STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CYNTHIA VALENCIC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-3535
	)	
DEPARTMENT OF ENVIRONMENTAL PROTECTION and SARASOTA COUNTY,	)	
	)	
Respondents.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on August 20, 21, 22, and 27, 2002, in Sarasota, Florida.

APPEARANCES

For Petitioner: Jeanne Marie Zokovitch Paben, Esquire
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For Respondent: (County) Rory C. Ryan, Esquire
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For Respondent: (County)
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STATEMENT OF THE ISSUE

The issue is whether Sarasota County's application for a permit authorizing the construction of a Class V, Group 3 aquifer storage and recovery well system at the Central County Water Reclamation Facility in Sarasota, Florida, should be approved.

PRELIMINARY STATEMENT

This matter began on July 19, 2001, when Respondent, Department of Environmental Protection (Department), published its Notice of Intent (Notice) to issue two underground injection control permits to Respondent, Sarasota County (County), authorizing the construction of aquifer storage and recovery well systems in Sarasota and Venice, Florida, respectively. Petitions challenging the two permits were then filed by the City of Venice, a municipality in the County, and Petitioner, Cynthia Valencic (Valencic), a resident of Tallahassee, Florida, whose verified Petition was filed under Sections 120.569, 120.57(1), and 403.412(5), Florida Statutes (2001).[2] Both matters were referred to the Division of Administrative Hearings on September 6, 2001, with a request

that an Administrative Law Judge be assigned to conduct a hearing. The challenges to the Venice permit were given Case Nos. 01-3515 and 01-3534, while the challenges to the Sarasota permit were given Case Nos. 01-3516 and 01-3535. All cases were later consolidated by Order dated September 24, 2001. In the same Order, and at the request of the parties, the final hearing was not scheduled until the week beginning February 4, 2002, pending efforts by the parties to reach a settlement.

On December 5, 2001, the County withdrew its application for a permit in Venice, Florida. Both Petitioners then filed a Notice of Partial Voluntary Dismissal and Request for Permission to File Revised Petitions and to Reschedule First Day of Hearing. By Order dated December 24, 2001, the undersigned granted the parties leave to file amended petitions, closed the files in Case Nos. 01-3515 and 01-3534, and rescheduled the final hearing to begin on February 5, 2002, instead of February 4, 2002. Amended Petitions were filed by the two challengers on January 11, 2002.

Thereafter, Ms. Valencic's unopposed Motion for Continuance of Hearing Date was granted, and the final hearing was rescheduled to April 15-19, 2002, in Sarasota, Florida. A second unopposed request for a continuance filed by the City of Venice was granted, and the final hearing was continued to August 20-22 and 27-29, 2002, at the same location.

On August 12, 2002, the City of Venice and the County entered into a Settlement Agreement (Agreement), which resolved their dispute. After the Agreement was executed by those parties, a Notice of Voluntary Dismissal was filed by the City of Venice on August 15, 2002, and Case No. 01-3516 was closed on August 19, 2002. Accordingly, only the challenge in Case No. 01-3535 to the issuance of the Sarasota permit remains at issue.

At the final hearing, Petitioner testified on her own behalf and offered Petitioner's Exhibits 1-3, 5-11, and 18-22. All were received except Exhibits 10, a portion of 11, and 22. In addition, a ruling was reserved as to Exhibits 19-21, which are the depositions of John Vecchioli, Charles Drake, and James Christopher, witnesses previously retained by the City of Venice, no longer a party in this proceeding. The County's and Department's objections to the admission of these exhibits is hereby sustained. The Department presented the testimony of Judith A. Richtar, Program Manager for the Tampa District Office's Underground Injection Control Program and accepted as an expert. The County presented the testimony of R. David G. Pyne, a professional engineer and accepted as an expert; Thomas A. Farkas, a hydrogeologist and accepted as an expert; Michael D. Micheau, a hydrogeologist and accepted as an expert; and James L. Ley, County Administrator. Also, it

offered County Exhibits 1-30, which were received in evidence.

The Transcript of the hearing (four volumes) was filed on September 6, 2002.

On August 22, 2002, or before the final hearing was concluded, Petitioner filed a Petition for Review of Non-Final Agency Action Under Administrative Procedure Act with the First District Court of Appeal challenging a preliminary Order dated August 19, 2002, which, among other things, quashed subpoenas issued by Petitioner to three experts previously retained by the City of Venice. That appeal was eventually dismissed by the Court on January 5, 2004, on the ground that Petitioner lacked standing to file her appeal. Cynthia Valencic v. Dep't of Envir. Prot. and Sarasota County Utilities, 865 So. 2d 584 (Fla. 1st DCA 2004). Petitioner's Motion for Rehearing, Clarification and Written Opinion and Motion for Rehearing En Banc were denied on February 12, 2004, and the Court's Mandate was issued on March 1, 2004. Also, on September 4, 2002, or just after the hearing was concluded, Petitioner filed a second Petition for Review of Non-Final Agency Action Under Administrative Procedure Act with the First District Court of Appeal challenging an evidentiary ruling made during the final hearing. That appeal was dismissed by an unpublished Order dated September 19, 2002, on the ground "that no written order has been rendered by the

lower tribunal." Cynthia Valencic v. Dep't of Envir. Prot. and Sarasota County Utilities, 1st Dist. Ct. App., Case No. 1D02-3564.

By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was abated until after the interlocutory appeals were concluded. Thereafter, the parties were given until March 31, 2004, in which to do so. Timely filings were made by the parties, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. On September 14, 1999, the County, through its Utilities Department, filed with the Department an application for a permit to construct a Class V, Group 3 aquifer storage and recovery (ASR) test well and monitor well system at its Central County Water Reclamation Facility, 79005 South McIntosh Road, Sarasota, Florida. The Department is charged with the responsibility of issuing such permits.

2. On July 19, 2001, the Department issued its Notice of Intent to issue Permit No. 160882-001-UC. The permit authorizes the County to construct one test well to determine

the feasibility for the storage and recovery of reclaimed water from the Suwannee Limestone of the Upper Floridan aquifer system at a depth of between 500 and 700 feet below land surface. Also, the County is authorized to construct three monitor wells, one into the target storage zone, the second into the first overlying transmissive unit, and the last into the overlying Arcadia Formation. The storage capacity of the test well is projected to be between one and two million gallons per day.

3. On August 10, 2001, Petitioner, who is a citizen of the State of Florida, resides in Tallahassee, and is a long-time employee of Legal Environmental Assistance Foundation, Inc., filed her verified Petition for Formal Administrative Hearing (Petition) under Sections 120.569, 120.57(1), and 403.412(5), Florida Statutes. In her Petition, she generally contended that the permitting would have the effect of impairing, polluting, or otherwise injuring the water of the State because the proposed injectate (being placed in the well) will not meet primary and secondary drinking water standards, may be harmful to human health, and will violate the minimum criteria for groundwater. She also contends that the permit application was not signed by the proper signatory and that the Department failed to require the County to first drill an exploratory well (as opposed to a test well). While

these allegations were not sufficient to demonstrate that Petitioner's substantial interests were affected by the proposed permitting, they were deemed sufficient (subject to proof at final hearing) to satisfy the pleading requirements of Section 403.412(5), Florida Statutes.

B. Water Reuse Generally

4. Water reuse is the use of reclaimed water for a beneficial purpose. Because of Florida's continuing population growth and occasional water shortage, the use of reclaimed water is an important conservation tool. Indeed, in 2002 the Legislature showed strong support for water conservation and reuse by amending Section 403.064(1), Florida Statutes, and adding language which states that "the reuse of reclaimed water is a critical component of meeting the state's existing and future water supply needs while sustaining natural systems." To this end, the County has filed its application for the purpose of using reclaimed water for such lesser uses as irrigation so that the existing high quality fresh groundwater can be used for higher and better purposes such as drinking water for the general public.

5. The Southwest Florida Water Management District (District) has also encouraged the use of reclaimed water by providing funding for this type of program to induce utilities to move forward with reuse programs. In addition, the

Department has been proactive in promoting the reuse of water throughout the State in order to conserve water resources.

C. Aquifer Storage and Recovery

6. Aquifer storage and recovery (ASR) is a reuse program encouraged by the Legislature, Department, and District. It involves the storage of water underground in a suitable formation, through a well, during times when water is available to put into the well, and then recovery of that stored water from the well during times when it is needed for some beneficial purpose. Put another way, an ASR operates like an underground storage tank.

7. Water is placed into the ASR wells (by means of pumping) during recharge periods when it is raining and there is no demand for reclaimed water. When the water is pumped into the well, a stored water bubble is created by using buffer zones made of water with more salinity than the stored water. These buffer zones are designed so that there can be full recovery of the stored water. The recovery rate is generally around 100 percent.

8. There are three ways to store reclaimed water: surface ponds, storage tanks, and ASR. The ASR storage method is the most efficient method of storing reclaimed water, and it has significant environmental, utility, and economic benefits. The ASR method has no impact on wetlands and

ecosystems, and unlike pond storage (and to a lesser degree storage tanks), it does not require the use of large surface areas and is not affected by evapotranspiration and seepage. (There is typically a 60 percent loss of water due to evaporation in surface storage areas.) It also results in cost savings (up to a 50 percent reduction in capital costs) and avoidance of wetlands impacts.

9. One of the goals of the County's Comprehensive Plan is to maximize the use of reclaimed water for irrigation purposes. Because other storage methods have proved to be inefficient, ASR is the County's preferred storage method to meet this goal.

10. At the time of the final hearing (August 2002), there were at least fifty-six ASR systems operating outside the State of Florida (and around one hundred more in various stages of development) and eleven ASR systems successfully operating in the State, the first one having been established in 1983. At that time, there were also two ASR test programs underway in the area, including one in the Englewood Water District, a few miles to the south of the proposed project, and the Northwest Hillsborough ASR program, which is located just north of the County. Also, ASR systems are located in Manatee County and near the Peace River, which is in the same storage area being proposed here. Therefore, the County has

the benefit of drawing upon twenty years of experience with this type of system.

D. The Permit

11. The County began an informal water reuse program in 1988, when it first used effluent disposal for irrigation purposes at a local golf course. A formal program (the Reuse Master Plan) was commenced in 1994; however, the County still lacks the storage capacity to meet the seasonal demands of its reuse customers.[3] Without storage, any excess water must be discharged and lost. In order to meet the County's goal of maximizing reclaimed water use, it must be able to adequately store reclaimed water.

12. Due to projected population growth and issues concerning management of limited resources, in 1997 the County began considering the use of ASR as a means to better manage its reclaimed water supply and demand for those facilities which serve the North County Reuse System.

13. If all necessary permits are obtained, the County intends to use reclaimed water from its Central County wastewater facility. Currently, that effluent receives advanced tertiary treatment with deep bed filtration and high level disinfection.

14. The proposed test well will be approximately 700 feet deep; at that depth, the injection (or storage) zone will

consist of the Suwannee Limestone formation of the Upper Floridan aquifer system. The storage zone is brackish, with the water quality or salinity having about six times the acceptable degree of salinity for a drinking water source.

15. It is anticipated that the total dissolved solids (TDS) concentration in the injection zone will be greater than 3,000 TDS. If water quality at the proposed injection zone is greater than 3,000 TDS, this fact will be revealed during the construction of the test injection well and during the various tests to be conducted during construction. (Assuming this level of TDS is found, then at that point the County would have to provide reasonable assurance that the water reclamation facility is providing full or principal treatment to the domestic waste.)

16. The evidence establishes that there is some level of transmissivity in the confining layer overlying the proposed injection zone. That is to say, there is some small degree of connectivity between the proposed injection zone and the aquifer above it. The actual level of transmissivity will be determined based upon tests run during the construction of the first monitor well.

17. The effluent produced from the County's water reclamation facility meets drinking water standards. If the plant is unable to produce effluent that meets or exceeds the

applicable water quality standards, this issue is an operational concern which can be addressed in a permit modification authorizing operational testing.

18. Under the Department's permit process, if the construction permit is approved, the County will construct a monitor well to obtain more site-specific information concerning such things as the geology, hydrology, and water quality at the site. (At this point, while the County has published literature sources and regional geologic information from two nearby ASR systems using the same storage area to rely upon, it has no specific data for the very small parcel where the well will be constructed.)

19. Once the information is obtained, an engineering report is prepared and submitted to the Department. That report contains a wide array of technical data, including construction data, hydrogeologic data, formation samples, water quality samples, hydraulic data, core data, Packer data, and geophysical data. This information is then used by the Department (and a special advisory committee called the Technical Advisory Committee) to evaluate whether the site can be authorized for cycle testing and later for operational purposes. If cycle testing is appropriate, the County must then request a modification to its construction permit to authorize cycle testing of its ASR well. That modification,

and any others that may be warranted by the new information, are "final agency action subject to the procedural safeguards contained in Chapter 120, F.S." Fla. Admin. Code R. 62-528.100(2).

20. When the test injection well is constructed and eventually placed into operation, monitor wells will be used to monitor background water in both the injection zone and in the two aquifers overlying the proposed injection zone. However, until further Department approval is obtained, no injection of reclaimed water is authorized; the permit being sought here authorizes only the construction of the well itself. Finally, Florida Administrative Code Rule 62-528.640(1)(a) requires that the County obtain a separate operation permit after the construction permit has been issued and testing completed.

E. Criteria and Standards for a Class V Well

21. Florida Administrative Code Chapter 62-528 governs all injection wells defined as Class I, III, IV, or V wells. (In Class II wells, the injected fluids are used in connection with oil and natural gas production and are regulated by the Florida Geological Survey under Chapter 377, Florida Statutes.) The category of wells in which the County seeks a permit is a Class V, Group 3 permit, which includes all domestic wastewater wells. See Fla. Admin. Code R. 62-

528.300(1)(e)3. A Group 3 well involves the injection of fluids that have been processed through a permitted domestic wastewater treatment plant.

22. Even though the County is requesting a permit for a Class V well, at the request of the Department, it submitted a different (and more stringent) type of application (a "900" application) since the Department has the authority to apply "any of the criteria for Class I wells" if it believes that the well may cause or allow fluids to migrate into an underground source of drinking water which may cause a violation of primary or secondary drinking water standards. See Fla. Admin. Code R. 62-528.605(2). (A Class I well is a well used to inject hazardous waste below the lowermost formation containing an underground source of drinking water.) In this case, the Department opted to apply certain Class I construction standards for the well, in addition to the normal standards for Class V wells. Those standards are found in Florida Administrative Code Rule 62-528.400. This means that the County will be held to a higher standard than a general underground injection control permit.

23. Florida Administrative Code Rule 62-528.605 contains the Class V well construction standards. For the following reasons, the County has given reasonable assurance that all criteria will be met.

24. Subsection (1) of the rule requires that "a well shall be designed and constructed for its intended use, in accordance with good engineering practices, and the design and construction shall be approved by the Department with a permit." The evidence clearly establishes that good engineering practices have been followed by the County for the design and construction of the well.

25. Subsection (2) requires that an applicant design and construct the well so that it will not "cause or allow fluids to migrate into an underground source of drinking water which may cause a violation of a primary or secondary drinking water standard . . . or may cause fluids of significantly differing water quality to migrate between underground sources of drinking water." Subsection (3) is also directed at the migration of fluids. The evidence shows that the migration of fluids between aquifers will be prevented as a part of the design and construction of the ASR well program. The design chosen by the County has been proven to prevent migration of fluids between aquifers, and it will preserve the integrity of the confining beds. The combination of steel casing and cementing prevents the migration of fluids along the borehole.

26. The well will be constructed by a Florida licensed contractor, as required by Subsection (4). The remaining criteria in the rule will be satisfied during the construction

process.

27. Florida Administrative Code Rule 62-528.620 contains reporting requirements for Class V wells. All of these requirements are included in the draft permit and will be met by the County.

28. The Department has also included Special Condition 1(h) in the draft permit, which provides that nothing will be injected into the well that does not meet the Federal Primary Drinking Water Standard. This condition is drawn from Florida Administrative Code Rule 62-528.307, which specifies general conditions to be included in underground injection control permits. In accordance with this condition, the County will monitor the movement of fluid to ensure that there are no violations.

29. The County has also demonstrated that there will be no hazardous waste injection, as prohibited by Florida Administrative Code Rule 62-528.600(1)(a).

30. Finally, the requirements of Florida Administrative Code Rule 62-528.630(3) do not apply at this time since the proposed permit is only for construction of a well, and not the injection of water.

F. Class I Well Construction Standards

31. Because the Department has imposed more stringent construction standards on the County, the Class I well

construction standards found in Florida Administrative Code Rule 62-528.410(1) come into play.

32. The County has demonstrated that it has complied with the requirement that the well be cemented and cased. In addition, the County has considered corrosion protection in the cementing and casing of the proposed well. Because the casing will be cemented, coating is not required. Finally, there will be no open annulus (spacing between the casings and the bore hole) in the ASR test well.

G. Other Requirements

a. Drilling

33. Geophysical surveys will be conducted during the pilot hole drilling stages to collect hydrogeologic information. Further, drill stem tests will be conducted throughout the drilling, and a driller's log will be maintained. See Fla. Admin. Code R. 62-528.410(3).

b. Casing

34. Steel casing will be used, taking into consideration the possible corrosion of steel. The life expectancy of the well was considered, as required by Florida Administrative Code Rule 62-528.410(4)(a), and was determined to be unknown.

c. Cement

35. Type 2 cement will be used, which is sulfate resistant and is specifically designed for use in regions such

as Florida.

d. Testing

36. Geophysical logs will be used during the construction and testing of the well to verify the physical conditions of the well and confirm that construction is proceeding according to the plan. Also, geophysical surveys will be conducted during pilot hole drilling stages to collect subsurface hydrogeologic information.

e. Environmental concerns

37. Once a drilling contractor is selected, the location for the disposal of drilling fluids will be submitted for Department approval in accordance with Special Condition 1(b) in the draft permit.

f. Monitor well construction standards

38. The monitor well will meet all construction requirements under Florida Administrative Code Rule 62-528.420. (The same standards that are applied to Class V wells are also applied to monitor wells.)

g. General design considerations

39. Exploratory pilot hole drilling stages will be conducted to collect hydrogeologic information, and complete sets of geophysical surveys will be performed.

40. Because cement generates heat, temperature surveys will be run as a part of the construction sequence to verify

coverage of the cement. This means that tools will be lowered into the hole after each cementing stage to verify coverage.

h. Monitoring requirements

41. Florida Administrative Code Rule 62-528.425(1)(d) requires that an applicant perform "a demonstration of mechanical integrity . . . at least once every five years during the life of the well." Details to accomplish this are found in both the application and the draft permit.

42. Florida Administrative Code Rule 62-528.425(1)(f) requires that the background water quality of the injection zone and monitoring zone be determined prior to injection. The County will perform this task before injection occurs.

43. Florida Administrative Code Rule 62-528.425(1)(g) requires that monitor wells be installed above the injection zone near the project. The County will construct three wells, as required by the rule. They will also be placed at a sufficient distance from the project, as required by Florida Administrative Code Rule 62-528.425(1)(h), and the specific monitoring intervals are detailed in the draft permit.

i. Reporting requirements

44. The Department requires periodic data reports and progress reports regarding eight separate types of information. See Fla. Admin. Code R. 62-528.430(1)(a). These reporting requirements will be performed and followed.

45. Because a Class V well may be required to be plugged and abandoned, the Department requires a plugging and abandonment report. See Fla. Admin. Code R. 62-528.625. All requirements under this rule have been met, and the County has the financial resources to accomplish this task, when required.

j. General Class I permitting requirements

46. Florida Administrative Code Rule 62-528.440 sets forth general permitting requirements for Class I and III wells. Because the Department has opted to impose certain Class I criteria on the County's application, some of the criteria in this rule apply. They include special conditions 1(a), (c), and (e) in the permit for well construction, system modification, and

fluid injection, all of which have been, or will be, met by the County.

47. In addition, the duration for the operation permit cannot exceed five years, and the County was required to submit an application for a permit which conformed with the requirements of the rule.

48. As a part of its application, the County established an area of review for the construction permit, taking into account the zone of endangering influence. See Fla. Admin. Code R. 62-528.300(4). (An area of review is the area surrounding an injection well, including the area of possible endangering influence.) This requirement was met because the established area of review is one mile even though the predicted area of influence is expected to be no more than 400 feet.

49. As a part of the preceding analysis, the County also conducted an area of review study, as required by Florida Administrative Code Rule 62-528.440(6)(a). In doing so, the County evaluated the impact on the ASR well, and the impact the ASR well would have on the surrounding area. That evaluation determined that there are no water supply wells within the area of review.

50. Because the construction permit only has a duration of five years, and given the County's supporting information

submitted with the area of influence study, the Department has

not required that the County provide a corrective action plan. See Fla. Admin. Code R. 62-528.300(5)(a).

k. Class I well construction permit criteria

51. All guidelines for constructing the well have been followed, and the construction of the well will not be a source of pollution. The County has provided reasonable assurance that the project will function in accordance with the requirements of Florida Administrative Code Chapter 62-528.

l. Hydrological modeling

52. Finally, Florida Administrative Code Rule 62-528.405 specifies criteria for evaluating the geologic and hydrologic environment of Class I wells. The County has satisfied all criteria in the rule.

H. Other Issues

a. Exploratory well

53. Petitioner contends that the Department should require the County to construct an exploratory well, as defined in Florida Administrative Code Rule 62-528.603(1), rather than a test well. That rule defines an exploratory well as one being "drilled for the specific purpose of obtaining information to determine the feasibility of underground injection at the proposed site." However, Florida Administrative Code Rule 62-528.450(1)(b) requires an

exploratory well only "for those projects located in an area where available information is lacking concerning geologic or hydraulic confinement or existing information indicates that geologic or hydraulic confinement may be poor or lacking." For example, an exploratory well would be required in a remote area (such as certain parts of Polk County) where the Department had insufficient literature, studies, or prior history concerning the general geology across and around the site.

54. In this case, two nearby ASR systems are located in the Englewood Water District and near the Peace River and use the same storage zone as that proposed by the County. Those systems have been operating for a number of years, and the County and Department can draw upon that experience. Given this significant regional geologic information, an exploratory well is not required. More importantly, the requirement for an exploratory well applies only to Class I well construction, and not Class V wells, and the Department properly exercised its discretion to not apply that requirement to the County's Class V application.

b. Signature on the application and other documents

55. Florida Administrative Code Rule 62-528.340(1)(c) requires that all permit applications by a local government be signed by "either a principal executive officer or ranking

elected official." Also, subsection (2) of the same rule requires that "reports required by permits and other information requested by the Department shall be signed by a person described in subsection (1) of this section [a principal executive officer or the highest ranking elected official], or by a duly authorized representative of that person." Petitioner contends that these requirements were not met.

56. The County's application was signed by James E. Caldwell, who was then the Manager of Sarasota County Utilities. At that time, Mr. Caldwell had overall responsibility for the County's utility operations. On August 27, 2002, James L. Ley, the County Administrator (and principal executive officer of the County), also executed the original copy of the application. (That is, on that date he signed the original application underneath Mr. Caldwell's signature.) By doing so, Mr. Ley cured any previous technical deficiency in the application.

57. Responses to requests for additional information which were submitted to the Department during the review process were signed by one of the County's outside consultants. However, on January 13, 2002, Mr. Ley submitted a letter to the Department authorizing various County employees and agents to act on his behalf in processing the

instant application. Accordingly, the outside consultant was a duly-authorized representative of the chief executive and was authorized to sign those documents.

c. Satisfaction of injection criteria

58. Petitioner also contends that before a construction permit may be issued, the County must meet all principal treatment and disinfection requirements, as required by Florida Administrative Code Rules 62-610.466 and 62-528.563. However, those rules apply to permits which authorize the injection of reclaimed water into the groundwater. Here, the requested permit does not authorize injection, and therefore those requirements do not apply.

d. Groundwater criteria

59. Even though Petitioner conceded at hearing that the issue of whether the construction of the proposed wells would harm the environment was not raised in her Petition, the County provided reasonable assurance that this was not an issue of concern.

e. Adequacy of permit conditions

60. Petitioner also suggested at hearing that the proposed conditions in the permit are insufficient. However, she failed to show in what respect they were insufficient or how they should be amended.

f. Water quality concerns

61. Florida Administrative Code Rule 62-528.605(3) requires that a Class V well be constructed so that its intended use does not violate the applicable water quality standards. On this issue, the evidence establishes that the construction of the proposed test well and monitor system will not discharge, emit, or cause pollution. Indeed, a well and monitor station does not emit or discharge pollution and, if constructed according to the technical requirements of Florida Administrative Code Chapter 62-528, does not cause pollution. Therefore, the County's compliance with the technical requirements of the Department's regulations is reasonable assurance that the proposed system will not cause pollution.

I. Request for Attorney's Fees and Costs

62. In its Proposed Recommended Order, the County has requested an award of attorney's fees and costs on the theory that Petitioner is a non-prevailing party who has participated for a "frivolous, meritless, and improper purpose" within the meaning of Section 120.595(1), Florida Statutes. This argument is based on the assertion that Petitioner is a non-prevailing party, that is, she failed to substantially change the outcome of the proposed final agency action which is the subject of this proceeding, and she "failed to produce any witnesses or evidence to support [her] claim that the proposed permit that was the subject of this proceeding should not be

issued."

63. While it is true that Petitioner is a non-prevailing party, she attempted to utilize the testimony of three expert witnesses previously retained by the City of Venice, a former party in Case No. 01-3516. Those subpoenas, however, were quashed on August 16, 2002, and that ruling was memorialized in an Order dated August 19, 2002, or just before the final hearing began. Without those witnesses, Petitioner's presentation was obviously limited in some respects.[4] Further, until the final hearing, Petitioner assumed that evidence in support of her allegation that the injectate would harm the water quality would be admissible and relevant. (As this Recommended Order clearly points out, however, not a single drop of water can be injected into the well until a modification of the permit is obtained, and therefore such evidence is irrelevant.) During the course of the hearing, the undersigned sustained objections by the County and Department to the introduction of such evidence. This ruling had the effect of limiting the scope of the issues to be tried. Despite these limitations, her participation cannot be described as being frivolous or meritless, as claimed by the County, and it is found that she did not participate for an improper purpose.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

65. In their Proposed Recommended Orders, the County and Department assert that Petitioner has not demonstrated standing to pursue this action. As noted earlier, Petitioner filed her Petition under Sections 120.569, 120.57(1), and 403.412(5), Florida Statutes. Clearly, Petitioner has not pled, nor has she proven, that she is substantially affected by the Department's proposed issuance of a permit so as to qualify for standing under Sections 120.569 and 120.57(1), Florida Statutes.

66. To have standing under Section 403.412(5), Florida Statutes (as it existed prior to 2002), to "intervene" in "any administrative . . . proceedings authorized by law for the protection of the . . . water," Petitioner was required to file a verified pleading asserting that the permitted activity "has or will have the effect of impairing, polluting, or otherwise injuring the . . . water . . . of this state." As amended, her pleading contains allegations sufficient to satisfy the requirements for initiating this action. However, she was still obliged to prove up those allegations at final hearing. On all disputed and relevant issues in this case, the evidence clearly supports a finding in favor of the

County. Moreover, the central focus of Petitioner's claim is that the proposed activity will pollute the waters of this State. As previously found, this assertion is without merit since there will not be any environmental harm caused by the construction of the well, especially since there will be no injection of reclaimed water until a modification to the construction permit is obtained at a later date. In short, because there is no proof that the proposed action will harm the environment, a necessary underpinning for establishing standing under Section 403.412(5), Florida Statutes, Petitioner lacks standing to pursue this action.

67. As the applicant, the County bears the burden of showing by a preponderance of the evidence that it is entitled to the requested permit. See Fla. Dep't of Trans. v. J.W.C. Co., Inc., et al., 396 So. 2d 778, 789 (Fla. 1st DCA 1981). Within the context of this case, the County must prove entitlement to a permit to construct a Class V, Group 3 well; it does not have to show entitlement to a permit to operate the well. To show entitlement, the County must affirmatively provide the Department with reasonable assurance that the proposed construction will not discharge, emit, or cause pollution in contravention of Department standards and rules. See Fla. Admin. Code R. 62-4.070(1).

68. The standards for issuing a construction permit for

a Class V injection well are found in Florida Administrative Code Chapter 62-528. By a preponderance of the evidence, the County has provided reasonable assurance that the proposed activities authorized by the construction permit will not cause pollution in contravention of Department standards and rules. Petitioner's numerous contentions that water quality standards will be violated are premature at best and are thus irrelevant since no injection of reclaimed water will occur until when (or if) a modification of the construction permit is obtained.

69. Petitioner has also objected to the issuance of a permit on the technical ground that the original application, and subsequent data requests supplied by the County to the Department, were not signed by the proper individuals, in violation of Florida Administrative Code Rule 62-528.340(c). As described above, although the manager of Sarasota County Utilities signed the original application (with the acquiescence of the Department), the chief executive officer, Mr. Ley, later signed the application after objections by third parties were raised. There is nothing in Florida Administrative Code Rule 62-528.340(c) which prohibits this sequence of events so long as the proper signature appears on the document before the permit is actually issued. Likewise, the fact that an outside consultant signed certain data

requests on behalf of the County is of no consequence since Mr. Ley sent the Department a letter in January 2002 authorizing the consultant to act as his agent.

70. Petitioner also relies on Santa Fe Lake Dwellers Ass'n, Inc. v. State of Fla., Dep't of Envir. Reg. et al., DOAH Case No. 85-4446, 1987 WL 62049 (DOAH Recommended Order April 8, 1987; DER Final Order May 21, 1987), to support the contention that the operational factors (including the effect, if any, of the injectate on water quality) of the proposed ASR are a proper subject of a construction permit proceeding. That reliance is misplaced for two reasons. First, in that case, the applicant sought to construct a wastewater treatment facility, not a well. Second, that decision predated the enactment of Section 403.0881, Florida Statutes,[5] which negates the need for the submission of detailed construction plans and specifications to obtain a construction permit. Under the current statutory scheme, more detailed and accurate data relating to these issues are obtained during the construction and testing phase of the well. See also Manasota-88, Inc. v. Manatee County and State of Fla., Dep't of Envir. Reg., DOAH Case No. 85-2731, 1986 WL 32861 (DOAH Recommended Order May 5, 1986; DER Final Order June 19, 1986)(operational concerns of a deep injection well should not be considered in proceeding involving application for a

construction permit).

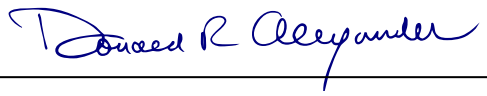
71. Finally, for the reasons given in Finding of Fact 63, the County's request for attorney's fees and costs under Section 120.595(1), Florida Statutes, should be denied.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order granting Permit No. 160882-001-UC authorizing the County to construct one Class V, Group 3 aquifer storage and recovery injection well and monitor well system in Sarasota County, Florida.

DONE AND ENTERED this 19th day of April, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 2004.

ENDNOTES

1/ On March 31, 2004, Nona R. Schaffner, Esquire, filed a Notice of Substitution of Counsel on behalf of the Department.

2/ Unless otherwise indicated, all future references shall be to Florida Statutes (2001). Also, in 2002, Section 403.412(5), Florida Statutes, was amended in various respects, including the elimination of the automatic standing of citizens of the State to initiate a challenge to the issuance of an environmental permit by merely filing a verified petition.

3/ As of 20 months ago, the reclaimed water users included at least 2,300 single-family homes (who used the water for residential lawn irrigation purposes), 19 golf courses, 10 multi-family developments, three parks, a sod farm, and various County highway medians, right-of-ways, and other common areas.

4/ Even if those witnesses had been allowed to testify, it is fair to conclude that most of their testimony focused on operational concerns, which are not at issue in this proceeding.

5/ Section 403.0881, Florida Statutes, became effective on July 1, 1987.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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