

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HARLLEE PACKING, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 98-2210
)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On September 28, 1998, a formal administrative hearing was held in this case in Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Terry Cole, Esquire
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& Cole, P.A.
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For Respondent: Ricardo Muratti
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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Environmental Protection (DEP) should revoke the Petitioner's exemption from the requirement to obtain a General Permit for Disposal of Tomato Wash Water under Florida Administrative Code

Rule 62-660.805.

PRELIMINARY STATEMENT

On January 28, 1998, DEP issued a Notice of Exemption Revocation. The Petitioner, then known as Harllee-Gargiulo, Inc., filed a Petitioner for Formal Administrative Proceeding, and DEP referred the matter to the Division of Administrative Hearings (DOAH) on May 14, 1998. In accordance with the parties' response to the Initial Order, final hearing was scheduled for September 28-29, 1998.

On July 21, 1998, the Petitioner filed a Motion to Correct Name "due to a corporate restructuring." On August 5, 1998, an Order Changing Name of Petitioner and Amending Caption was entered.

On August 7, 1998, the Petitioner filed a Motion for Summary Recommended Order. On August 17, 1998, DEP filed a response in opposition and a Motion for Relinquishment of Jurisdiction. Initially, the parties requested oral argument on the motions, but oral argument could not be scheduled promptly, the request was withdrawn, and an Amendment to Notice of Final Hearing (Limiting Evidence and Reducing Time Set Aside for Final Hearing) was entered on August 24, 1998. Oral argument was deferred to final hearing, the evidence at final hearing was limited to evidence relevant to the proper interpretation of Florida Administrative Code Rule 62-660.805, and the time set aside for the final hearing was reduced to three hours.

At final hearing, the Petitioner had one exhibit admitted in

evidence as Petitioner's Exhibit A, and the Department had two exhibits admitted in evidence as Department Exhibits 1 and 2. Neither party called a witness. After oral argument, the parties were given ten days in which to file proposed recommended orders. The parties' proposed recommended orders have been considered.

FINDINGS OF FACT

1. The Petitioner, Harllee Packing, Inc., formerly known as Harllee-Gargiulo, Inc., is a grower and shipper of Florida vegetables that generates wastewater from its tomato-washing operation.

2. On January 8, 1992, the Department of Environmental Regulation (DER), the predecessor to the Respondent, the Department of Environmental Protection (DEP), adopted Florida Administrative Code Rule 17-660.805, which not only provided for a General Permit for Disposal of Tomato Wash Water but also provided for an exemption from the requirement to obtain a permit under certain circumstances and conditions. (The rule was renumbered in 1996 and is now Rule 62-660.805.)

3. In 1992, the Petitioner requested an exemption for its tomato-washing operation and entered into discussions with DER regarding the tomato-washing operation. On October 6, 1992, the Petitioner submitted information in support of its request for an exemption. DER issued the Petitioner a Notice of Permit Exemption on November 13, 1992. The Notice of Permit Exemption stated that the information submitted on October 6, 1992, provided "reasonable assurance that proper operation will occur

to prevent violations of the Department's rules and regulations." There was no other evidence as to why the exemption was issued.

4. At the time of and since issuance of the Notice of Permit Exemption, the Petitioner's tomato-washing operation has used approximately 16,500 gallons of wash-water a day. After use in the tomato-washing operation, the tomato wash-water is loaded from a storage tank into dedicated tankers for transportation and uniform distribution on uncultivated agricultural fields in accordance with the Notice of Permit Exemption.

5. The Notice of Permit Exemption prohibits distribution during or within 24 hours after a rainfall event greater than a 10-year, 1-hour storm and requires a minimum 5-day resting period between distributions to any one distribution site. Runoff outside the prescribed distribution sites also is prohibited. Although no witness testified, it can be inferred from these provisions themselves that their purpose was to control entry of the tomato wash-water into the groundwater and to prevent surface water runoff.

6. The Notice of Permit Exemption warned that it could be revoked if the tomato-washing operation was substantially modified, if the basis for the exemption was determined to be materially incorrect, or if the Petitioner failed to comply with the specific conditions in the Notice of Permit Exemption.

7. On January 28, 1998, DEP issued a Notice of Exemption Revocation. There was no evidence that the tomato-washing operation has been modified or that the Petitioner failed to

comply with the specific conditions in the Notice of Permit Exemption. The exemption was revoked because "tomato washing operations discharging between 5000 and 50,000 gallons per day are required to obtain industrial wastewater general permits from the Department."

CONCLUSIONS OF LAW

8. Florida Administrative Code Rule 62-660.805 provides in pertinent part:

(1) General Requirements.

(a) This rule authorizes a general permit for any person constructing or operating a treatment and disposal system for wash water from the packaging of fresh market tomatoes with a wash tank discharging between 5,000 and 50,000 gallons per day, provided that all of the conditions of this rule are met.

(b) Any tomato wash water disposal system with a wash tank discharging less than 5,000 gallons per day is exempt from the requirement to obtain a Department industrial wastewater permit if:

1. The disposal of the systems [sic] wash water does not cause a violation of any Department standard for surface or ground water quality, and

2. Wash water is not discharged directly to surface waters or to ground waters through wells or sinkholes that allow direct contact with Class G-I or Class G-II ground waters.

Between 1992 and 1996, the rule was numbered 17-660.805, but the language was the same. The parties agree, as stated in the Petitioner's Proposed Recommended Order: "The key issue for resolution at the Final Hearing and on the Motion for Summary Recommended Order is resolving the question of what is a 'discharge' [for purposes of the exemption rule]."

9. The Petitioner contends that the rule should be interpreted to allow an exemption so long as a tomato wash operation is not discharging 5,000 or more gallons a day "into waters of the State." Accordingly, the Petitioner contends that its exemption was properly issued and that, in order to revoke

the Petitioner's exemption, DEP would have had to prove that the Petitioner was discharging 5,000 or more gallons a day "into waters of the State."

10. In support of its interpretation of the rule, the Petitioner points to other statutes and rules that modify the word "discharge" with the limitation "into waters of the State." See Section 403.031(3), Florida Statutes (1997)(defining "effluent limitations" in terms of restrictions on the discharge of constituents "into waters of the state"); Florida Administrative Code Rule 62-620.200(12)(defining "discharge of a pollutant" in terms of additions of pollutants "to waters") and (13) (defining "discharge of wastes" in terms of the "introduction or addition to waters" of any substance that would "pollute any waters of the State.")

11. DEP has made to no attempt to prove a discharge into waters of the State. Instead, DEP contends that Rule 62-660.805(1)(b) restricts permit exemptions to a "tomato wash water disposal system with a wash tank discharging less than 5,000 gallons per day" regardless of the disposition of the wash-water.

12. In support of its interpretation of the rule, DEP points out that the word "discharge" itself is not defined in either Chapter 403, Florida Statutes (1997), or Florida Administrative Code Chapter 62-660. DEP also points out that the statutes and rules cited by the Petitioner concern regulation of the constituents of wastewater. Meanwhile, other statutes and

rules use the word "discharge" in a broader sense. See Florida Administrative Code Rule 62-610.200(13)(defining "disposal" as "the discharge of effluent to injection well, effluent outfalls, subsurface drain systems, and other facilities utilized strictly for the release of effluent into the environment") and (19)(referring to discharges into the "environment of that state."); Rule 62-610.500(2)(a)(referring to discharges to absorption fields); Rule 62-610.510(2)(referring to discharges to land application systems); and Rule 62-610.654 (referring to "discharges to system storage or the reuse system").

13. While the language of Rule 62-660.805(1)(b) may not be crystal clear, by limiting exemptions to a "disposal system . . . with a wash tank discharging less than 5,000 gallons per day," the exemption language seems to focus on the quantity of wastewater exiting the wash tank, regardless of the disposition of the wash-water. Such an intent makes sense; otherwise, the exemption would seem to be impractical in that it could well be much more expensive and onerous to prove entitlement to an exemption than it would be to obtain a general permit; likewise, it would seem to be more difficult for DEP to administer such an exemption process than it would be to administer the general permit process. Meanwhile, were it the intent to allow exemptions so long as less than 5,000 gallons a day discharged into waters of the State, the rule easily could have been written to make such an intent clear. For these reasons, it is concluded that the DEP's interpretation of the rule is correct.

14. The Petitioner also argues that, since DER issued the Notice of Permit Exemption in 1992 with full knowledge that more than 5,000 gallons a day would be leaving the wash tank for distribution on agricultural lands, DER must have interpreted the word "discharging" in the rule to mean "discharging into waters of the State." If it were clear that the Petitioner's exemption was being revoked solely because of a change in the agency's interpretation of a rule, revocation might not be permissible. Cf. C-Sand Co. v. Dept. of Transp., 494 So. 2d 267 (Fla. 1st DCA 1986); Food 'N Fun, Inc. v. Dept. of Transp., 493 So. 2d 23 (Fla. 1st DCA 1986); Wainwright v. Dept. of Transp., 488 So. 2d 563 (Fla. 1st DCA 1986). However, no witness testified, and the evidence is not clear as to whether the exemption was based on DER's interpretation of its rule or whether the exemption was issued erroneously. If, on the other hand, the exemption was issued in error, the basis for the exemption was materially incorrect, and DEP is authorized to revoke it under the terms of the Notice of Permit Exemption.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order revoking the Petitioner's exemption.

DONE AND ENTERED this 16th day of October, 1998, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of October, 1998.

COPIES FURNISHED:

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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.