

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

QUILLON YON AND KEVIN YON,)
)
 Petitioners,)
)
vs.) Case No. 07-2414
)
TOWN OF GRAND RIDGE AND)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
 Respondents.)

)

RECOMMENDED ORDER

The final hearing in this case was held on September 18 through 20, 2007, in Tallahassee, Florida, before Bram D.E. Canter, an Administrative Law Judge (ALJ), of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether the Town of Grand Ridge (Grand Ridge) is entitled the Domestic Wastewater Facility Permit that the Department of Environmental Protection intends to issue.

PRELIMINARY STATEMENT

On April 11, 2007, the Department gave notice of its intent to issue Domestic Wastewater Facility Permit No.: FLA546429-001-DW2P/NP) to Grand Ridge to construct and operate a wastewater treatment plant and associated sprayfield. Petitioners Quillon Yon and Kevin Yon filed a petition for hearing to challenge the proposed agency action. The Department referred the matter to DOAH to conduct an evidentiary hearing.

On September 12, 2007, Petitioners filed a Motion for Continuance based on the Town's identification of a revised site plan for the sprayfield. Following a telephonic hearing on the motion, the motion was denied. The ALJ also ruled that evidence presented at the hearing was to be confined to the proposed project with the revised sprayfield site plan.

Respondents filed a Joint Motion in Limine, seeking to strike Petitioners' allegations that the proposed project would violate Department statutes and rules that apply to projects that are designed to have a direct discharge of pollutants. The motion in limine was granted, because Grand Ridge does not propose, and the Department's proposed permit does not authorize, a direct discharge of treated wastewater to ground or surface waters of the state.

Grand Ridge also filed a Motion for Costs and Attorneys' Fees. A ruling on that motion was deferred to this Recommended Order.

At the final hearing, Joint Exhibit 1, consisting of documents in the Department's permitting file, were admitted into evidence. Grand Ridge presented the testimony of Clyde Moneyham, Jr., the town manager of Grand Ridge; Michael G. Varner, who was accepted as an expert in geotechnical engineering, including the study of soils, field testing, soil sampling and testing, and laboratory testing of soils; Glen Allen, who was accepted as an expert certified wastewater treatment plant and sprayfield operator; Eric Guarino, who was accepted as an expert in geology, hydrogeology, groundwater assessment, groundwater monitoring and groundwater quality; Amir Zafar, who was accepted as an expert in wastewater treatment, reclaimed water holding ponds, sprayfield irrigation, sanitary

sewer collection and transmission and hydraulic modeling; and Frasier Bingham, Ph.D, who was accepted as an expert in ecology, state and federal wetlands delineation, including vegetation, soils and hydrology, and state and federal endangered and threatened species. Grand Ridge's Exhibits 1, 2, 5, 8, 12, 17, 19b, 19c, 19d, 19f, 19g, 19j, 19k, 19m, 19n, 19o, 19p, 19q, 20, 21, 24, 25, 28c, 28d, 29, 30a, 30b, 31, 32a, 32b, 32c, 32d, 33, 34, 36, 37, 38, 39, 53, 54b, 54d, 54e, 55 and 77 were admitted into evidence. The Department presented the testimony of James Billizon, who was accepted as an expert in geologic and groundwater issues pertaining to permit applications, both domestic and industrial wastewater; and William Evans, P.E., who was accepted as an expert in environmental engineering as it applies to domestic wastewater facilities. The Department's Exhibit 2 was admitted into evidence. Petitioners presented the testimony of Quillon Yon, Jerry Gilley, and James Stevenson. Petitioners' Exhibits 2, 3, and 6 were admitted into evidence.

At the request of Grand Ridge, the ALJ officially recognized portions of the U.S. Environmental Protection Agency (EPA) publication entitled, "Land Treatment of Municipal Wastewater—Process Design Manual" (1981), and the entirety of the EPA publication entitled "Design Criteria for Mechanical, Electric, and Fluid Systems" (1974).

The six-volume Transcript of the final hearing was filed with DOAH. The ALJ granted the motions of Petitioners and the Department to extend the time to file proposed recommended orders. Each party timely filed a Proposed Recommended Order which was carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Department is the agency with the responsibility and authority to regulate the construction and operation of domestic wastewater treatment facilities in Florida.

2. The permit applicant, Town of Grand Ridge, is a municipality in Jackson County. Grand Ridge has a population of approximately 950 persons.

3. Petitioner Quillon Yon is the owner of 95 acres of land contiguous to the site of Grand Ridge's proposed wastewater treatment plant and sprayfield. He resides on this property half of each year. He grows Pensacola Bahia grass as pasturage for about 40 head of cattle. The rest of the property is forested. There are potable water wells on the property.

4. Petitioners are co-owners of about 20 acres adjacent to Ocheesee Pond which is east of the project site. Part of the property is used to grow Coastal Bermuda grass as hay. Petitioners fish on Ocheesee Pond.

The Proposed Project and Project Site

5. The challenged Department permit authorizes Grand Ridge to construct and operate an "extended aeration secondary treatment domestic wastewater treatment plant consisting of flow equalization, influent screening, comminution, grit removal, aeration, secondary clarification, and chlorination." The permit also authorizes Grand Ridge to construct and operate a slow-rate, restricted public access, land application system (sprayfield).

6. The treatment plant and sprayfield would be constructed on a 475-acre site owned by Grand Ridge and located within the town limits. The wastewater treatment plant would be constructed in the approximate middle of the site. The sprayfield would be located in the southern portion of the site. The northern portion of the site would remain in its natural condition.

7. The land uses surrounding the proposed project site are mostly agriculture, consisting of row crops, hayfields, vegetables, and cattle operations. Ocheesee Pond is a natural waterbody located about 3,000 feet to the east of the project site. Dickson Bay is a natural waterbody located 1,500 to 2,500 feet south of the project site. There are other wetlands and unnamed surface waters near the project site.

8. The treatment plant would have the capacity to treat an annual average daily flow of 205,000 gallons of domestic wastewater. This design capacity would accommodate the projected population growth of Grand Ridge through 2028.

9. The treatment plant is designed to meet Class 1 Reliability standards as established by the EPA. Class 1 Reliability relates primarily to the provision of backup systems throughout the treatment plant, such as electrical power sources, pumps, holding ponds, and treatment processes, which give greater assurance that the facility will remain operational in the event of system failures.

10. Grand Ridge provided reasonable assurance that the treatment plant would meet all the design and operational standards applicable to domestic wastewater treatment plants of this type.

11. The treatment plant would be located a minimum of 1,600 feet away from any of the project site boundaries. The only part of the plant that might produce objectionable odor is near the "headworks" where the sewage comes in from the collection system. Based on the location of the treatment plant on the project site and the odor control measures to be utilized, Grand Ridge provided reasonable assurance that the proposed project would not create objectionable odors so as to create a nuisance to persons residing near the project site.

12. After the wastewater is treated, it would be stored in two above-ground storage ponds until it is pumped to the sprayfield. The ponds would be lined with a high-density polyethylene liner.

13. The ponds would hold ten days of wastewater flow at the average daily flow rate. Under the Department's rules, only three days of storage capacity is required. Grand Ridge provided reasonable assurance that the storage ponds would prevent wastewater from being released even during unusually heavy rainfall or rainfall of unusually long duration and that all other standards applicable to wastewater storage would be met.

14. Grand Ridge originally proposed a sprayfield of 168 acres. The proposed sprayfield was later reduced to 106 acres and generally occupies the relatively flatter terrain within the original 168 acres. The rest of the 62 acres that had been part of the originally proposed sprayfield are now proposed to be left in their natural vegetation.

15. A portion of the wastewater sprayed onto the sprayfield would be taken up by the grasses grown there for that purpose, and the balance of the wastewater would percolate through the soil to the groundwater. Because the wastewater is treated and returned to the groundwater in this process, it is also referred to as reclaimed water.

16. The project is not designed to have a direct discharge to ground or surface waters.

Soils at the Project Site

17. The Jackson County Soil Survey indicates that the predominant soil types at the proposed sprayfield are Dothan loamy sands and Fuquay coarse sands. Ninety-five percent of the soils in area of the proposed sprayfield are defined in the soil survey as being well-drained, meaning that water readily percolates down through them. Because the soils are well-drained, they are generally suitable for a sprayfield.

18. Hand auger soil borings were taken throughout the proposed site to determine the thickness of the sandy soils that begin at the ground surface. The thickness of the sandy soils determines their capacity to store water. The thickness of the sandy soils is greatest in the southern portion of the proposed site where the sprayfield would be located, with an average of about two feet.

19. Six deeper soil borings were made, ranging in depth from 70 to 80 feet. Each of the deeper borings showed that beneath the sandy soils exists a thicker layer of clayey sands. Beneath the clayey sands is a confining layer of highly plastic (almost impermeable) clay. Below the clay is limestone.

20. Four double ring infiltrometer field tests were conducted to determine the vertical infiltration rate of water

through the soils. The tests showed an average infiltration rate in the area of the proposed sprayfield of 4.5 inches per hour. This is a good infiltration rate for a sprayfield.

21. Wastewater percolating downward through the soil would reach the confining layer of clay and then move horizontally along the clay layer. "Slug tests" were conducted to determine the horizontal conductivity of the soils. The average horizontal conductivity was determined to be 0.06 feet per day, which was characterized by a geotechnical engineer as "fairly slow."

22. Permeability tests in a laboratory were performed on the clay layer to determine how long it would take water to move through the clay. The permeability of the clay layer was .00008 feet per day. At the thinnest clay layer (9 feet thick), it would take approximately 189 years for treated wastewater applied to the sprayfield to penetrate through the clay to the underlying limestone.

23. The project site is not a recharge area for the Floridan aquifer due to the clay confining layer beneath the site.

24. The soils in the area of the proposed storage ponds are stable and suitable for the construction of the proposed ponds.

25. In conducting the evaluation of the soils on the project site, Grand Ridge's consultants found a few depressions, but no sinkholes or other "karst" features. A karst feature is a sinkhole or other geologic form which indicates exposed limestone or the presence of limestone near the ground surface.

Groundwater

26. Five piezometers were installed at the site at depths from 68 to 75 feet to determine the depth of the groundwater and the direction of the groundwater flow. Groundwater was encountered at depths between 18.9 to 68.8 feet below the surface. The direction of groundwater flow beneath the proposed sprayfield was determined to be generally east and southeast.

27. A "mounding" analysis, using a computer model, was conducted to predict how groundwater levels would be affected by the application of treated wastewater to the sprayfield. The main purpose of the analysis was to determine whether treated wastewater could be applied to the sprayfield without causing ponding of water on the surface of the sprayfield. The permit contains a condition that prohibits surface runoff or ponding of the applied reclaimed water.

28. Several conservative assumptions were used in the mounding analysis. It assumed a perched groundwater condition beneath the proposed sprayfield, because the Jackson County Soil Survey indicated that the soils found there are indicative of

the presence of perched groundwater for part of the year. Perched groundwater is a situation where a soil layer of low permeability will cause groundwater to perch for a time before it moves downward. Although the soil survey indicated that the perched water condition might exist for three to four months a year, the computer model used in the mounding analysis was run with the assumption that the perched water condition was present year round.

29. Another conservative assumption used in the mounding analysis was an average annual rainfall amount of 64.9 inches. The historic annual rainfall for the area is approximately 55 inches per year.

30. Another conservative assumption used in the mounding analysis was an infiltration rate of 3.5 inches per hour. That was the average infiltration rate computed from the five piezometers, but the piezometers in the area of the proposed sprayfield showed an average infiltration rate of 4.5 inches per hour.

31. Using these conservative assumptions, the mounding analysis showed the sprayfield could absorb 2.75 inches per hour without ponding. Therefore, Grand Ridge provided reasonable assurance that mounding would not occur at the permitted application rate of 0.5 inches per acre, per week.

Sprayfield Operation

32. Grand Ridge's proposal to reduce the proposed sprayfield from 168 acres to 106 acres did not affect the permitted application rate of 0.5 inches per week, per week. However, the permitted wastewater volume of .308 million gallons per day (mgd) would have to be reduced to .205 mgd to correspond with the reduction in the size of the sprayfield. Grand Ridge agreed to this modification.

33. The sprayfield would be divided into seven zones that could be operated independently. It is Grand Ridge's general plan to rotate from one zone to another through the week, spraying 0.5 inches per acre each day. That is likely to require spraying for two to three hours each day. Because each of the seven sprayfield zones would only be sprayed once each week, this method of operation would meet the permit condition of 0.5 inches per week, per week.

34. The spray nozzles along the boundary of the sprayfield would be installed and operated to spray only inward, toward the sprayfield.

35. Florida Administrative Code Rule 62-610.421(2) requires a 100-foot setback from the property line to the wetted area of the sprayfield, unless the setback is vegetated with trees or shrubs that create a visual barrier, in which case the required setback is 50 feet. Grand Ridge proposes an 80-foot

buffer zone around the wetted area of the sprayfield and, beyond this zone, an additional 100-foot vegetated buffer, consisting partly of thickly-planted yellow pine trees. The total buffer from the wetted area of the sprayfield to the property boundaries would be 180 feet.

36. Because of the extensive buffers around the proposed sprayfield, including forested areas, Grand Ridge provided reasonable assurance that any aerosol drift from the sprayfield would not move off the project site.

37. The sprayfield would not be operated when it is raining at the project site. Furthermore, because the permit does not require a treatment plant operator to be on the site at all times, Grand Ridge proposes to install rain sensors that would automatically shut down the sprinklers when the sensors detect rain. The sprinklers would have to be restarted manually. During the shut-down, treated effluent would remain in the storage ponds.

38. Grand Ridge has proposed to add a condition to the permit that prohibits the operation of the sprayfield sooner than four hours after a rainfall event.

39. The sprayfield would be located at least 100 feet from the wetlands on the project site. The spray nozzles would direct spray away from the wetlands.

40. Grand Ridge also proposes to construct a one-foot-high earthen berm around the wetlands nearest the sprayfield to direct any surface flow of rainwater away from them.

The Crops

41. Grand Ridge proposes to plant Coastal Bermuda grass in the summer and rye grass in the winter on the sprayfield. These crops were chosen for their high nitrogen uptake, high water uptake, and moisture tolerance.

42. The amount of nitrogen that would be applied to the sprayfield as a component of the treated wastewater is about 120 pounds per acre, per year when the treatment plant is at full capacity. This is less than the amount of nitrogen generally recommended for the fertilization of Coastal Bermuda and rye grasses. Therefore, Grand Ridge might need to occasionally apply supplemental nitrogen to fertilize the grasses. Grand Ridge proposes to limit its application of supplemental nitrogen to only the amount necessary to maintain the crops, but never more than 200 pounds per acre, per year.¹

43. The Town of Sneads, approximately five miles east of Grand Ridge, grows Coastal Bermuda grass on its sprayfield. The operator of the Sneads sprayfield said that the Coastal Bermuda grass has done well without the need to apply supplemental nitrogen. Petitioners grow Coastal Bermuda on their property near Ocheesee Pond.

44. Any supplemental nitrogen applied to the crops would be applied in split applications that will not exceed 40 pounds per acre at a time. The supplemental nitrogen would be applied just before spraying, which would help to release the nitrogen into the soil.

45. The total nitrogen in the wastewater and in the supplemental nitrogen fertilizer that would be applied to the grasses is less than the amount of nitrogen these grasses are generally able to take up. Even though it is reasonable to expect that some nitrogen will percolate past the root zone of the grasses before it can be taken up by the plants, only a small fraction of the nitrogen would likely percolate through the soils and reach the ground water beneath the sprayfield.

46. Department rules provide for a "zone of discharge" for a sprayfield that extends horizontally 100 feet from the wetted area of the sprayfield or to the facility's property line, whichever distance is smaller. Groundwater quality standards must be met beyond the zone of discharge. In this case, the 100-foot zone of discharge would be applicable. Grand Ridge provided reasonable assurance that nitrogen in the groundwater would not reach concentrations that exceed the state groundwater quality standard beyond the zone of discharge.

Monitoring

47. There are to be six groundwater monitoring wells on the proposed site which would be sampled quarterly for compliance with groundwater quality standards. Samples would be taken from these wells before the sprayfield is placed in operation to establish the background quality of the groundwater.

48. The proposed placement of the groundwater monitoring wells was determined by Grand Ridge in consultation with the Department staff and takes into account the direction of groundwater movement. The monitoring plan is reasonably designed to intercept and determine the concentration of nitrogen and other constituents of the reclaimed water as it moves away from the proposed sprayfield.

49. There would be one surface water monitoring station. It would be located at a small pond just north of the treatment plant and would also be sampled quarterly.

50. Grand Ridge proposes to monitor the nitrogen levels in the treated wastewater and in the soils of the sprayfield on a bi-monthly basis to determine the amount of any supplemental nitrogen that should be applied to the grasses. This particular monitoring is not required by Department rules.

Potable Water Wells

51. Florida Administrative Code Rule 62-610.421(3) requires a sprayfield to be set back at least 500 feet from the edge of the wetted area to existing or approved potable water supply wells, unless the treatment facility meets Class 1 Reliability standards, in which case the setback requirement is 200 feet. Because this proposed facility would meet Class 1 Reliability standards, the 200-foot setback is applicable.

52. Grand Ridge's consultants examined the records of the Northwest Florida Water Management District (NFWWMD) to determine whether there were any permitted potable water wells near the proposed project. They also went to every house near the project site to determine if there were any unpermitted wells. They found no record or other evidence of a potable water well within 200 feet of the proposed sprayfield.

53. In April 2007, NFWWMD issued permits for two water wells to Petitioner Quillon Yon. These wells are to be located on his property south of the proposed project site. They have not yet been installed. Also, in April 2007, NFWWMD issued a permit to Merita Stanley for a well to be located at 450 Highway 69 in Grand Ridge. In May 2007, NFWWMD issued a permit to Rodney Lewis for a well to be located at 7289 Shady Grove Road in Grand Ridge. Grand Ridge's counsel stated at the hearing that he thinks the Stanley and Lewis wells have been installed.

Grand Ridge filed petitions for administrative hearing with the NFWFMD to challenge these four potable water well permits. No information was provided about the status of the permit challenges.

54. The permit documents that are part of Grand Ridge's Exhibit 53 do not indicate a precise location for the recently permitted wells. However, because the sprayfield is set back 180 feet from the property boundaries, the new potable water wells would have to be drilled less than 20 feet from the boundaries of the project site in order to be within 200 feet of the sprayfield. Mr. Zafar testified that, if it were necessary, the proposed wetted area of the sprayfield could be adjusted so that it is 20 feet further from the property lines.

Surface Runoff Entering the Sprayfield

55. Florida Administrative Code Rule 62-610.417(1) requires a sprayfield to be designed to prevent the entrance of surface runoff. The rule requires berms to be placed around the application area, if necessary for this purpose.

56. In a hydrogeologic report from Grand Ridge's consultants, it was recommended that "sprayfield areas with greater than 5 percent slopes or adjacent to wetland areas be bermed with a one-foot high grassed berm to reduce the possibility of surface runoff." Grand Ridge proposes to place one-foot high berms around the wetlands near the sprayfield, but

it was not made clear whether berms are to be placed to prevent runoff from entering the sprayfield. Grand Ridge's Exhibit 77 shows only berms down gradient of the sprayfield. There are no berms shown above the sprayfield.

Stormwater Leaving the Project Site

57. One of the principal disputes in this case is whether there would be contaminated runoff from the sprayfield that would move off-site. Florida Administrative Code Rule 62-610.400(1) states that off-site surface runoff of the applied reclaimed water is to be "generally avoided." Florida Administrative Code Rule 62-610.417(1) states that provisions for on-site surface runoff control are to be described in the applicant's engineering report and are subject to Department approval. There are no more specific requirements for controlling runoff associated with a proposed sprayfield.

58. Grand Ridge's engineering report states that the existing drainage patterns of the project site will be used. The project site is highest near its southern boundary where the elevation reaches 250 feet and slopes down to an elevation of 120 feet in the northeastern corner of the site. Grand Ridge does not propose to do any grading on the site.

59. Grand Ridge has proposed a permit condition that it must obtain a National Pollutant Discharge Elimination System

Permit for construction of the sprayfield in order to address stormwater and erosion in greater detail.

60. Petitioner Quillon Yon testified that stormwater runs off the northeastern corner of the project site and the southwestern area of the project site and makes its way, respectively, to Ocheese Pond and to Dickson Bay. However, Petitioners did not establish what size rainfall event causes stormwater to run off the project site (or, more importantly, the proposed sprayfield area), what concentrations of contaminants would be in the stormwater leaving the project site, or what levels of contamination in the runoff would be necessary to cause an adverse impact to Ocheese Pond or Dickson Bay.

61. The average infiltration rate of 4.5 inches per hour far exceeds the permitted application rate of 0.5 inches per week. Grand Ridge would not be applying treated effluent to the sprayfield during a rainstorm. Any runoff from the sprayfield would have to flow across 180 feet of vegetated buffer before reaching the site boundaries. These and several other conditions of the proposed permit provide reasonable assurance that contaminated stormwater would not flow off the project site.

62. Petitioners' evidence was insufficient to rise above speculation and to competently demonstrate that there is a

reasonable probability that stormwater contaminated with treated effluent would flow off the proposed sprayfield, across the vegetated buffer areas, and make its way to Ocheesee Pond or Dickson Bay in concentrations that would adversely affect these water bodies.

63. Petitioners' counsel, on cross-examination, frequently asked witnesses to assume hurricane and other extreme storm conditions. Rainstorms of extreme magnitude can overcome the ability of man-made stormwater controls to prevent runoff, but it is neither practicable nor reasonable to require permit applicants to install stormwater controls that would prevent runoff during a hurricane or other extreme circumstances that only rarely occur. The infiltration rate compared to the permitted application rate, the wide vegetated buffers, and other proposed permit conditions (such as the automatic shutoff during rainfall) make it unlikely that stormwater would run off the sprayfield and off the project site except under extreme rainfall. If there was runoff under extreme storm conditions, the runoff from the project site would constitute an insignificant contribution to the overall natural and man-induced contamination of Ocheesee Pond and Dickson Bay caused from the flows they would receive from all areas within their watersheds.

On-Site Spring

64. One of the factual disputes in this case is whether there exists a spring on the project site. The Department argues in its Proposed Recommended Order that, even if there were a spring where Petitioners claim it is located, there is no evidence that it is still flowing and, further, the operation of the sprayfield would not adversely affect the spring even if it were still flowing. However, the existence of a groundwater-fed spring, whether it is still flowing or not, would suggest there might be a direct conduit to the limestone aquifer. Therefore, whether a spring exists is relevant to the question of whether this project site is suitable for the operation of a sprayfield.

65. There was no evidence presented in the form of maps or government records to indicate official knowledge of the existence of a spring on the project site.

66. Petitioner Quillon Yon indicated that a spring is located on a hill close to the southern boundary of the project site. He described it as water flowing out of the ground and running down the hill all through the year except during droughts. He said that as a child growing up on the land he now owns that is south of the project site, he would occasionally gather water from the spring and his mother would sometimes wash clothes at the spring.

67. Petitioner Quillon Yon said it has been many years since he has seen the spring. He also said that the spring might not be flowing any more because of the dry conditions of the past several years.

68. Jerry Gilley testified that he leased the project site between 1985 and 2000 and constructed some of the roads on the site. He said he installed a culvert under a road located near the spring, which he called Springhead Road, so the flow from the spring would not wash out the road. He said the problem occurred every time it rained. Curiously, Mr. Gilley said he never actually saw the spring, but just the water running down the hill from the spring.

69. There was a site inspection by Petitioners during the discovery phase of this case, one purpose of which was to look for the spring. No one reported finding the spring.

70. Dr. Frasier Bingham, a biologist, walked throughout the project site to delineate wetlands and to look for threatened and endangered plant and animal species. He did not find a spring. However, Dr. Bingham described two wetlands on the project site associated with "slope seeps" where water in the soil beneath the ground surface emerges on a hillside to create wet conditions. One of these wetlands is in the area where Petitioner Quillon Yon said the spring is located.

71. Eric Guarino, a hydrogeologist, offered the opinion that the spring described by Petitioner Quillon Yon would most likely be caused by rainfall, rather than upwelling from a hydraulic connection to groundwater, and, therefore, was not a spring.

72. The more persuasive testimony in the record is that the feature described as a spring by Petitioners was probably a slope seep. The slope seeps are not within the proposed sprayfield. The existence of slope seeps on the project site does not make the site unsuitable for use as a sprayfield.

On-Site Well

73. Mr. Gilley said there was a man-made well located on the proposed project site which he thought was 40 to 50 feet deep. No one else seemed to have any knowledge of the well's existence.

Off-Site Features

74. Florida Administrative Code Rule 62-610.310(3)(c) requires permit applicants to prepare and submit a hydrogeologic survey, which includes geophysical information concerning known solution openings and sinkhole features within one mile of the site. Grand Ridge's hydrogeologist reviewed topographic maps to determine whether there was potential for sinkhole development within a one-mile radius of the project site. No features were found that indicated a potential for sinkhole development.

75. Mr. Gilley said there is a sinkhole at the southeast corner of Ocheesee Pond. It was not established in the record how far this alleged sinkhole is from the project site. Respondents contend that Mr. Gilley is not competent to identify a sinkhole. A sinkhole is a feature that occurs with regularity in Florida and is recognizable to many people of average intelligence without the need to have been trained or educated as a hydrogeologist. Grand Ridge's hydrogeologist did not identify this feature as a sinkhole in his hydrogeologic survey. The record evidence does not show whether he was aware of the feature, but did not consider it a sinkhole, or determined that it was more than one mile from the project site.

76. James Stevenson said there were five springs east of Ocheesee Pond, which he estimated to be four to six miles from the project site.

77. Grand Ridge met the minimum requirements of Florida Administrative Code Rule 62-610.310(3)(c).

CONCLUSIONS OF LAW

78. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2007).²

79. The Department is the state agency with authority and responsibility to permit and regulate domestic wastewater

treatment facilities pursuant to Chapter 403, Florida Statutes, and the rules promulgated thereunder.

80. Subsection 120.569(1), Florida Statutes, provides that the right to participate in administrative proceedings extends to any person whose substantial interests will be affected by proposed agency action.

81. A petitioner's standing is not dependent on proving a claim that the proposed agency action would violate applicable law. Standing and the merits of a claim are different concepts. See, e.g., Village Park Mobile Home Ass'n., Inc. v. State Dept. of Business Regulation, 506 So. 2d 426, 433 (Fla. 1st DCA 1987); St. Martin's Episcopal Church v. Prudential-Bache Securities, 613 So. 2d 108, 109, n. 4 (Fla. 4th DCA 1993). Instead, standing requires proof that the petitioner has a substantial interest and that the interest would be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question for determination.

82. Petitioner Quillon Yon's interest in protecting his contiguous real property from groundwater and surface water contamination is a substantial interest for purposes of standing. Petitioners' interest in fishing on Ocheesee Pond is also a substantial interest. These are interests of the type and nature which this proceeding was designed to protect.

83. The direction of groundwater flow and the horizontal conductivity of the soils underlying the proposed sprayfield shows that some of the groundwater beneath the proposed sprayfield could move toward and then beneath the contiguous property of Petitioner Quillon Yon. The record also shows that this groundwater is likely to contain some nitrogen and other wastewater constituents that percolated from the sprayfield. This evidence is sufficient to show that Petitioner Quillon Yon's substantial interest in protecting his contiguous real property from groundwater contamination would be affected by the proposed sprayfield operation. Although he did not prove that the concentration of contaminants in the groundwater would exceed applicable groundwater quality standards, Petitioner Quillon Yon has the requisite standing to initiate and maintain these administrative proceedings to present his contrary view.

84. On the other hand, the evidence in the record regarding the effect of the proposed project on Quillon Yon's and Kevin Yon's substantial interest in fishing on Ocheesee Pond was speculative and incomplete.³ Necessary details, such as the size of the rain event that would cause runoff from the sprayfield and the project site, and the concentration of nitrogen or of other contaminants in the runoff that would be necessary to result in a detectable increase in these contaminants' levels in Ocheesee Pond, were not presented.

There was also insufficient evidence to show that Ocheesee Pond would be affected by groundwater contamination originating from the project site. The allegation of harm to Ocheesee Pond was the only effect on the interests of Petitioner Kevin Yon presented at the hearing. Therefore, Petitioner Kevin Yon failed to prove his standing.

85. As the applicant for the permit, Grand Ridge has the ultimate burden of proving its entitlement to the permit by a preponderance of the evidence. Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

86. Florida Administrative Code Rule 62-4.070(1) states that a permit shall be issued only if "the applicant affirmatively provides the Department with reasonable assurance based on plans, test results, installation of pollution control equipment, or other information, that the construction, expansion, modification, operation, or activity of the installation will not discharge, emit, or cause pollution in contravention of Department standards or rules."

87. "Reasonable assurance" in this context means a demonstration that there is a substantial likelihood of compliance with standards, or "a substantial likelihood that the project will be successfully implemented." Metropolitan Dade County, v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

88. The reasonable assurance standard requires the applicant to address reasonably foreseeable contingencies. See Rowe v. Oleander Power Project, L.P., 1999 Fla. Env. Lexis 5752 (DEP 1999); Chipola Basin Protective Group, Inc. v. Fla. Chapter Sierra Club, 1988 Fla. Env. Lexis 112 (DER 1988).

89. In advance of the final hearing, Grand Ridge proposed several additional permit conditions affecting primarily the operational aspects of the proposed facility in order to address some of the concerns raised by Petitioners. Each of the proposed additional conditions would tend to reduce the potential for adverse environmental impacts.

90. Proceedings under Section 120.57, Florida Statutes, are intended to formulate final agency action, not to review action taken earlier and preliminarily. J.W.C, supra, 396 So. 2d at 785 (quoting McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977)). Therefore, as long as the due process rights of the parties are preserved, modifications to a project can be proposed and addressed at the final hearing. In this case Petitioners' due process rights, principally their right to have sufficient notice of the proposed modifications to prepare for the final hearing, were preserved.

91. Florida Administrative Code Rule 62-110.106(7)(a)4. provides that additional public notice does not have to be

published by a permit applicant for modifications made after a notice of intent was published unless the modifications are substantial. A substantial modification is defined in the rule as "a relocation or modification of the activity or project that is reasonably expected to cause new or significantly greater adverse environmental impacts." Because Grand Ridge's modifications would reduce potential environmental impacts, additional public notice was not required.

92. Many of the rules that Petitioners contend Grand Ridge failed to comply with are only applicable to projects designed to have a direct discharge of a pollutant. Those rules are not applicable here because Grand Ridge's project is not designed to have a direct discharge, and Petitioners did not demonstrate that the proposed project would have a direct discharge.

93. Based on all the competent substantial evidence submitted at the final hearing and as discussed in the Findings of Fact set forth above, Grand Ridge demonstrated by a preponderance of the evidence that the proposed wastewater treatment plant and sprayfield would comply with all applicable Department standards or rules for a facility of this kind, except as set forth below. If the permit modifications recommended by the ALJ are made, the proposed facility would comply in all respects.

94. Florida Administrative Code Rule 62-610.417(1) requires that the sprayfield be designed to prevent the entrance of surface runoff. There was competent evidence to support the need for berms to prevent runoff from slopes greater than five percent, but the evidence was not clear that berms would be placed to prevent surface runoff into the sprayfield from higher elevations adjacent to the sprayfield where the slope is greater than five percent. Therefore, to comply with Rule 62-610.417(1), the proposed permit would have to be modified to include a condition that berms be placed to prevent surface runoff into the sprayfield from higher elevations adjacent to the sprayfield where the slope is greater than five percent.

95. Florida Administrative Code Rule 62-610.421(3) requires that the wetted area of this proposed sprayfield be set back at least 200 feet from existing or approved potable water supply wells. Because Grand Ridge stated at the hearing that the Stanley and Lewis wells might have already been installed, but did not show that these wells are more than 200 feet from the wetted area of the proposed sprayfield, it failed to show compliance with this rule. However, there is competent substantial evidence in the record that the wetted area of the sprayfield can be moved so that it is 200 feet from the property boundaries. In order to show compliance with Rule 62-610.421(3), the proposed permit would have to be modified to

require the wetted area of the proposed sprayfield to be set back at least 200 feet from the property boundaries.

96. Grand Ridge filed a Motion for Costs and Attorneys' Fees pursuant to Subsections 120.569(2)(e) and Section 120.595, Florida Statutes, arguing that the proceeding was initiated for improper purposes. Grand Ridge presented no evidence of an improper purpose. Therefore, the Motion for Costs and Attorneys' Fees is 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 approving the permit requested by the Town of Grand Ridge, with the following modifications:

1. The permit should incorporate the conditions described in Respondent's Exhibit 77;
2. A condition should be added to require that berms be placed to prevent surface runoff into the sprayfield from higher elevations adjacent to the sprayfield where the slope is greater than five percent;
3. A condition should be added to require the wetted area of the sprayfield to be set back at least 200 feet from the property boundaries;

4. The permitted capacity of the land application system should be reduced to .205 mgd; and

5. An investigation should be made to find the well referred to by Mr. Gilley and, if it is found, to properly abandon the well or take other appropriate action so that the well does not impair the function of the land application system.

DONE AND ENTERED this 8th day of February, 2008, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of February, 2008.

ENDNOTES

^{1/} Petitioner Quillon Yon applies about 300 pounds per acre each year to his property south of the project site.

^{2/} All references are to 2007 Florida Statutes, unless otherwise indicated.

^{3/} Petitioners do not use Dickson Bay for fishing or for any other purpose. Therefore, the alleged potential for the proposed project to adversely impact Dickson Bay does not affect any substantial interest of Petitioners.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.