McCue its "Groundwater Flow Model, GEL Corporation C&D Landfill," authored by Douglas Dufresne, senior hydrogeologist. At the final hearing, Mr. Dufresne testified that Mr. Golden asked him to put together a groundwater flow model to predict how water might move from the GEL facility.

30. Mr. Dufresne constructed a simple groundwater flow model using Visual MODFLOW, a standard modeling tool. The model consisted of two layers, one representing the surficial aquifer and one representing the deeper Floridian aquifer.

31. The model indicated that water from the GEL landfill would move east toward the City's wells and would arrive at those wells within 40 to 50 years, indicating that the contaminants from the GEL facility could constitute a

significant threat to the long-term quality of the City's drinking water supply.

32. Mr. Dufresne testified that he was initially surprised at the results of his model, because he would have expected water to flow west from the GEL facility, toward Blue Springs and away from the City's wells. However, after examining the specifics of the area, Mr. Dufresne concluded there was a very strong possibility that the subregional flow in the limited area covered by his model could be exactly as shown by the model.

33. Mr. Dufresne cited the fact that this is a high recharge area and the fact that the aquifer is a Karst formation filled with conduits and fractures rather than an isotropic aquifer in which the flow would consistently run from the higher potentiometric head to the lower, to explain that water in a given small area may flow in a direction opposite the general flow of water in the region.

34. Mr. Dufresne emphasized that this was a simple model designed to show the potential directions of contaminants and arrive at a "ballpark idea" of the risk of contamination to the City's wells. The model was not calibrated or verified.

35. On July 11, 2001, Mr. Golden, representing the City, met with Thomas Bechtol, the principal of Bechtol Engineering, to discuss conditions that would make the proposed permit acceptable to the City. At the meeting, Mr. Golden presented a

list of 14 requested permit conditions for the GEL landfill. Mr. Golden testified that he went through the list of requested conditions, and then Mr. Bechtol responded that the conditions appeared reasonable. Mr. Golden left the meeting believing that negotiations were moving forward. However, he never received a substantive response from Mr. Bechtol or any other GEL representative prior to DEP's issuance of the Notice.

36. On August 31, 2001, DEP issued the Notice. On September 13, 2001, the City council addressed the matter at a regularly scheduled public meeting. Mr. Miller, the City manager, recommended that the City proceed with filing the Petition. The minutes of the meeting state, in relevant part:

> Mr. Miller stated, "I think that it is worthy that we proceed." He mentioned that the worst-case scenario would be that no changes would be made in the permit [;] however, he felt there were some possibilities for additional permit conditions. The maximum possibility would be that the permit would be denied. An independent hearing officer would review the City's petition and the total process would take between four and five months. Mr. Miller stated, "In general, the City has spent a significant amount of time and money in an effort to protect your citizens against groundwater contamination, air pollution and esthetic discomforts. We are now at a point where we must decide whether to complete the efforts to dispute the GEL Landfill operating permit conditions. My recommendation is for the City Attorney to represent the City in the legal aspects. Also, to make sure that Jim Golden is the

person to represent the technical aspects. This is a technical dispute. . . ."

Jim Golden, Hartman and Associates, came forward and stated that included in the petition would be how the City's substantial interests are affected by the release of the permit. After reviewing the permit, he determined that the permit does not protect the Floridian aquifer. The permit does not require GEL to test the aquifer; it does not require them to change their operations at all. Mr. Golden stated he had negotiated fourteen conditions with GEL representatives and then at the last minute, they basically stated that GEL didn't have to adhere to those voluntary conditions. At the end of the petition, the City's request for relief would be to either have the permit denied or adding partial relief.

Mr. Golden noted that the issues Councilmember Casteel was concerned about, such as setbacks, no cover on the slopes, and no stormwater controls, could be brought before the hearing officer and covered by conditions in the permit that GEL would have to live by. Councilmember Casteel was concerned that GEL would go bankrupt and the City would end up being responsible for the landfill. He questioned why the size of the landfill increased, the height of the landfill went up ten feet, and why the financial assurance was based on five years and not thirty years. Mr. Golden replied that if the permit did not state the correct facts that would be another reason for the hearing officer to deny the permit.

Mayor Erwin felt the City should petition for an administrative hearing. He stated, "I honestly do feel that before a hearing officer, who had no connection with DEP or with the City, is going to be much fairer and I feel some of the issues we have raised will certainly receive a lot of consideration." At a recent meeting the

Mayor stated he had questioned Mr. Green, former DEP Deputy Director, about what the City lacked in their presentation in trying to convince DEP that the City's concerns were valid. Mr. Green's reply was that DEP didn't have the technical ability at this time to prove or disprove the City's theories.

In response to a question from Vice Mayor Blue, Mr. Golden replied that as of March, deep groundwater contamination five feet above the Floridian aquifer was discovered. Councilmember Cardone was concerned because DEP would be the agency assigned to enforce any conditions placed on the permit by the administrative hearing officer. He felt the most effective way to deal with the landfill was through the land use issues and believed that the groundwater contamination had now contaminated the City's property. In his opinion, GEL will never adhere to the conditions of the permit. Councilmember Casteel felt the City's goal should be to either shut the GEL Landfill operation down or enforce the conditions and require GEL to purchase a performance bond. He questioned what would happen if the administrative hearing officer did not rule in the City's favor.

Councilmember Cardone questioned what ruling a judge would make if the City attempted to enforce land use issues against GEL. [City attorney] Mr. Reischmann responded that a judge could grant a request for an injunction if the GEL operation is determined to be a non-conforming use and would issue an order that they cease and desist their operation. Alternatively, a judge could find that GEL is expanding an existing non-conforming use and would not be permitted to expand the existing non-conforming use. A judge could also deny the City's request. Mr. Reischmann noted that if the City won a court battle, the court might order GEL to shut down. Then, if GEL

no longer had any income from their landfill the chances are GEL would walk away from the property and file bankruptcy. The underlying problem with groundwater contamination would still remain a problem and that would not stop unless there is proper closure of the landfill. The hearing officer has an option that the state judge does not have and that is to impose the regulations of the State of Florida that regulate C&D landfills which would require proper closure. Mr. Golden stated that if GEL went bankrupt the State would take over the $500,000 bond and try to properly close the landfill. He noted that the bond would not be sufficient to properly close the landfill. The State has some special funds that come from fines for non-compliance issues that are set aside for clean-up of orphan sites.

Mr. Reischamnn stated, "I don't think anyone here can say that there is a perfect solution. What we have before us are options and the City Manager, Mr. Golden and I have come to you with a time frame where we have to either choose to go forward with one of those options or not. And, it is my belief that while certainly not a guarantee by any stretch of the imagination, that success with this petition, directed at the permit, there is no guarantee that that will either close the dump or clean up our aquifer or prevent further contamination of the aquifer."

Councilmember Cardone stated, "At what point do you stop pouring money into it?" Mr. Reischmann replied, "It's a horrible fight. It's a fight against the State of Florida and we are fighting a corporation that makes a lot of money and we are trying to take all that money away from them. You don't enter into that fight lightly. And, that fight is not going to be cheap, it hasn't been to date and it won't be in the future. Whether you choose the vehicle of charging the hill

> through the challenge to the petition [sic] or whether you charge hill number two which is the land use or code enforcement. That in it's [sic] own way is going to be expensive and difficult as well." He believed that with a hearing officer, for the first time, the City is going to have someone that is not connected with DEP, and doesn't have an ongoing relationship with GEL, who can enforce the statutes in the Florida Administrative Code and enforce the rules that apply to C&D landfills. Mr. Reischmann stated, "I just think that it's a remedy that has the highest chance of success of closing the landfill, if not immediately, within a reasonable period of time, with proper closure."
>
> Vice Mayor Blue asked if the permit issued by DEP required any wells to be drilled into the Floridian aquifer. Mr. Golden replied that he believed that at some point in the assessment, DEP would probably require a Floridian well. Mr. Golden noted that this is the first time GEL's permit has had specific conditions, as in the past, it was a general permit.
>
> Mr. Reischmann identified the time frame and outlined the procedures that would take place if Council authorized him to petition for an administrative hearing.
>
> Councilmember Blair moved to accept the City Manager's recommendation to challenge the issuing of the DEP permit to GEL, to place a spending limit of $30,000 on the challenge, seconded by Councilmember Cardone and passed by unanimous 6/0 voice vote of the Council.

37. On September 17, 2001, the City filed the Petition. The relief sought by the Petition is set forth in the Preliminary Statement above. The Petition set forth the

following as ultimate facts supporting denial of the proposed permit:

> a. Confirmed groundwater contamination from the G.E.L. Corp. C&D/Lake Marie landfill site is a serious threat to the drinking water supply of Orange City. Contamination reported at or beyond the Department defined ZOD[13] since 1979 includes but is not limited to PCB's, acetone, benzene, vinyl chloride, ammonia, chloride, sodium, sulfates, arsenic, cadmium, chromium, lead, mercury, silver, and zinc. The City's wells are distances of approximately 3,000 and 5,000 feet downgradient of the landfill. Because of this contamination, the G.E.L. Corp. C&D landfill has violated Chapter 62-520.400(1), FAC, which states "All groundwater shall at all places and at all times be free from domestic, industrial, agricultural, or other man-induced non-thermal components of discharges. . ."
>
> b. The G.E.L. Corp. C&D landfill is a vertical expansion of the former Lake Marie Class I landfill, as specified in Chapter 62-701.430(1), FAC, which states "Construction of a solid waste disposal unit on top of or against the side slopes of a previously filled landfill, whether active, closed, or inactive, is considered a vertical expansion of that landfill." Further, Chapter 62-701.430(1)(c)5, FAC, states that a construction and demolition landfill constructed on top of a closed, unlined landfill shall not contribute to any leachate leakage from the existing landfill. A hydrogeologic model has shown that the existence of the G.E.L. Corp. C&D landfill on top of the Lake Marie landfill is contributing to leachate leakage into the aquifer, further increasing the threat to the drinking water supply of Orange City.
>
> c. The G.E.L. Corp. C&D landfill has a long history of violating Department rules,

specifically Chapter 62-701, FAC and the general conditions of their permit. Examples of these violations that potentially endanger the well being of the community and the environment include:

1. Operation of the landfill for 5 years without a Department permit;

2. 8 inspections over 2 years resulting in violations including disposal of Class I and Class III solid waste;

3. Greater than 100 odor complaints from 1997-2001;

4. Neglecting to report fires within 24 hours to the Department;

5. Neglecting to conduct groundwater monitoring from 1992-2000;

6. Neglecting to design a groundwater monitoring plan and install groundwater monitoring wells in a timely fashion;

7. Neglecting to obtain proper financial assurance in a timely fashion; and

8. Violating the facility's approved plan as follows:

(a) Extending the disposal area beyond the permitted footprint;

(b) Extending the disposal area to the north and east beyond the setbacks specified in the plans;

(c) Failure to maintain above grade side slopes of 3H:1V; and

(d) Failure to cover all areas except the working face as specified in the plans.

> Many of the prior operations plan items that have been violated were again submitted with the permit renewal application. . . .
>
> d. The Department approved financial assurance estimate is inadequate for proper closure and long term care of the facility. Additionally, the funding does not include closure of the recycling area.[14] Should the facility become bankrupt, the State will not have sufficient funding to properly close and maintain the facility, potentially requiring the Petitioner to bear the substantial expense.
>
> e. The permit to be issued includes construction and demolition disposal and recycling. Chapter 62-701.730(13)(a), FAC requires this type of facility to comply with the requirements of Chapter 62-701.710, FAC. The application did not address many of the items in this rule.

38. The above findings of fact lead to the ultimate finding that the City did not file its Petition for an improper purpose as that term is used in Section 120.595, Florida Statutes. The GEL landfill had a history of odor problems, of fires, and of accepting unauthorized Class I solid waste. Mr. Sims' White Paper of August 7, 2000, appeared to establish that the GEL landfill was constructed over the old Class I Lake Marie landfill, that it constituted a long-term contamination threat to the City's drinking water supply, and that it should be closed and properly capped as soon as practical.

39. Mr. Sims' report of November 29, 2000, emphasized the risk of sinkhole activity, which added some urgency to the

perceived need to close and cap the GEL landfill. Hartman and Associates' PCAR of February 23, 2001, recommended that GEL be required to implement a corrective action plan for off-site groundwater contamination and to conduct further groundwater quality assessments off-site, including the installation of shallow, intermediate, and deep monitor wells. Hartman and Associates' Groundwater Flow Model of March 8, 2001, indicated at least a possibility that water from the GEL facility would move east toward the City's wells and arrive at the wells, possibly carrying contaminants, within 40 to 50 years.

40. The City's Petition reflected the concerns raised by the City's expert advisors, as well as the city manager's realistic advice that the City focus its efforts on permit compliance issues rather than on closing the landfill. The record is bare of indications that the City possessed knowledge that should have caused it to question the work performed by its scientific advisors as of the date the Petition was filed. The evidence is insufficient to demonstrate that the City's Petition was filed "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity."

41. GEL contends that the Petition was simply one more frivolous step in a long campaign by the City to close down the GEL landfill, that the City's "only concern was putting [GEL]

out of business." However, the only evidence produced by GEL to support this contention was highly subjective. Mrs. Marilyn Evans, the mother of Milton Evans, Jr., listened to tapes of City council meetings and concluded that the council was looking for ways to put her son out of business. Mr. Evans himself concluded that the City "just didn't want us in business," basing his opinion in part on media accounts of problems between GEL, CALICO, and the City.

42. At a City council meeting on December 12, 2000, Councilman James Mahoney made a motion that "the City continue to aggressively pursue the elimination of toxic fumes and groundwater contamination emanating from the Lake Marie/GEL landfills and the proper closure of these landfills by whatever legal means are available to the City." This motion passed unanimously.

43. No specific course of action was directed by this motion. John McCue, the city manager between October 1999 and the spring of 2001, testified that he advised the City council on numerous occasions that the City should address its compliance issues through the permitting process, and that immediate closure of the facility was unlikely. Eugene Miller, who was the city manager from May 2001 through March 2003, testified that the City council was adamant that the City's concerns regarding potential expansion of the landfill,

groundwater monitoring, and other technical issues be resolved. The City filed the Petition with the end result in mind of amending the permit to resolve these issues.

44. Even if GEL had proven that that the City's sole purpose in filing the Petition was to close the C&D landfill, such proof would have been insufficient without a further demonstration that such was an improper purpose. The DEP permitting procedure, in conjunction with the Administrative Procedure Act, makes provisions for affected persons to challenge DEP's proposed issuance of a permit. Any such challenge necessarily entails the possibility that the permit will be denied and the facility closed. If a desire to close a landfill were an improper purpose, then no proposed permit could ever be challenged, except by a party seeking solely to impose additional conditions on the permit.

45. As found above, there is little question that relations between the City and GEL were strained from the time that residential development reached the formerly remote GEL landfill site. Citizens of the City were vocal about the odors and fires at the landfill, and later about the perceived threat the landfill posed to the City's drinking water. GEL was less than fully cooperative in providing access and information to the City because it mistrusted the City's intentions. GEL's uncooperativeness further fed the citizens' anger.

46. The 2000 Consent Order issued by DEP on the GEL landfill added to the City's concerns. The record is clear that the City would have preferred that the GEL landfill be closed and capped sooner rather than later, although no City council member ever expressed a single-minded purpose to immediately close the landfill, or put GEL out of business. The City made significant efforts in negotiating permit conditions with GEL that might obviate the need for filing the Petition. It was GEL, not the City, that cut off these negotiations in July 2001, prior to DEP's issuance of the Notice.

47. The record is also clear that the City recognized that its chances of convincing DEP to deny the permit renewal outright were slim, and, thus, the City sought alternative relief in the form of permit conditions relating to random load checks, visual buffers, slope heights, and groundwater protection.

48. In summary, there was a legitimate basis and a reasonably clear legal justification for the City to bring the Petition under the permitting criteria. Having established that the City's Petition was not filed for an improper purpose on September 17, 2001, the question remains whether the City's purposes in pursuing the Petition became improper at some point prior to the dismissal of the Petition on May 30, 2002. GEL contends that discovery in the case should have made it clear to

the City that it had no case whatsoever, and that the City continued to pursue the case purely to harass GEL and add to its costs in obtaining the permit.

49. At the outset, it is noted that between September 17, 2001, and May 30, 2002, GEL filed no Motion for Summary disposition of the Petition on the grounds that the Petition was without merit. No ruling was ever made on the merits of the Petition. The City voluntarily dismissed the Petition.

50. GEL contends that the discovery process revealed that the City's experts were unscrupulous "hired guns" who offered unsubstantiated opinions to support the City's litigation position. GEL focused its attack on Mr. Sims' White Paper and Mr. Dufresne's groundwater flow model.

51. As noted above, Mr. Sims employed maps, historical aerial photographs, and groundwater quality data to conclude that the GEL landfill was constructed on top of the old Lake Marie landfill. At a deposition on April 5, 2002, counsel for GEL produced a later version of a Lake Marie landfill map that Mr. Sims had used in preparing his report. The earlier version used by Mr. Sims showed that the GEL landfill was on top of the Lake Marie landfill. The later version, which Mr. Sims had not seen before the deposition, indicated that the GEL landfill may not be constructed entirely on top of the Lake Marie landfill.

52. This change might have been significant to the litigation, because much of the City's critique of the GEL landfill's impact was premised upon its nature as a "vertical expansion" compressing the contents of the old Lake Marie landfill, which was the actual source of the pollutants that potentially threatened the City's drinking water.

53. On April 9, 2002, City Attorney Lonnie Groot conducted an attorney-client private session with the City council. Because of the confidential nature of this "shade meeting" under Subsection 286.011(8), Florida Statutes, experts such as Mr. Sims were excluded. Mr. Groot initially addressed the council as follows, in relevant part:

> The testimony is not going to be as strong as we had originally thought. Okay? Indeed, let me just come straight to the chase for you-all. Okay? At the end of Mr. Sims' deposition last week, he was asked the question-- this was at the very end-- he was asked: Would you recommend that DEP issue the permit as requested, if there were certain conditions placed upon that permit? And Mr. Sims said yes, he would. And the two conditions was just monitoring of the Floridian Aquifer and capping or coverage over that portion of Lake Marie-- the old Lake Marie Class I Landfill that has the C&D landfill on top of it. Okay?
>
> And here's what is even more significant about Mr. Sims' testimony. Besides that; I mean, first of all that is significant. He said, yes, I would grant the permit if those two conditions were met. Mr. Sims had premised his ideas, the concept of where the C&D landfill was on top of the Class I Lake

> Marie Landfill, on a report issued by a Mr. McCloud. Okay? And he found two reports in the DEP files. What surfaced at the deposition was a later report with a different map. Mr. Sims was premising the location of the Class I fill, the garbage, based upon a map that was in a prior report. The latter report showed the Class I fill in a different location; not as extensive. So Mr. Sims' assumption, if you will, about what was piled upon the old Lake Marie Landfill was dramatically changed; dramatically changed.
>
> Under the-- in the new report, with the new map, the C&D landfill was only atop the old Lake Marie Landfill in the northeast corner and a large-- the other area was not. So that dramatically changed Mr. Sims' view of the case. So the experts haven't gone as strong as we thought they would. Okay?

54. The Council members then initiated a wide-ranging discussion with Mr. Groot concerning the merits of the case and litigation strategy going forward. Mr. Groot pointed out that Mr. Golden had identified violations, bad practices, and deviations from the GEL operational plan that could be relevant in the permit proceeding. As to the overall merits of the case, Mr. Groot expressly advised the Council as follows:

> This is not a frivolous case. Okay? If you had a frivolous administrative proceeding initiated, you can get fees and costs. This is not frivolous, because there are a couple of issues, you know, at least a couple of issues, which relate to the permit issuance which are, you know, the closure of-- the impervious substance over the Class I landfill area, and the Floridian Aquifer monitoring. Those are legitimate issues.

55. GEL places great emphasis on the following discussion between Mr. Groot and Mayor Albert Erwin:

> MR. ERWIN: When . . . the Council decided to go ahead with the administrative hearing, my own feeling was on this-- I didn't feel we were going to get the permit denied. All right? I felt that they were going to go ahead and issue the permit. But based on what I felt at the time was legitimate data basically, I felt that we had some argument for getting stipulations built into the-- built into the permit that would ease somewhat the implications of the landfill in regard to the-- mostly in regard to the groundwater situation. And I felt that well, if we can gain that, we've gained something. Plus some stipulations about care of the dump and things like that.
>
> When you mentioned Mr. Sims' [deposition] statement, my feeling on that was that that blew it. We have lost the case; I honestly believe that. And I don't see where we have anything to stand on. We were-- we were-- basically what we were gambling on-- not gambling on; because we were right, in that the landfill was contributing to the pollution because of the fact that it was on top of-- we assumed was on top of the Lake Marie Landfill. And all this 100s of 1000s of tons of rubble that's been pushed on top of it is going to squeeze that sponge down there and push the pollution out in whatever direction. And I felt that we had a good case. But the fact that the landfill itself is on a-- is over a very small portion of the Lake Marie Landfill, tells me that the landfill itself is not making any major contribution to the groundwater contamination.
>
> MR. GROOT: It may be, but monitoring--
>
> MR. ERWIN: Well, I know. But I'm talking about the landfill itself; I'm not talking

about the other condition. The landfill itself is not making a major contribution to the contamination.

MR. GROOT: Well, I think that's clearly what the other side will testify to, and I think Mr. Sims--

MR. ERWIN: That's what I feel is coming. And so therefore, as far as the landfill is concerned, I think we're out in left field. I think we're-- at this point in time, what can we salvage out of this, is what I'm saying to myself. Where do we go from here? Because that was the basis of our argument, and it's been pulled right out from under us. So . . .

MR. GROOT: First of all, you-all-- what you has in front of you, you know, you-all made a good decision. Okay? And I think you did the right thing. But once Mr. Sims was shown that new map, a lot of-- you know, the proverbial rug-- you could feel it.

MR. ERWIN: It was pulled out from under.

MR. GROOT: You could feel it.

MR. ERWIN: I'm still feeling it.

MR. GROOT: Now, what can you salvage? Well, first of all, yeah, you can proceed. But second of all, I think, there are settlement options; the things that Mr. Sims said would be requisite conditions of the permit. Plus I think there's some other things that G.E.L. has agreed to in the past; you know, the wall, the-- some other things that could be achieved and make the effort of this Council worthwhile.

56. GEL contends that the quoted discussion proves that the City recognized as of April 9, 2002, that it had no case whatsoever, and that the City was obliged at that point to

withdraw its Petition. However, this portion of the discussion must be read in the context of the entire discussion that occurred at this "shade meeting." It must also be recognized that this was not a formal public meeting of the City council, but an attorney-client litigation strategy session. Mayor Erwin certainly concluded that the City's case was lost, but he was not speaking formally, and he was not speaking publicly as a representative of the City.

57. Not everyone at the meeting agreed that matters were so dire. In the passage quoted above, Mr. Groot opined that the City could go forward with the litigation, or it could pursue settlement options. Mr. Groot still believed there were "things that could be achieved" to make the effort worthwhile. Mr. Miller, the city manager, set forth some of these possible achievements, which included capping the portion of the GEL landfill that was over the Lake Marie landfill, and requiring the placement of two or three more aquifer wells to monitor water quality.

58. The general sentiment at the conclusion of the "shade meeting" was that Mr. Miller should broach the notion of a settlement with DEP while the lawyers "cool it from a legal perspective" for a few days. No official votes were or could have been taken at this meeting. See § 286.011(1), Fla. Stat.,

providing that formal action by a public body such as the City council are binding only when taken at a public meeting.

59. At the final hearing, Mr. Miller testified that he met with Mr. Golden after the "shade meeting," and that Mr. Golden disagreed that "the rug had been pulled out" from underneath the City's case. Mr. Golden testified that he continued to believe there was adequate scientific information to support the City's Petition and continued to stand behind the conclusions of his company's reports.

60. At the final hearing, Mr. Sims testified that he continued to believe that the GEL landfill constituted a vertical expansion of the old Lake Marie landfill. He stated that, despite the map shown to him at his deposition, all the available data suggested that the GEL landfill was on top of the Lake Marie landfill. Mr. Sims agreed that the only way to be absolutely certain of the fills' location would be to take test borings, but that he could be reasonably certain based on the water quality data and survey maps. In other words, Mr. Sims' opinion did not change, and he continued to stand behind his White Paper.

61. At the hearing, GEL contended that Mr. Dufresne's groundwater flow model was so ludicrous on its face that the City should have known that it could not be relied upon. As noted above, Mr. Dufresne was himself surprised that his model

showed water moving from the GEL landfill east toward the City's wells, because he would have expected the water to flow west toward Blue Springs. Nonetheless, Mr. Dufresne continued to stand by his model, within the limits established by its simplicity.

62. GEL expert Robert Oros was highly critical of Mr. Dufresne's methodology. Mr. Oros testified that the model was incorrect because it was set up with incorrect boundary conditions and that the boundaries appeared to be constructed to force the flow of water "in a direction that's contrary to every single bit of published information and modeling information that's available in the public domain." Mr. Oros stated that, "the model was able to make water run uphill in the eastern section of the modeling domain."

63. Mr. Oros' technical critique had to do with Mr. Dufrense's decision to use a constant potentiometric head on the eastern boundary of his model, based on a single data point on a U.S.G.S. potentiometric map. Mr. Oros stated that there existed sufficient data to allow a variable eastern boundary more closely reflective of actual conditions, and this variable boundary would have changed the result of the model to show the water flowing west from the GEL landfill, meaning that the contaminants would flow away from the City's wells.

64. GEL expert Thomas Bechtol also opined that Mr. Dufresne's modeling work was not consistent with good engineering practice, although neither Mr. Oros nor Mr. Bechtol would go so far as to impugn Mr. Dufresne's integrity. Mr. Dufresne testified that experts can disagree on how to set the boundaries in a model and that such disagreements were completely normal.

65. George Houston, a professional geologist working for DEP, also disagreed with Mr. Dufresne's use of a constant head on the eastern boundary of his model area. However, he testified that assumptions are always made in modeling, and that professionals disagree with each others' assumptions "all the time." Mr. Houston did not consider Hartman and Associates, Mr. Golden, or Mr. Dufresne to be "unscrupulous" or "hired guns"; he simply disagreed with their assumptions.[15]

66. Had there been a full hearing on the merits, the testimony of GEL's experts would likely have resulted in the rejection of Mr. Dufresne's model as a reliable predictor of water flow in the area. However, the test in this proceeding is not whether Mr. Dufresne's model was accurate, but whether the City's reliance upon it was unreasonable.

67. Even if Mr. Oros' view of Mr. Dufresne's work is accepted, GEL has not established that the laypeople making litigation decisions for the City reasonably should have known

that Mr. Dufresne's model was flawed. Mr. Oros was asked the following question: "If the City had made some reasonable inquiry into its groundwater model, is there readily available data that would have alerted the City that its groundwater model was flawed?" Mr. Oros replied:

> Yes. I-- there is an abundance of published information that allows one to evaluate the groundwater flow system in the area that was modeled. This includes potentiometric surface maps generated by the U.S. Geological Survey going back to the '70s. And also more recent modeling information that's been generated by the St. Johns River Water Management District through their East Central Florida regional model, commonly referred to as the ECF model.

68. In other words, had the City mistrusted the opinion of its expert, it could have retained a second expert to find and examine the cited maps and models in order to correct that opinion. However, GEL has provided insufficient evidence to establish why the City should have been suspicious of Mr. Dufresne's work in the first place. GEL did not provide the City with its experts' critiques while the substantive litigation was pending, and Mr. Dufresne was unshaken by the critiques when presented with them at the final hearing in this fee case.

69. The City's trial counsel, William Reischmann, fell ill in early April 2002. His physical condition caused the City to file a Motion to Continue the hearing scheduled to commence on

April 22, 2002. The motion was granted by Order dated April 10, 2002. The hearing was rescheduled to commence on June 3, 2002.

70. On April 9, 2002, the City filed a Motion for Partial Summary Judgment, seeking a ruling on its standing prior to the commencement of the formal hearing. By order dated April 19, 2002, the motion was denied without prejudice.

71. Discovery proceeded during the April/May 2002 timeframe. GEL filed no pleadings challenging the City's case in any way. During this period, DEP continued to respond to the City's concerns, and to pursue its own concerns regarding groundwater contamination possibly emanating from the GEL property.

72. In a letter to GEL dated April 12, 2002, DEP noted that its review of a groundwater sampling preliminary report detected concentrations of benzene, vinyl chloride, and tetrachloroethane and trichloroethene, all in excess of the G-II groundwater standards[16] for those contaminants. The letter requested GEL to install monitoring well clusters in four different locations near two existing monitoring wells to determine the horizontal extent of the contamination, and a single vertical extent monitoring well near one of the existing monitoring wells to gauge the vertical extent of the contamination. Finally, the letter stated:

> Since monitoring wells have been installed at the adjacent Orange City Trash Site across Leavitt Avenue and west of the GEL landfill, we recommend that a ground water elevation map combining both sites be constructed to gain a better understanding of the ground water flow direction(s) in this area.

73. On May 24, 2002, DEP issued a Notice of Amended Proposed Agency Action, which stated, in relevant part:

> 3. During the pendency of this proceeding, the DEP has continued to review the issue of side slopes at C&D debris disposal facilities. As a result of this review, the DEP is prepared to propose two new permit conditions which reflect the DEP's policy. These two conditions will provide reasonable assurance that the facility will establish and maintain side slopes of 3:1 and that the facility will be able to maintain this ratio when the facility reaches the final design height of the disposal area.
>
> 4. Section 120.57(1)(k), Florida Statutes, provides in pertinent part that "All proceedings conducted pursuant to this subsection shall be de novo." The DEP hereby gives the Petitioner, Orange City, notice that the DEP intends to include the following two permit conditions as specific conditions in the proposed agency action concerning the permit. The two proposed permit conditions are as follows:
>
> PROPOSED PERMIT CONDITIONS
>
> G.E.L. Corporation shall conduct an annual evaluation of the remaining operational life of the permitted disposal area. The professional engineer of record, or other licensed professional with appropriate qualifications and experience, shall perform the evaluation.

The evaluation shall include: (1) an analysis of the projected remaining operational life of the facility; (2) the projected date of facility closure which shall be based upon the footprint of the disposal area and the establishment and maintenance of side slopes no steeper than 3:1 (horizontal: vertical), and (3) the final design height of the disposal area, including the required 24 inches of final cover. The report of the evaluation shall be submitted to the Department no later than 60 days following the issuance of this permit, and annually thereafter.

All side slopes in the disposal area shall be maintained at a ratio of 3:1 (horizontal: vertical) during facility operation unless otherwise specified in the approved operation plan. Any proposal to maintain side slopes steeper than 3:1 during facility operation shall be submitted to the Department. The submittal shall be signed and sealed by the professional engineer of record, or other licensed professional with appropriate qualifications and experience. The proposal shall be subject to approval by the Department and shall include affirmative justification that side slopes no steeper than 3:1 will be established on all portions of the disposal area prior to closure, and that neither the final design height of +125' NGVD nor the boundaries of the permitted footprint of the disposal area will be exceeded at closure. The proposal shall also include affirmative justification that establishment of side slopes steeper than 3:1 during operation will not contribute to slope failure. Any side slopes in the disposal area that do not comply with this requirement at the time of permit issuance shall be established and maintained at 3:1, or established and maintained as specified in the approved

operation plan no later than 90 days following permit issuance.

5. The DEP has consulted with counsel for GEL and the DEP is authorized to represent that GEL has no objection to the inclusion of the two proposed permit conditions. (emphasis added)

74. On May 28, 2002, Mr. Reischmann made a presentation before the City council at its regularly scheduled meeting. The minutes of that meeting state, in relevant part:

> Mr. Reischmann advised that he had completed the discovery and was in the process of finalizing the preparations for the Administrative Hearing which was scheduled to begin on Monday, June 3rd at 1:00 p.m. at the Seminole County Courthouse. He stated that he had received a Notice of Amended Proposed Agency Action from the Department of Environmental Protection (DEP). This Notice changed the permit that DEP intends to issue on the application for the permit submitted by the GEL Corporation. The Notice adds two specific conditions to the permit as it will be issued. Mr. Reischmann stated that the two conditions were:
>
> 1. GEL Corporation every year will have to have its representative, specifically a professional Engineer or other licensed professional, quantify the remaining operational life of the facility, based on a survey of the quantity of material at the site. GEL is required to maintain a 3:1 ratio under the proposed permit.
>
> Mr. Reischmann stated that the first report would have to be submitted sixty days following the issuance of the permit and then on a yearly basis thereafter. He noted that the City and its consultants had always believed that because of the quantity of material at the site, this type of survey

would show that GEL is much closer to the required closure than the position they had taken in their application for the permit.

2. The second condition deals with side slopes and is different than the position DEP had previously taken throughout the proceedings. The side slopes would have to be maintained at a 3:1, horizontal to vertical, during the facility's operation. GEL could request a change to this stipulation; however, they would have to prove to DEP that they would still be able to maintain closure within the permitted footprint and height and the final 3:1 slopes.

Mr. Reischmann said that the Notice stated that these conditions had been approved by both DEP and the GEL Corporation. Based on the permit changes, he recommended that Council consider the options that are now available. Mr. Reischmann was pleased that the permit conditions had been included in the permit and suggested that this was an opportunity to move forward with the City's efforts to solve the problems at the GEL facility through means that are more direct and available to the City, such as code enforcement or land use issues.

Mr. Reischmann advised that he believed the Notice was being submitted by DEP at the last minute as a way to convince the Administrative Law Judge that given these additional permit conditions and the required Floridian well tests, that DEP had provided all the reasonable assurances it needed to in order for the permit to be issued. Mr. Reischmann stated that Council had several options to consider; they could direct his firm to terminate the action and all associated expenses. This option would also reduce the risk for any claim for attorney's fees from the opposing side. The other option would be to direct him to proceed to the Administrative Hearing.

75. There followed a series of questions to Mr. Reischmann by various City council members relating to the City's regulatory options as to the GEL landfill and the enforceability of the new requirement that GEL maintain 3:1 slopes during the operation of the landfill.[17] Council member Robert Cardone was particularly concerned about the requirement that GEL maintains the landfill within the permitted footprint:

> Councilmember Cardone noted that since the original operational plan was approved, GEL had definitely expanded the footprint. He expressed his concern that GEL could ignore the operational plan and expand the footprint without the City knowing and being able to voice any opposition. Mr. Reischmann responded that the new permit conditions require GEL's engineer to submit specific information on the anticipated length of operation, such that it can be closed with the existing footprint with the height and 3:1 slopes. He believed that if the quantity of material at the landfill was measured accurately and then compared with the volume allowed under the proposed permit, the operational life of the facility would be close to being met.
>
> In response to a question from Councilmember Cardone, Mr. Reischmann replied that GEL's permit application had given a closing date of three years from the time the application was made. Councilmember Cardone questioned which footprint of the disposal area, the current footprint or the one on the operational plan, would be used to determine the projected date for closure of the facility. Mr. Reischmann said he thought the only footprint that could be determined would be that which is permitted under the proposed permit. He stated that the City

> would have to rely on DEP regarding issues of enforcement of the operational plan. He noted that during one of the depositions, a DEP enforcement official had testified that the actual footprint and the slopes were beyond what was permitted.
>
> In response to a question from Councilmember Blue, Mr. Reischmann responded that the operational plan could not be amended unless approved by DEP. Councilmember Blue asked for a copy of the 1998 amended 1995 operational plan. Mr. Reischmann explained that the permit would be the governing document; the operational plan would be part of the permit and could be amended.
>
> Councilmember Cardone stated that it was very important to know which would be considered the footprint. If the footprint defined in the permit conditions was the footprint in the current operational plan, then he supported the conditions addressed in the Notice. Mr. Reischmann replied that he could seek written clarification regarding which footprint was proposed to be used.

76. Shortly after the discussion of the footprint, Mr. Reischmann steered the discussion back to the question of the pending litigation:

> Mr. Reischmann referenced the limited amount of City funds available to move forward with the litigation and questioned whether that would be the best use of those funds. He noted that evidence would be presented to the Administrative Law Judge that would ultimately support a request for a final order in which the Law Judge would either deny the permit or issue the permit with conditions. He reviewed a discussion at the last Council meeting regarding the evidence the City had to present concerning the vertical expansion of the landfill site and

pointed out that if the Law Judge was not persuaded on the issue of that expansion it would be unlikely that the final ruling would be the denial of the permit, rather, the permit would be issued with conditions.

Mr. Reischmann reiterated that DEP had now proposed placing conditions on the permit application and questioned what the City would gain by going forward with the litigation. He asked for Council's direction on how they wished his office to proceed.

* * *

In response to a question from Vice Mayor Blair, Mr. Reischmann responded that his associate, Mr. Groot, had provided Council with information regarding the cost to move forward with the Administrative Hearing. Vice Mayor Blair said that he felt that Council had previously been advised to request an Administrative Hearing and that now Mr. Reischmann was telling the Council that the City did not have a lot to gain by going to the Hearing. Mr. Reischmann replied that he had previously recommended the City seek an Administrative Hearing on the proposed permit. He stated, "We all work with the information that was provided to us at that time, and at that time, the information that was presented to me, was arguably different than what has ultimately turned out to be the case. And, that's not unusual, that's not unheard of in litigation."

Councilmember Abell noted that the general consensus had been that it was not realistic to expect that the City could close down the GEL landfill. However, it was felt that the City could attempt to get GEL in compliance and become "neighbor friendly" by esthetically improving the site. Councilmember Abell stated that in his opinion, based on the conditions included in

the Notice of Amended Proposed Agency Action and Mr. Miller's comments regarding GEL's attempt to improve the esthetics of the site, the City should agree to the permit conditions.

* * *

Mayor Erwin stated that he did not trust either the GEL Corporation or the DEP. However, he felt that the City had achieved some of its goals, such as the more intense groundwater monitoring that is now being done. He was hopeful that the regulations and conditions placed in the permit would be enforced by DEP. Mayor Erwin said that he reluctantly agreed with the permit conditions proposed by DEP.

In response to a question from Councilmember Cardone, Mr. Reischmann responded that he could contact Mr. Beeson [sic], the attorney who prepared the permit conditions and request that the word "permitted" be included within the first condition.

* * *

Councilmember Cardone moved to direct the City Attorney to enter into an agreement based on DEP's Notice of Amended Proposed Agency Action containing the proposed permit conditions for the permitting of the GEL Landfill, with the stipulation that the footprint mentioned in the document is the permitted footprint of the GEL site and that the City not proceed with the Administrative Hearing, seconded by Councilmember Abell.

* * *

Mr. Reischmann stated that Council should be aware that if he could not gain the inclusion of the term "permitted footprint" in an appropriate legal document, then the City would have to go forward with the Administrative Hearing. The Council

> requested that Mr. Reischmann seek clarification regarding adding the word "permitted" in the first condition and if DEP would not agree to adding that word to the document, then holding a special meeting to discuss the City's options.
>
> The motion passed by a unanimous 7/0 voice vote of the Council.

77. On May 30, 2002, DEP issued a Second Notice of Amended Proposed Agency Action. In this Second Notice, DEP amended the first proposed permit condition to provide that the annual evaluation shall include "(2) the projected date of facility closure which shall be based upon the permitted footprint of the disposal area and the establishment and maintenance of side slopes no steeper than 3:1 (horizontal:vertical). . ." . (emphasis in original) The addition of the word "permitted" in the quoted sentence was the only change to the proposed permit conditions set forth in the May 24, 2002, Notice of Amended Proposed Agency Action.

78. James Bradner is the solid and hazardous wastes program manager with DEP's central district, which includes the City and the GEL C&D landfill. Between February 1999 and September 2001, Mr. Bradner and his staff participated in several meetings in the effort to resolve the disputes between the City and GEL. Mr. Bradner was the chief draftsman of the "Proposed Permit Conditions" contained in the two Notices of Amended Proposed Agency Action dated May 24 and May 30, 2002.

Mr. Bradner testified that the 3:1 working slope requirement was not in the initial proposed permit, and that the City's participation was partly responsible for its inclusion.[18] Mr. Bradner also testified that he included the word "permitted" in the Second Notice of Amended Proposed Agency Action at the request of the City, and that the effect of that inclusion was to require GEL to keep the slopes and waste within the permitted footprint.

79. As noted above, the City filed its Notice of Voluntary Dismissal on May 30, 2002, the same date as the Second Notice of Amended Proposed Agency Action.

80. There is a paucity of evidence to establish that the City acted unreasonably between the time it filed the Petition and the filing of the Notice of Voluntary Dismissal. GEL's argument is premised upon the presumption that "the City's entire initiative was completely premised on total closure of the facility," and that the City never had a legal basis to pursue that closure. However, the evidence presented at the hearing, including the official Transcripts and minutes of City council meetings quoted at length above, established that the City was not engaged in an effort to shut down the GEL landfill, except insofar as the City opposed issuance of the permit without significant amendments.

81. Further, as noted in Finding of Fact 44 supra, the permitting process itself, in conjunction with the Administrative Procedure Act, contemplates that a party may initiate a proceeding challenging the proposed issuance of a permit, the end result of which could be the closure of the facility in question. Initiating a proceeding within the lawful scope of the permitting statute cannot without more be said to demonstrate an improper purpose.

82. For all of GEL's inflammatory rhetoric about the City's "so-called 'experts'" and "hired guns," the evidence established no more than that GEL's experts disagreed with the methodologies and conclusions of the City's experts. Mr. Sims credibly denied that the City directed him to arrive at a certain result. He testified that he would have written the same report for the owners of the GEL landfill. Mr. Sims was supposedly "wrong" about the location of the GEL landfill, but the only direct evidence offered to establish that fact was the bare assertion of Mr. Evans that the GEL C&D landfill was not constructed over the Lake Marie landfill. All of the experts agreed that soil borings would be required to provide absolute certainty on the issue, and all agreed that no soil borings had been performed.

83. Even if GEL had proven definitively that the City's experts were uniformly wrong in their opinions, GEL offered no

factual basis for the assertion that the City should have known its experts were wrong. The facts adduced at the hearing lead to the ultimate finding that the City's reliance on the opinions of its experts was reasonable at all times between September 2001 and May 2002.

CONCLUSIONS OF LAW

84. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this proceeding. §§ 120.569 and 120.595, Fla. Stat.; G.E.L. Corporation v. Department of Environmental Protection, 875 So. 2d 1257 (Fla. 5th DCA 2004). DOAH provided the parties with adequate notice of the formal hearing.

85. Subsection 120.595(1), Florida Statutes, provides in pertinent part:

> (a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.
>
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.
>
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as

defined by this subsection and s. 120.569(2)(e). In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject

> of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

86. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in the proceeding. Young v. Department of Community Affairs, 625 So. 2d 831 (Fla. 1993); Antel v. Department of Professional Regulation, 522 So. 2d 1056 (Fla. 5th DCA 1988). Thus, GEL must carry the burden of first demonstrating that the City was a "nonprevailing adverse party," then of demonstrating that the City participated in the proceeding for an "improper purpose." GEL must make these demonstrations by a preponderance of the evidence. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

87. In Thornber v. City of Fort Walton Beach, 568 So. 2d 914, 919 (Fla. 1990), the Supreme Court of Florida stated:

> In general, when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party. Stuart Plaza, Ltd. v. Atlantic Coast Development Corp., 493 So. 2d 1136 (Fla. 4th DCA 1986). A determination on the merits is not a prerequisite to an award of attorney's fees where the statute provides that they will inure to the prevailing party. Metropolitan Dade County v. Evans, 474 So. 2d 392 (Fla. 3d DCA 1985); State Department of Health and Rehabilitative Services v. Hall, 409 So. 2d 193 (Fla. 3d DCA 1982). There must be some end to the litigation on the merits so that the court can determine whether the party requesting fees has prevailed. Simmons v. Schimmel, 476 So. 2d 1342 (Fla. 3d DCA 1985), review denied, 486 So. 2d 597 (Fla. 1986).

88. However, under this general rule, exceptions are recognized. In McCoy v. Pinellas County, 920 So. 2d 1260, 1261 (Fla. 2d DCA 2006), the court acknowledged the Thornber rule, but went on to state: "Although a voluntary dismissal by the plaintiff may provide a sufficient predicate for the defendant to seek attorneys' fees, entitlement to such fees is determined by, and is dependent upon, the specific statute under which the fees are sought."[19]

89. In the instant case, Subsection 120.595(1), Florida Statutes, provides explicit qualifications for an award of costs and attorney's fees that clearly establish an exception to the general rule set forth in Thornber, which would otherwise

establish GEL as the prevailing party by virtue of the City's voluntary dismissal of its Petition.

90. Under Subsection 120.595(1)(e)3., Florida Statutes, the City is a nonprevailing adverse party if it "failed to have substantially changed the outcome of the proposed or final agency action" regarding the Notice to issue GEL a permit for the continued operation of its C&D landfill. The City's filing of its Petition and maintenance of a proceeding from September 2001 to May 2002 resulted in the installation of additional monitoring wells at the GEL facility, and the addition of new permit conditions regarding the maintenance of side slopes during the operation of the facility, and the conduct of an annual evaluation of the remaining operational life of the permitted disposal area. While these new conditions were less than the relief sought initially by the Petition, they were substantial changes to the permit as initially proposed. The City is not a nonprevailing adverse party as that term is used in Subsection 120.595(1), Florida Statutes.

91. Even if the City were a nonprevailing adverse party, the evidence failed to establish that the City participated in this proceeding for an improper purpose. At the outset, it is concluded that the rebuttable presumption of improper purpose set forth in Subsection 120.595(1)(c), Florida Statutes, has not been triggered because the City has not participated in "two or

more other such proceedings involving the same prevailing party and the same project as an adverse party." Previous to filing the Petition, the City had participated in only one such proceeding, a challenge to the Consent Order entered into by DEP and GEL on May 19, 1999.

92. As set forth in full above, Subsection 120.595(1)(e), Florida Statutes, provides that the administrative law judge must determine whether any party participated in the proceeding for an improper purpose "as defined by this subsection and s. 120.569(2)(e)."[20]

93. Subsection 120.569(2)(e), Florida Statutes, does not define "improper purpose"; rather, it sets forth examples of conduct that would be considered improper. It provides that signatures on pleadings, motions, or other papers certify that the signatory has read the document and that "based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation."

94. Reading the definition in Subsection 120.595(1)(e)1., Florida Statutes, together with the examples set forth in Subsection 120.569(2)(e), Florida Statutes, it is concluded that the examples of improper purposes cited in Subsection 120.569(2)(e), Florida Statutes, do not lessen the

emphasis that participation in a proceeding is for an improper purpose under Subsection 120.595(1), Florida Statutes, only if it is "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing or securing the approval of an activity." (emphasis added)

95. Case law holds that an objective standard is used to determine improper purpose for the purpose of imposing sanctions on a party or attorney under Subsection 120.569(2)(e), Florida Statutes, and predecessor statutes. As stated in Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42, 50-51 (Fla. 1st DCA 2000):

> In the same vein, we stated in Procacci Commercial Realty, Inc. v. Department of Health and Rehabilitative Services, 690 So. 2d 603 (Fla. 1st DCA 1997): The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." Id. at 608 n. 9 (quoting Pelletier v. Zweifel, 921 F.2d 1465, 1515 (11th Cir.1991)). See Sargent v. Sanders, 136 F.3d 349, 352 (4th Cir.1998) ("Put differently a legal position violates Rule 11 if it 'has "absolutely no chance of success under the existing precedent." ') Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir.1991)(quoting Cleveland

> Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir.1987))."[)]
>
> * * *
>
> Whether [predecessor to Section 120.595(1)] section 120.57(1)(b)5., Florida Statutes (1995), authorizes sanctions for an initial petition in an environmental case turns . . . on the question whether the signer could reasonably have concluded that a justiciable controversy existed under pertinent statutes and regulations. If, after reasonable inquiry, a person who reads, then signs, a pleading had "reasonably clear legal justification" to proceed, sanctions are inappropriate. Procacci, 690 So. 2d at 608 n. 9; Mercedes, 560 So. 2d at 278.

96. In another appellate decision, decided under a predecessor to Subsection 120.595(1), Florida Statutes, before the objective standard was enunciated for cases under Subsection 120.569(2)(e), Florida Statutes, and its predecessor statutes, the court in Burke v. Harbor Estates Associates, Inc., 591 So. 2d 1034, 1036-1037 (Fla. 1st DCA 1991), held:

> The statute is intended to shift the cost of participation in a Section 120.57(1) proceeding to the nonprevailing party if the nonprevailing party participated in the proceeding for an improper purpose. A party participates in the proceeding for an improper purpose if the party's primary intent in participating is any of four reasons, viz: to harass, to cause unnecessary delay, for any frivolous purpose, [FN1] or to needlessly increase the prevailing party's cost of securing a license or securing agency approval of an activity.

> Whether a party intended to participate in a Section 120.57(1) proceeding for an improper purpose is an issue of fact. See Howard Johnson Company v. Kilpatrick, 501 So. 2d 59, 61 (Fla. 1st DCA 1987) (existence of discriminatory intent is a factual issue); School Board of Leon County v. Hargis, 400 So. 2d 103, 107 (Fla. 1st DCA 1981) (questions of credibility, motivation, and purpose are ordinarily questions of fact). The absence of direct evidence of a party's intent does not convert the issue to a question of law. Indeed, direct evidence of intent may seldom be available. In determining a party's intent, the finder of fact is entitled to rely upon permissible inferences from all the facts and circumstances of the case and the proceedings before him.
>
> FN1. A frivolous purpose is one which is of little significance or importance in the context of the goal of administrative proceedings. Mercedes Lighting & Electrical Supply, Inc. v. Department of General Services, 560 So. 2d 272, 278 (Fla. 1st DCA 1990).

97. A leading case dealing with the award of attorney's fees and costs against a party alleged to have participated in an administrative proceeding for an improper purpose is Mercedes Lighting and Electrical Supply, Inc. v. Department of General Services, 560 So. 2d 272 (Fla. 1st DCA 1990). In applying Subsection 120.57(1)(b)5., Florida Statutes (now Subsection 120.569(2)(c), Florida Statutes), the court held that

> [C]ourts should not delve into an attorney's or party's subjective intent or into a good faith-bad faith analysis. Instead, if a reasonably clear legal justification can be shown for the filing of the paper in

> question, improper purpose cannot be found and sanctions are inappropriate. . . . [I]mproper purpose may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake.

Mercedes Lighting, 560 So. 2d at 278 (citations omitted).

98. The undersigned has found no appellate decision explicitly extending the objective standard to Subsection 120.595(1), Florida Statutes. However, there appears no reason why the objective standard should not be used to determine whether the City's participation in this proceeding was for an improper purpose. See, e.g., Palm Beach Polo Holdings, Inc., v. Acme Improvement District, Case No. 03-2469 (DOAH March 25, 2004); South Florida Water Management District v. Berryman and Henigar, Inc., Case No. 02-4286 (DOAH May 12, 2003); Amscot Insurance, Inc., v. Dept. of Insurance, Case No. 98-1974F (DOAH July 14, 1998).

99. Applying this objective standard to the case at hand, an "improper purpose" cannot be found against the City under Subsection 120.595(1), Florida Statutes. The City's case was premised upon the scientific opinions offered by its hired experts. "When making inquiry, lawyers and parties alike may rely on the opinions of experts, when it is reasonable to do

so." Friends of Nassau County, 752 So. 2d at 52. The footnote to the quoted text provides, in pertinent part:

> The test is whether the inquiry was reasonable. A lawyer cannot automatically shield himself from liability for sanctions by purportedly relying on the opinion of an unscrupulous or incompetent "hired gun." The standard is whether, under the circumstances, a reasonable lawyer would have relied on the expert's opinion. . . .

Id. See also Dubois v. U.S. Department of Agriculture, 270 F.3d 77, 83 (1st Cir. 2001) ("[G]overnment counsel in the instant case reasonably relied on the technical expertise of the Forest Service to craft its litigation position. The Forest Service is a recognized expert on environmental issues, and government counsel . . . had no reason to question the accuracy of their client's claims. In addition, the subject matter of the Forest Service's statement was highly technical."); Coffey v. Healthtrust, Inc., 1 F.3d 1101, 1104 (10th Cir. 1993) ("The attorney relies on the expert to explain to the judge or jury what is not within his or her realm of knowledge. There would seem to be no problem for the attorney to rely on the expert's opinion as the basis of his client's position. As long as reliance is reasonable under the circumstances, the court must allow parties and their attorneys to rely on their experts without fear of punishment for any errors in judgment made by the expert.")

100. As found above, the experts' research and reports in the instant case were highly technical. The evidence did not support GEL's allegation that the City's experts were unscrupulous or incompetent "hired guns." The City and its lawyers had no reason to suspect there was a problem with the reports of its experts. The City's experts stood behind their work throughout the litigation, even in the face of the GEL experts' critiques at the final hearing. The City's reliance on its experts was reasonable.

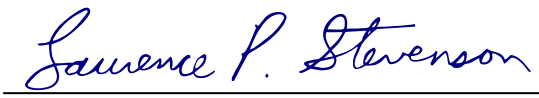
101. The record evidence established that the City's chief purpose in filing the Petition was the protection of its drinking water supply, along with curtailing some of the historical nuisances that its citizens had complained about in relation to the GEL landfill. The Petition sought denial of the permit, but also sought alternative relief in the form of permit conditions, some of which were imposed on the permit that was ultimately issued to GEL. The City was not a nonprevailing adverse party, and its purposes in filing and litigating its Petition were entirely within the scope of the permitting statute and, therefore, proper.

FINAL ORDER

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

ORDERED that G.E.L. Corporation's Motion for Attorney's Fees and Costs is denied and this matter is hereby dismissed.

DONE AND ORDERED this 24th day of July, 2006, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2006.

ENDNOTES

1/ Unless otherwise indicated, all references to the Florida Statutes shall be to the 2001 version.

2/ The undersigned is cognizant of the fact that, by its terms, Subsection 120.595(1), Florida Statutes, does not authorize an administrative law judge to issue a final order. Subsection 120.595(1)(d), Florida Statutes, expressly states that the administrative law judge's determination as to attorney's fees and costs will be included in "the recommended order." As noted by Judge Manry, see quoted portion of the final order, supra, this statutory language, unremarked by the G.E.L. Corporation court, 875 So. 2d at 1260 (setting forth the "pertinent language" of the statute), appears to presume that matters will take the normal course of a Subsection 120.57(1), Florida Statutes, proceeding: there will be a formal administrative hearing in the underlying proceeding, and that hearing will culminate in a recommended order setting forth findings of fact and conclusions of law as to the substantive case, as well as a determination as to the award of costs and attorney's fees.

However, the court's decision in G.E.L. Corporation has discerned within the statute the Administrative Law Judge's authority to conduct a standalone hearing on costs and attorney's fees where the substantive case has been dismissed with no formal hearing on the merits. Because the agency has no substantive jurisdiction to review the Administrative Law Judge's award of attorney's fees and costs, G.E.L. Corporation, 875 So. 2d at 1263-1264, and the order in this proceeding involves nothing other than the award of attorney's fees and costs, the undersigned has concluded that a final order must issue in this proceeding.

3/ The basis for the motion was Judge Manry's statement in the final order that the "parties settled the underlying case." In fact, the City dismissed its Petition after DEP issued the Second Notice of Amended Proposed Agency Action.

4/ GEL Exhibit 9 was not provided to the undersigned at the time of the reconvened hearing. Through no fault of the parties, the exhibits from the September 13, 2002, hearing were not returned after the appellate process was completed. The parties were forced to recreate their exhibits for the reconvened hearing, and were unable to recreate them all. None of the missing exhibits was crucial to the decision in this case.

5/ City Exhibits 6 and 17 were not provided to the undersigned at the time of the reconvened hearing, for the same reasons set forth in footnote 3, supra.

6/ A Class I landfill is a general purpose solid waste landfill that can accept all non-hazardous wastes, except those prohibited under Florida Administrative Code Rule 62-701.300. Fla. Admin. Code R. 62-701.200(13).

7/ "Class III waste" means yard trash, construction and demolition debris, processed tires, asbestos, carpet, cardboard, paper, glass, plastic, furniture other than appliances, or other materials approved by DEP that are not expected to produce leachate. Fla. Admin. Code R. 62-701.200(14).

8/ Unlike a Class III landfill, a C&D landfill may accept only construction and demolition debris. Fla. Admin. Code R. 62-701.200(27).

9/ Note that the stipulated penalties paragraph excluded compliance with Paragraphs 20 and 22, which required GEL to address the odor problems at the facility.

10/ Neither of the principal parties presented evidence that definitive test borings have been conducted since the White Paper was completed.

11/ George Houston, a DEP geologist, testified that, as of September 2002, DEP was still assessing the size of the contamination plume and that DEP had asked GEL to place additional monitoring wells to assist in this assessment. Thomas Bechtol, GEL's principal engineer, conceded that there was contamination of the shallow aquifer at the GEL C&D landfill site, though he disputed Mr. Sims' opinion that there was any threat to the deeper Floridian aquifer and therefore, to the Orange City drinking water supply.

12/ The White Paper explained that the "open and porous matrix" of the C&D landfill captured rainfall, thereby promoting recharge beneath the C&D landfill, into the Lake Marie landfill, resulting in the creation of leachate in the old Class I landfill.

13/ "Zone of discharge," the requirement in Florida Administrative Code Rule 62-522.410(2) that groundwater discharges may be no greater than that established by the Department during the permitting process.

14/ GEL operates a recycling facility on the same site as the C&D landfill.

15/ GEL also presented the testimony of James Sullivan, a professional engineer, who stated his belief that Mr. Dufresne set the constant head on the eastern boundary to force the groundwater flow to the east. However, Mr. Sullivan conceded that he had not discussed the matter with Mr. Dufresne or anyone from Hartman and Associates, and that he had not communicated his findings to the City.

16/ Florida Administrative Code Rule 62-520.410 sets forth the classifications for ground water of the state, according to designated uses. Class G-II is defined as "[p]otable water use, ground water in aquifers which has a total dissolved solids content of less than 10,000 mg/l, unless otherwise classified by the [Environmental Regulation] Commission."

17/ Mr. Bechtol, GEL's permitting engineer, read this new requirement as providing that GEL was not required to maintain slopes at 3:1 during the operation of the landfill, but only at the time of closure, provided that steeper slopes were included in the facility's operations plan. Mr. Bechtol's testimony appeared to take for granted that DEP would approve an operations plan that allowed steeper slopes. The language of the new permit condition, quoted with emphasis supra, clearly contemplated that 3:1 slopes were to be maintained at all times during the operation of the facility, unless the facility could demonstrate that steeper slopes during operation would not affect the maintenance of 3:1 slopes at the time of the facility's closure. Whether Mr. Bechtol's statement represented the actual state of affairs between GEL and DEP cannot be ascertained from the record and is in any event irrelevant in this fee case. The relevant factor is that the City was reasonable in viewing this 3:1 ratio during the operating life of the facility as a new permit requirement.

18/ On April 4, 2002, while the hearing on the Petition was pending, DEP's central district issued a policy memorandum imposing on all applicants a 3:1 working side slope requirement. Mr. Bradner testified that this requirement would have been imposed on GEL, had GEL's application been made after April 4, 2002. However, the record was unclear as to whether DEP could have imposed this requirement on GEL pre-existing permit application.

19/ In McCoy, the court reviewed an award of attorneys' fees under Subsection 760.11(5), Florida Statutes (2003), the fee provision of the Florida Civil Rights Act. The court reviewed the relevant case law and found that an award of attorneys' fees was proper only where a plaintiff's suit was "frivolous, unreasonable, or without foundation." 920 So. 2d at 1262. The court reversed the lower court's award of fees to Pinellas County. Id.

20/ The reference to Section 120.569 was eliminated by section 6, Chapter 2003-94, Laws of Florida.

COPIES FURNISHED:

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

Dennis Wells, Esquire
Webb, Wells & Williams P.A.
994 Lake Destiny Road, Suite 102
Altamonte Springs, Florida 32714

William E. Reischmann, Jr., Esquire
Stenstrom, McIntosh, Colbert,
Whigham & Reischmann
200 West First Street, Suite 22
Post Office Box 4848
Sanford, Florida 32772-4848

Albert E. Ford, II, Esquire
Ford & Brueggerman, P.A.
270 Waynont Court, Suite 110
Lake Mary, Florida 32746-3569

Sandra K. Ambrose, Esquire
Catherine D. Reischmann, Esquire
Clayton D. Simmons, Esquire
Stenstrom, McIntosh, Colbert, Whigham,
Reischmann & Partlow, P.A.
200 West First Street, Suite 22
Post Office Box 4848
Sanford, Florida 32772-4848

Colleen M. Castille, Secretary
Department of Environmental Protection
The Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Greg Munson, General Counsel
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Lea Crandall, Agency Clerk
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.