COMES Now Petitioner, Department of Health, pursuant to Section 120.57(1)(b) Florida Statutes, and submits to the Hearing Officer this Proposed Recommended Order, which it asserts the Hearing Officer should enter as findings of fact and conclusions of law in the Recommended Order for this proceeding. The Petitioner respectfully requests that the Hearing Officer adopt each of the below findings of fact and conclusions of law.

STATEMENT OF THE ISSUES

The issues in this case are whether the Respondent, Connie H. Sanders, violated the Standards of Practice and Disciplinary Guidelines regulating registered septic tank contractors set forth in Rule 64E-6.022, Florida Administrative Code, and, if so, what penalty should be imposed.

PROPOSED PRELIMINARY STATEMENT

By Administrative Complaint dated March 18, 2011, the Petitioner, Department of Health, charged the Respondent, Connie H. Sanders, with violating the rules in the Florida Administrative Code that govern registered septic tank contractors. Specifically, the Respondent was charged with violating Rule 64E-6.022, subsections (1)(k) and (1)(l)(1) in connection with
the Form DH 4015 tank certification generated for a septic system located at 413 Richmond Avenue North, Lehigh Acres, Florida (“Property”).

The Respondent timely requested a formal administrative hearing to contest the allegations in the Administrative Complaint. The request for hearing was duly forwarded to the Division of Administrative Hearings (“DOAH”). The case was assigned to Administrative Law Judge R. Bruce McKibben and the hearing was scheduled for August 11, 2011. The Petitioner amended its Administrative Complaint, filing its Second Administrative Complaint with DOAH on July 29, 2011.

At the final hearing, the Petitioner presented the testimony of two witnesses: Dustin James Sabins, Environmental Supervisor I and Johanna Marie Whelan, Onsite Wastewater Program Coordinator and Environmental Supervisor II. The Petitioner’s Exhibits 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 16, 18 and 19 were admitted into evidence.

The Respondent testified on her own behalf and also called her husband David Sanders, who is her employee and also a registered septic tank contractor.

The parties advised they would not be ordering a transcript of the final hearing. They were given 10 days from the date of the final hearing to submit proposed recommended orders.

**PROPOSED FINDINGS OF FACT**

1. The Petitioner is the state agency responsible for regulating the practice of registered septic tank contractors and for enforcing the provisions of Chapter 64E-6, Florida Administrative Code, relating to the Onsite Sewage Treatment and Disposal Systems.

2. At all times relevant to this proceeding, the Respondent was a registered septic tank contractor, holding registration number SR0931140. The Respondent has been a registered septic tank contractor since 1993.
3. At all times relevant to this proceeding, the Respondent was the qualifying registered septic tank contractor for Lehigh Septic, Inc. ("Lehigh Septic"), Authorization Number SA0890333, and was authorized to provide septic tank contracting services through said business.

4. At all times relevant to this proceeding, the Respondent has been permitted to provide septage disposal services via a permit issued by the Lee County Health Department.

5. Although the Respondent was the qualifying registered septic tank contractor for Lehigh Septic, the Respondent primarily handles the day to day running of the office including billing, maintenance of records and payroll. The Respondent leaves most of the actual septic tank contracting, which includes tank pump outs and septic system construction, repair and modification, to her agents or employees.

6. The Respondent’s husband, David Sanders, often acts as the Respondent’s agent. Mr. Sanders is himself a registered septic tank contractor.

7. The Respondent has had previous disciplinary action taken against her by the Department of Health.

8. On July 16, 2003, the Department entered a Final Order, No. 03-0118-DFO against Connie H. Sanders imposing an administrative fine in the amount of $1,000.00 for failing to properly abandon a septic tank and creating a sanitary nuisance.

9. On May 15, 2009, the Department entered a Final Order No. DOH-09-0945-S-HST against Connie H. Sanders, imposing an administrative fine in the amount of $1,000.00 for failing to remove the entire contents of an onsite septage treatment and disposal system and for doing business under an unauthorized name.
10. Finally, on June 7, 2010, the Department entered a Final Order No. DOH-10-1324-FOI-HST against Connie Sanders, imposing a fine in the amount of $1,000 for failing to remove the entire contents of an onsite septage treatment and disposal system.

11. On January 18, 2011, the Petitioner investigated a report of a sanitary nuisance on the Property. Michael Fillian, Environmental Specialist, inspected the property and observed a blowout in the drainfield, resulting in sewage ponding on the ground surface and a strong odor of sewage. The ponding sewage was clearly visible to anyone inspecting the drainfield area. (Petitioner’s Exhibit 10).

12. As a result of his inspection, Mr. Fillian sent a notice to abate the sanitary nuisance to the Property owner, requiring corrective action including (1) pump out of the system tank, (2) apply for and obtain a repair permit, and (3) repair the septic system.

13. On or between January 18, 2011 and January 19, 2011, the Respondent was contacted by the Property’s representative to conduct a pump out at the Property and indicated the Property “smelled.” (Supported by testimony provided by the Respondent and Mr. Sanders, in addition to Petitioner’s Composite Exhibit 16 and handwritten invoice from Lehigh Septic contained in Petitioner’s Exhibit 4).

14. As of a repair made to the Property’s septic system by the Respondent in 2003, the septic system is comprised of three tanks: a 900 gallon septic tank, a 450 gallon septic tank and a 450 gallon dosing tank.

15. Per Mr. Sanders, the Respondent was hired to pump out the 900 gallon septic tank only.

16. On or between January 18, 2011 and January 24, 2011, the Respondent’s employee responded to the property and pumped out only the 900 gallon septic tank. The
employee noted on the invoice provided for the pump-out that the septic system’s drainfield was in failure.

17. Mr. Sanders responded to the property and inspected the septic system on at least one occasion prior on or prior to January 31, 2011.

18. On or between January 24, 2011 and January 31, 2011, the Property’s representative contacted the Respondent and informed the Respondent that the septic system’s drainfield was in failure and inquired into the costs involved for repairing the system. (Petitioner’s Composite Exhibit 16).

19. On or between January 24, 2011 and January 31, 2011, the Property’s representative contacted the Respondent and requested the Respondent provide him with a tank certification.

20. On or about January 30, 2011, registered septic tank contractor Antoine Difoggia, who is unaffiliated with the Respondent, provided the Property’s representative with a proposal for the repairs required to the Property’s septic system. (Supported by Proposal from Southwest Environmental dated 1/30/2011 and included as part of Petitioner’s Exhibit 4).

21. As part of the septic system repair permit application process, a licensed septic tank contractor must certify on form DH 4015 that all septic system tanks have been pumped, inspected and determined to be structurally sound. This tank certification must be submitted along with the completed repair permit application before a repair permit can be issued.

22. In her close to twenty year career, the Respondent has generated countless Form DH 4015 tank certifications for inclusion with repair permit applications. The Respondent and her employees are fully aware of the requirements of certifying septic system tanks and are aware they are required by the Petitioner prior to the issuance of a repair permit.
23. On or about January 31, 2011, the Respondent filled out and signed a tank certification form for the Property’s septic system. On the form, the Respondent knowingly, falsely and erroneously certified that the system consisted of a 1350 gallon septic tank and an “approx” 350 gallon dosing tank. The Respondent further knowingly, falsely and erroneously certified that on January 24, 2011, the Respondent had pumped the non-existent 1350 gallon septic tank and 350 gallon dosing tank and that both tanks were inspected and found to be structurally sound. (Petitioner’s Exhibit 1).

24. Form DH 4015 tank certifications are only required for the purpose of obtaining a repair or modification permit for septic systems as the purpose of the certifications is to ensure that the existing tanks are in sound condition for continued use after the repair of the system. If a tank is not deemed to be structurally sound, it must be replaced as part of the repair work to the septic system. A septic system tank that is not structurally sound creates a public health risk, allowing untreated septage to saturate ground surfaces and enter the water table.

25. On or about January 31, 2011, the Respondent provided the DH Form 4015 tank certification to the Property’s representative.

26. On or between January 30, 2011 and February 4, 2011, the Property’s representative hired Antoine Difoggia/SW Environmental to repair the septic system.

27. On February 4, 2011, Antoine Difoggia submitted a repair permit application for the Property’s septic system to the Petitioner. As part of the repair permit application, Mr. Diffogia submitted the Form DH4015 tank certification the Respondent generated and supplied to the Property’s representative.

28. On February 7, 2011, Michael Fillian, Environmental Specialist II for the Petitioner, conducted a site evaluation of the Property as part of the required procedure for the
issuance of a repair permit. While at the Property, Mr. Fillian observed that the existing tank information documented by the Respondent on the Form DH 4015 certification was incorrect. Mr. Fillian also noted that only one of the three septic system tanks had actually been accessed and pumped, evidencing that the Respondent had falsified the information provided on the tank certification. Mr. Fillian communicated his findings to his supervisor, Dustin Sabins.

29. On February 9, 2011, Mr. Sabins responded to the Property. Prior to visiting the site, Mr. Sabins reviewed the information the Petitioner had on the existing system, which consisted of a 2003 repair permit.

30. A review of the 2003 permit reveals that as part of the repair work conducted by the Respondent, the Respondent kept the existing 900 gallon septic tank but also installed a second 450 gallon septic tank and a 450 gallon dosing tank.

31. Upon his inspection, Mr. Sabins also confirmed that the system consisted of the three above mentioned tanks and that the Respondent’s tank certification was fraught with false and erroneous information.

32. Mr. Sabins called the Respondent’s business and spoke to Mr. Sanders. Mr. Sabins informed Mr. Sanders that the information contained in the tank certification was incorrect and that contrary to the certification, two of the septic system tanks had not been accessed, pumped or inspected for structural integrity. Mr. Sabins ordered the Respondent to return to the property to pump and inspect all tanks and resubmit a true and accurate tank certification as the Petitioner would be unable to issue a repair permit until such information was received.

33. Mr. Sanders reported to the Property on the same date to pump and inspect all three tanks.
34. On the same date, Mr. Sanders contacted Johanna Whelan and informed he had pumped and certified the tanks in 2008 but had been unaware that he could use the 2008 tank certification for the 2011 repair permit. Ms. Whelan informed him that tank certifications could be used for up to three years after the certification date.

35. On January 11, 2011, the Respondent submitted two new tank certifications to the Department, one listing a February 11, 2011 pump date and a second listing an October 6, 2008 pump date. The Petitioner used the certification with the February 11, 2011 pump date for the basis of the repair permit application approval.

36. At the hearing, the Respondent testified that all of the field work for the Property was done by either Mr. Sanders or another employee. She testified that the Property representative had originally contacted them and reported a sanitary nuisance on their property. She testified that she authorizes Mr. Sanders to fill out and sign Form DH 4015s on her behalf and continues to do so.

37. At the hearing, Mr. Sanders testified that he performed all of the work relating to the Property on behalf of the Respondent and her business. He admitted to completing and signing the certification form dated January 31, 2011 on behalf of the Respondent. He further admitted to certifying that a non-existent 1350 gallon septic tank and the dosing tank were pumped and found to be structurally sound despite the fact that neither the second septic tank nor the dosing tank were ever accessed or pumped.

38. Mr. Sanders assertions that he was not aware that the DH 4015 are refuted by the Respondent’s business records, the Respondent’s statements, the obvious conditions evidencing system failure on the Property, his experience generating Form DH 4015s, and his knowledge that they are required as part of any repair permit application.
39. Had the septic system not failed in 2011, the Respondent would still have been prohibited from using the 2008 pump out since the testimony and Respondent’s own business records show that only one of the two septic tanks were pumped in 2008. (Petitioner’s Exhibits 18 and 19). As such, tank certification submitted to the Petitioner on February 11, 2011 with the October 6, 2008 pump out date also contains false information.

PROPOSED CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes.

41. Pursuant to Chapters 381 and 489, Part III, Florida Statutes, the Petitioner adopted the rules in Chapter 64E-6, Florida Administrative Code, regulating the standards for onsite sewage treatment and disposal systems.

42. Section 489.556, Florida Statutes states in pertinent part that a septic tank contractor’s registration may be revoked upon the showing that the septic tank contractor:

    (2) Violated any lawful order or rule rendered or adopted by the Department.

43. The qualifying septic tank contractor for a septic tank contracting business is responsible for the actions of his or her employees or agents.

44. The Department has adopted disciplinary guidelines applicable to registered septic tank contractors in Rule 64E-6.022 Florida Administrative Code. Rule 64E-6.022 states in relevant part:

    (1) It shall be the responsibility of persons registered under this rule to see that work for which they have contracted and which has been performed by them or under their supervision is carried out in conformance with the requirements of all applicable Florida Statutes and Chapter 64E-6, F.A.C. The following actions by a person included under this
rule shall be deemed unethical and subject to penalties as set forth in this section. The penalties listed shall be used as guidelines in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this section.

(k) Practicing fraud or deceit, making misleading or untrue representations. First violation, letter of warning or fine up to $500; repeat violation, revocation.

(l) Gross negligence, incompetence, or misconduct which:

1. Causes no monetary or other harm to a customer, or physical harm to any person. First violation, letter of warning or fine up to $500; repeat violation, $500 fine and 90 day suspension or revocation.

45. Petitioner has the burden of proving, by clear and convincing evidence all of the allegations against the Respondent in licensure disciplinary proceedings. Section 120.57(1)(j) Florida Statutes, Department of Banking and Finance v. Osborne Stern and Company, 670 So.2d 932 (Fla. 1996).

46. Indisputably, the evidence presented during the hearing established that the Respondent generated and supplied to the Property’s representative a Form DH 4015 tank certification that was fraught with false and erroneous information. This tank certification was subsequently provided by the representative to another septic contractor, who relied on its veracity and submitted it to the Petitioner as part of the repair permit application for the Property’s septic system.

47. It is also indisputable that there is no particular complexity to the act of properly certifying a septic tank. The Respondent is admittedly aware of the requirements for generating a true and accurate tank certification but chose to willfully disregard these requirements, blatantly violating one of the most basic duties associated with her profession.
48. The Respondent, as a registered septic tank contractor, is required to comply with the rules and statutes governing the profession and to ensure that employees carrying out contracted work do the same. Excuses such as, “I didn’t know the certification would be used as part of a repair permit application,” are absurd and calls the Respondent and Mr. Sanders’ credibility into question, given the Respondent’s knowledge of the condition of the septic system and years of experience in the septic tank contracting industry.

49. Regardless, whether or not the Respondent was aware the tank certification would be used for a repair permit application, she still provided a tank certification containing false and misleading representations to a client. There is no requirement in Rule 6.022(1)(k) that the false or misleading representations be made to the Petitioner. It is actually more egregious to have provided false and misleading information regarding the existing septic system to a client, who is likely completely unaware of the make-up of their existing system and of requirements for certifying septic system tanks. Clients must rely on the people who are licensed to work in the industry to provide them with true and accurate information to ensure their systems are properly maintained and repaired.

50. The Respondent argues that the Petitioner should have never accepted their certification and that the certification is therefore invalid because the Respondent did not directly submit it to the Petitioner, erroneously relying on Rule 64E-6.001(4), Florida Administrative Code, in support of this argument. Page 4 of the DH 4015 repair permit application form requires a signature from the individual who performed a complete inspection of the septic system. The unrefuted testimony presented by both Mr. Sabins and Ms. Whelan establishes that the reference to “inspection” in Rule 64E- 6.001, Florida Administrative Code, refers to this complete inspection, which was completed by Mr. Sabins and not to the septic tank inspection.
And again, the false and erroneous information was initially provided to the Property’s representative. The Respondent’s misinterpretation of the Rule is irrelevant as there is no requirement that the false or misleading statements be made to the Petitioner.

51. The Respondent argues that she should be absolved from having providing false and erroneous information regarding the existing tank information because the information was obtained after contacting one of the Petitioner’s clerical staff for existing tank information. This testimony is unreliable, as neither the Respondent nor Mr. Sanders could remember who they spoke to or when the call was made. Furthermore, as a registered septic tank contractor, the Respondent has an independent duty to ensure that all information provided on official forms or provided to clients or the Petitioner are true and accurate. The Respondent is familiar with the property and existing tank information since she repaired the system and installed the 450 gallon septic tank and the dosing tank. Furthermore, the Respondent could have probed the tank area as Mr. Sabins did and could have easily located the three tanks. Her failure to do so is just another example of her complete lack of any care in the preparation and submission of the tank certification.

52. The Respondent also makes the “no harm, no foul” argument, asserting she could have rightfully used the 2008 pump out as the basis for the 2011 certification. The evidence presented at the hearing clearly established that the Respondent did not pump the second 450 gallon septic tank in 2008 and that neither the Respondent nor any of her employees can remember the pump out or whether any of the tanks were examined for structural integrity. More importantly, Rule 6.001(4), Florida Administrative Code, only allows the use of three year old certifications if there is no “record of failure of the system.” The failing drainfield constitutes failure of the septic system.
53. The information provided by the Respondent on the Form DH 4015 tank certification dated January 31, 2011 contained false and misleading information and constitutes a violation of Rule 6.022(1)(k), Florida Administrative Code, subjecting the Respondent to the discipline mandated for a repeat violation, which is revocation.

54. Her complete lack of any care in obtaining the information necessary to truly and accurately complete the form and in failing to pump and inspect all septic system tanks spits on the laws regulating the Respondent and amounts to gross negligence, incompetence, or misconduct. This violation subjects the Respondent to the discipline mandated in Rule 64E-6.022(1)(l)1 Florida Administrative Code, which is revocation for a repeat violation.

55. It is indisputable that these violations are repeat violations as defined by Rule 64E-6.022, Florida Administrative Code.

56. Rule 64E-6.022(2) Florida Administrative Code directs the Department to consider the following facts for the purpose of mitigation or aggravation of the penalty:

   a) Monetary or other damage to the registrant's customer, in any way associated with the violation, which damage the registrant has not relieved, as of the time the penalty is to be assessed.
   b) Actual job-site violations of this rule or conditions exhibiting gross negligence, incompetence or misconduct by the contractor, which have not been corrected as of the time the penalty is being assessed.
   c) The severity of the offense.
   d) The danger to the public.
   e) The number of repetitions of the offense.
   f) The number of complaints filed against the contractor.
   g) The length of time the contractor has practiced and registration category.
   h) The actual damage, physical or otherwise, to the customer.
   i) The effect of the penalty upon the contractor's livelihood.
   j) Any efforts at rehabilitation.
   k) Any other mitigating or aggravating circumstances.
57. It is true that there was no monetary damage to the Respondent’s customer. However, the lack of monetary damage is attributable to the fact that the Petitioner caught the violations committed by the Respondent before repair work commenced and her good fortune that the existing tanks were in fact structurally sound, despite her failure to confirm their condition prior to generating the tank certification. The potential for monetary damage is present any time a septic tank contractor fails to ascertain the structural integrity of septic system tanks, as their failure could result in a sanitary nuisance, costs for cleaning up the nuisance, and additional repair costs.

58. Although the Respondent took the necessary corrective action by returning to the property and pumping and inspecting the tanks, this was only done after the violations were discovered by the Petitioner and the Petitioner ordered the corrective action. Had the Petitioner not discovered the violations, the failure to pump, inspect and provide truthful and accurate information regarding the tanks’ structural integrity would have gone unchecked.

59. Providing false and misleading information to a client and/or the Petitioner and failing to use any care in the execution of a duty that is uncomplicated, yet vital to the proper issuance of repair permits are extremely serious offenses. Dishonesty and complete carelessness from a licensed professional is a danger to public health; wastes the Petitioner’s limited resources by requiring them to essentially baby-sit a professional that should be doing their job properly without the Petitioner’s involvement; negatively affects the image of the profession as a whole; and often results in financial hardship to clients. Clients must be able to rely that the information provided to them by trained professionals is true and accurate to ensure they make the right decisions regarding the maintenance and repairs of their septic systems. The average client is completely clueless when it comes to their septic systems. Equally as important, the Petitioner
must be able to rely on the information provided by licensed professionals. Providing false and misleading certifications to the Petitioner severely diminishes its ability to properly regulate septic systems and protect the public’s health and safety.

60. The Respondent’s actions delayed the issuance of the repair permit for a system that was creating a sanitary nuisance. Although it is true that the delay was minimal, two to three days at the most, any delay poses a danger to the public’s health. These were two to three additional days that untreated human waste wasn’t filtered by a properly working drainfield and potentially polluted the groundwater. The potential for additional danger to the public’s health is present any time a registered septic tank contractor falsely certifies the structural integrity of a septic system tank.

61. Although the Respondent has never been disciplined for similar factual allegations, the Respondent’s three prior disciplines involved gross negligence, incompetence, or misconduct. The most recent two disciplines arguably also constituted fraud and/or deceit as both involved the Respondent’s failure to fully pump out septic tanks, a service her clients paid her to complete.

62. Given the fact that the Respondent was disciplined as recently as 2009 and 2010, it is evident she is unable or unwilling to comply with the laws and rules regulating her professions. The Respondent is an experienced registered contractor who has been in the business for close to 20 years. As such, there is no excuse for the continued violations.

63. The effect of the penalty of revocation is substantial, but deserved in light of the aggravating factors, the current severe offenses, the Respondent’s prior extensive disciplinary history and the timing of those prior violations in relation to the timing of the current violations. Without a registration, the Respondent can still work for Mr. Sanders’ septic tank contracting
business, or she can hire another registered septic tank contractor to qualify her business, one who would hopefully refrain from repeated violations of the Standards of Practice and Disciplinary Guidelines.

PROPOSED RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law it is proposed that the Recommended Order recommend entry of a final order imposing revocation of the Respondent’s septic tank contractor registration.

Respectfully Submitted,

STATE OF FLORIDA
DEPARTMENT OF HEALTH

/S/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original was filed with DOAH via the ACCESS link and and that a true and correct copy was furnished via mail and email and to Neysa Borkert, 1833 Hendry Street, Fort Myers, Florida 33901 this 22nd day of August, 2011

/S/
Denise Duque