



# FLORIDA DEPARTMENT OF Environmental Protection

South District  
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DEP #20-1053

**Ron DeSantis**  
Governor

**Jeanette Nuñez**  
Lt. Governor

**Noah Valenstein**  
Secretary

## BEFORE THE STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

In re: Florida Keys Aqueduct Authority

OGC Case No. 20-1278

DEP File No.: FLA671932-010

Petition for Variance from  
Provisions of Rule 62-600.540, F.A.C.

### **ORDER GRANTING PETITION FOR VARIANCE**

On August 28, 2020, Florida Keys Aqueduct Authority, Petitioner, filed a petition with the Florida Department of Environmental Protection (Department) requesting a section 120.542, Florida Statutes, variance from the requirements of Rule 62-600.540(5)(b), Florida Administrative Code (F.A.C.). Rule 62-600.540(5)(b), requires pumping stations for injection well disposal to have divided compartments to allow access for repair and maintenance without interrupting operation. The Petitioner seeks a variance in order to allow for a method of maintenance other than having divided compartments.

Notice of receipt of the petition was published in the Florida Administrative Register on September 3, 2020. Public comments were received that commented on the petition and objected to the petition. The comments and Department responses are shown below:

Comments Received September 9, 2020 from Cudjoe Gardens Property Owners Association and Sugarloaf Shores Property Owners Association (collectively known as the POAs):

**Comment 1.** The POAs do not object to the request for a variance from Rule 62-600.540(5), F.A.C. based on:

- a. FKAA's representation that "(t)hree years of operational experience have demonstrated that [the design of the deep well pumps] allows access for repair and maintenance purposes without interrupting operation,"
- b. the expectation that the variance is conditioned upon continuation of the existing vertical pump design, and includes a provision that FKAA will provide written notice directly to the POAs of any actions by FKAA to change same, and
- c. the operating permits for deep and shallow wells will specify that the deep well is the "sole means of primary effluent disposal" at the Facility, and that "Section 403.086(10)(e)(3) Florida Statutes applies to the operation of the shallow wells.

#### **Department Response 1.**

- a. The Department concurs with the comment.
- b. Pursuant to Rule 62-620.300(3)(a), F.A.C., the Petitioner will be required to obtain approval from the Department before any change to the pump station shall be made.
- c. The comment is not relevant to the decision of whether the variance will meet the intent of the rule to provide continuous operation. Note: the wastewater permit does limit the operation of the shallow injection wells to the requirements of Section 403.086(11)(e)(3), Florida Statutes.

**Comment 2.** For the record, the POAs note their objection to the contents of the Petition that go beyond providing information that the Department needs to determine whether or not the requested variance will comply with the Rule's expressed intent....

**Department Response 2.** The comment is not relevant to the decision of whether the variance will meet the intent of the rule to provide continuous operation.

### BACKGROUND AND APPLICABLE REGULATORY CRITERIA

The Petitioner owns and operates a wastewater treatment facility and disposal injection wells. Injection into four wells are powered by gravity. A pump-powered fifth well was constructed after the original wells. The wet well that feeds the injection wells was modified to install two pumps to allow injection into the fifth well. Each pump is able to be removed without shutting down the other pump. The Petitioner did not install separate compartments or chambers in the wet well.

The activity authorized by this variance is located at 780 Blimp Road, Cudjoe Key, Florida 33042, in Section 19, Township 66S, Range 28E in Monroe County, at lat 24°40'36"N/long 81°31'31"W.

The applicable rules state in pertinent part: "Effluent or reclaimed water pumping stations shall be provided with divided compartments to allow access for repair and maintenance purposes without interrupting operation" (emphasis added).

### THE VARIANCE WILL MEET THE UNDERLYING PURPOSE OF THE STATUTE

Section 120.542(2), Fla. Stat., states "variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness." The variance procedure is intended to provide relief from unreasonable, unfair, and unintended results in unique cases.

Section 403.021, F.S., states "the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife and fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses and to provide that no wastes be discharged into any waters of the state without first being given the degree of treatment necessary to protect the beneficial uses of such water" (emphasis added). Further, section 403.061, F.S., states the Department shall, "Adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this act."

The purpose of section 403.061, F.S. is to ensure that adopted rules require pollution abatement systems to be sufficiently robust to ensure the waters of the state are protected. The Department adopted Rule 62-600.540(5)(b), F.A.C. to satisfy statutory requirements and ensure continuous environmental protection during maintenance.

The Petitioner demonstrated that the purpose of the underlying statute has been achieved by installing pumps that can be removed for service while the other pump may remain in operation. This reliability of function is the specified purpose of the rule.

Each pump is mounted within its own outer casing. Each casing is attached separately to the pumping station deck. Each of these pumps is capable of being removed for service or replacement without disturbing operation of the active pump.

## SUBSTANTIAL HARDSHIP TO THE PETITIONER

“Substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.

Petitioner requests a variance of the strict application of Rule 62-600.540(5)(b), F.A.C., because applying the rules for divided compartments would be a substantial hardship.

The Petitioner demonstrated that strict application of the rule would result in substantial economic hardship to the Petitioner.

The Petitioner faces a substantial hardship to construct a divided wet well. Based on provided estimates, modification of the pumping station to install divided compartments will cost \$1,300,000.

### THEREFORE, IT IS ORDERED:

Based on the foregoing reasons, the Petitioner has demonstrated that it has met the requirements for a variance of 62-600.540(5)(b), F.A.C. **PETITIONER’S REQUEST FOR A VARIANCE IS GRANTED.**

This variance is permanent, but may be re-opened and re-evaluated if the Petitioner alters the design of the subject pumps, pump station, or wet well; or if the Petitioner uses the backup shallow wells for more than a total of 500 hours during any 5-year period.

### **PUBLICATION OF NOTICE**

You (the petitioner) are required to publish at your own expense the enclosed notice of this variance. The notice is required to be published one time within 30 days, in the legal advertisements section of a newspaper of general circulation in the area affected. For the purpose of this rule, “publication in a newspaper of general circulation in the area affected” means publication in a newspaper meeting the requirements of Sections 50.011 and 50.031, F.S., in the county where the activity is to take place. The applicant shall provide proof of publication to:

Department of Environmental Protection  
South District  
[SD\\_Newapps@Floridadep.gov](mailto:SD_Newapps@Floridadep.gov)

The proof of publication shall be provided to the above address within seven days of publication. Failure to publish the notice and provide proof of publication within the allotted time shall be grounds for denial of the variance or waiver.

### **NOTICE OF RIGHTS**

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the request for a variance or waiver.

### Petition for Administrative Hearing

A person whose substantial interests are affected by the Department’s action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. Pursuant to Rule 28-106.201, F.A.C., a petition for an administrative hearing must contain the following information:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, telephone number, and any e-mail address of the petitioner; the name, address, telephone number, and any e-mail address of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

The petition must be filed (received by the Clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000. Also, a copy of the petition shall be mailed to the applicant at the address indicated above at the time of filing.

#### Time Period for Filing a Petition

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing must be filed within 21 days of receipt of this written notice. The failure to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will be only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

#### Extension of Time

Under Rule 62-110.106(4), F.A.C., a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline for filing a petition for an administrative hearing. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

#### Mediation

Mediation is not available in this proceeding.

#### Judicial Review

Once this decision becomes final, any party to this action has the right to seek judicial review pursuant to Section 120.68, F.S., by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this action is filed with the Clerk of the Department.

DONE AND ORDERED this 30<sup>th</sup> day of November;2020, in Lee, Florida.

STATE OF FLORIDA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION



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Jon M. Iglehart  
Director of District Management  
South District

**Attachments:**

Notice for Newspaper Publication

**Copies furnished to:**

Kerry Shelby [kschelby@fcaa.com](mailto:kschelby@fcaa.com)

Fred Springer, Esq. [fspriinger@bmlaw.com](mailto:fspriinger@bmlaw.com)

Jan M. Edelstein [jmeten@comcast.net](mailto:jmeten@comcast.net)

Caron Balkany, Esq. [balkany@aol.com](mailto:balkany@aol.com)

Stuart Schaffer, Sugarloaf Shores Property Owners Association [sfschaffer@gmail.com](mailto:sfschaffer@gmail.com)

Joint Administrative Procedures Committee, [japc@leg.state.fl.us](mailto:japc@leg.state.fl.us)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on 30<sup>th</sup> day of November;2020, to the above listed persons.

**FILING AND ACKNOWLEDGMENT**

FILED, on this date, under 120.52(7) of the Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.



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Clerk

November 30, 2020  
Date



STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
NOTICE OF ORDER GRANTING VARIANCE

The Department of Environmental Protection gives notice of its determination pursuant to section 120.542, Florida Statutes, in File No. FLA671932-010, to grant a variance to Florida Keys Aqueduct Authority from Rule 62-600.540(5)(b), Florida Administrative Code (F.A.C.), in order to operate the injection well pump station without divided compartments at 780 Blimp Road, Cudjoe Key, Florida 33042, in Section 19, Township 66S, Range 28E in Monroe County, at lat 24°40'36"N/long 81°31'31"W.

The petition, Order 20-1278, and the administrative file are available for public inspection at <https://prodenv.dep.state.fl.us/DepNexus/public/electronic-documents/FLA671932/facility!search> and during normal business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, except legal holidays, at the Department's South District Office, 2295 Victoria Ave, Suite 364, Ft. Myers, Florida 33901-3875, at phone number (239)344-5600.

**NOTICE OF RIGHTS**

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the application.

**Petition for Administrative Hearing**

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. Pursuant to Rules 28-106.201 and 28-106.301, F.A.C., a petition for an administrative hearing must contain the following information:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;

- (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

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#### Time Period for Filing a Petition

Petitions filed by any persons other than the applicant, and other than those entitled to written notice under Section 120.60(3), F.S., must be filed within 21 days of publication of the notice or within 21 days of receipt of the written notice, whichever occurs first. The failure to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will be only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C.

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