STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 98-2560
	)	
TRAMMEL FOWLER,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal proceeding before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on August 26, 1999, at Crestview, Florida.

APPEARANCES

For Petitioner: Rodney M. Johnson, Esquire
Department of Health
Northwest Law Office
1295 West Fairfield Drive
Pensacola, Florida 32501

For Respondent: Matthew D. Bordelon, Esquire
2721 Gulf Breeze Parkway
Gulf Breeze, Florida 32561

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concerns whether the Respondent installed a septic system without a permit; whether a permit was required for the installation; whether the installation was of inadequate size; whether the Respondent caused the disconnection of an existing system without a permit, and whether that system was improperly abandoned. A related issue is whether the proposed $1,500.00 fine should be

imposed if the violations are proven or what, if any, fine is warranted.

PRELIMINARY STATEMENT

This cause arose on or about September 2, 1997, when the Petitioner Agency filed a "Citation for Violation" against the Respondent. The Respondent, Trammel Fowler, is a licensed septic tank contractor engaged in septic tank and drainfield installation and repair. The citation for violation related to a septic tank and drainfield installation, and alleged subsequent repair, at an address known as 5642 Old Bethel Road, Crestview, Florida. The Respondent requested a formal proceeding to contest the citation and the matter was ultimately referred to the Division of Administrative Hearings and the undersigned Administrative Law Judge. An amended citation was subsequently filed alleging other violations against the Respondent, advocating a fine totaling $1,500.00.

The cause came on for hearing as noticed. The Petitioner called three witnesses: David Donaldson, the inspector for the Okaloosa County Health Department; Douglas Sims, the environmental manager for the Okaloosa County Health Department; and William Sirmans, the environmental health director for Santa Rosa County Health Department. The Respondent called three witnesses: Trammel Fowler himself; Arthur Allen Brown, a former inspector of the Okaloosa County Health Department; and Cecil Oliver Rogers, a licensed septic tank contractor. Additionally, the Petitioner called four rebuttal witnesses: Gene Wykle, an

inspector with the Okaloosa County Health Department; Ken Arnett, a licensed septic tank contractor; Johnny Wilkinson, a licensed septic tank contractor; and Douglas Sims. Seven exhibits were offered into evidence and admitted for the Petitioner. The Respondent had four exhibits admitted into evidence.

Upon conclusion of the proceeding the parties ordered a transcript thereof and requested an extended briefing schedule. The request was granted and proposed recommended orders were timely filed and are considered in the rendition of this recommended order.

FINDINGS OF FACT

1. The Petitioner is an agency of the State of Florida charged, in pertinent part, by its organic statutes and rules, with regulating the practice of septic tank contracting and the installation and repair of septic tank and drainfield waste disposal systems and with licensure of such contractors pursuant to Rule Chapter 64E, Florida Administrative Code. The Respondent, Trammel Fowler (Fowler), is a licensed septic tank contractor regulated by the statutes and rules cited herein. Fowler has never been issued any citations or been subjected to discipline under the relevant statutes and rules enforced by the Petitioner with regard to septic system design, construction, installation and repair. He has worked in the septic tank installation business for 19 years.

2. The Respondent installed a septic tank and drainfield system at 5642 Old Bethel Road, Crestview, Florida, a residential construction project (home) in 1993. The original septic tank

system installed by the Respondent was finally approved on June 11, 1993.

3. The home site at issue was originally designed to have the septic tank and drainfield system located in the backyard of the residence. Plumbing errors by the general contractor and the plumbing sub-contractor caused the plumbing system to be "stubbed-out" to the front of the house so that the septic tank and drainfield system was installed in the front of the house rather than in the backyard as originally designed and approved by the Petitioner. Additional excavation work was required at the site, which caused the soil type to change in the front of the house where the septic tank and drainfield were to be installed. This in turn required the Okaloosa County Health Department to require additional drainfield square footage to be added to the previously approved 600 square feet of drainfield, so that the drainfield installed in the front of the house by the Respondent ultimately encompassed 800 square feet. Thus, although the original site plans approved by the Okaloosa County Health Department were not followed, subsequent modifications to the system resulted in the septic tank system being fully approved by the Petitioner (through the Okaloosa County Health Department), on June 11, 1993.

4. In the ensuing months, landscaping problems at the site caused surface water to collect around and above the drainfield area. This, coupled with a continuous water flow from the residence caused by leaking appliances, and particularly the

commode, resulted in raw or partially treated wastewater becoming exposed on the surface of the ground, as a sanitary nuisance. This was caused as the septic tank and drainfield system became saturated by the excess water from the two referenced sources. This caused the failure of that septic tank and drainfield system within nine months of its original installation, as was noted on March 4, 1994, by the Department's representative Mr. Sims. It is undisputed that the Respondent, Mr. Fowler, did not cause or contribute to this septic tank system failure. He constructed the system as designed and approved by the Department (or as re-approved by the Department in June 1993 with the relocation of the system to the front yard of the residence and with the augmentation of the drainfield referenced above).

5. The Department was aware of the failure of the original system in the front yard of the residence as early as March 1994. There is no evidence that an actual permit for repair of that system was ever issued. Mr. Fowler maintains that the Department had a policy at that time of authorizing repairs to systems that failed within one year of original installation, as this one did, without a written, formal permit process, but rather by informal approval and inspection of the repair work. The Petitioner disagrees and Mr. Sims, the Petitioner's representative, states that a permit was required, although no fee was charged. Indeed in 1994 a rule was enacted authorizing issuance of a permit for repair work for systems that failed within one year of original installation without being accompanied by the charging of a fee for that permit. In any event, prior to the rule change, repairs

were authorized for failures within one year by the Department without a permit, but were required to be inspected and a notation made in the permit file or in some cases on a "nuisance complaint card," so authorization and inspection was supposed to be documented. When by the time the repair was effected by the installation of the backyard septic tank and drainfield system or "overflow-system" in February 1995, the rule change requiring issuance of a repair permit without fee had become effective. There is evidence that the Respondent was aware of this since, sometime in 1994, he had obtained a permit authorizing repair of a septic tank and drainfield site on "Windsor Circle" as shown by the Petitioner's Exhibits 6 and 7 in evidence.

6. Be that as it may, the Respondent contends that Mr. Brown, the environmental specialist and inspector for the Department, met with him at the repair site in question and at least verbally authorized the repair of the system by installation of the septic tank and drainfield in the backyard of the residence; to be connected to the sewer line which also was connected with the malfunctioning system in the front yard of that residence. Mr. Brown in his testimony purports to have no memory of authorizing the repair work or inspecting it and seems confused as to whether he met with the Respondent at the site. The Petitioner acknowledges, as does Mr. Brown, that he has had problems since that time with memory lapses, attendant to two life-threatening injuries, which have apparently caused problems with memory loss. He purportedly suffers from post-traumatic stress syndrome and is taking medication with regard thereto.

There is no dispute that he has problems with recall. Moreover, there is evidence that Mr. Brown met with the Respondent at an address on Old Bethel Road for some reason, as shown by a notation in Department records in February 1995. Consequently, while there is no doubt that the repair work in question was done without a written permit, there is evidence to corroborate Mr. Fowler's testimony to the effect that Mr. Brown inspected and reviewed the repair system while it was actually being installed by Fowler and approved it. Thus, it is possible that Mr. Fowler was under a good faith impression that the Department had a policy of inspecting and approving repair work without there being a permit related to it at the time when he installed the secondary "overflow" system at the Old Bethel Road site in February of 1995, even though that impression may have been legally mistaken, because the rule requiring a permit at no fee for repair work was already in effect.

7. In any event, Mr. Fowler installed the so-called "repair system" in February 1995, which he has termed an "overflow" system designed to augment the treatment capability of the previously-approved system installed in the front yard at that residence. That system, as found above, consisted of 800 square feet of drainfield. The "overflow" system installed in the backyard by Mr. Fowler in February 1995 without the permit, has only 300 square feet of drainfield. This is clearly well below the minimum required for such a system and tends to support Mr. Fowler's testimony that it was intended really as a repair job in the form of a overflow system to handle extra flow that

the original system in the front yard would not be able to handle in performing the intended treatment function. It is unlikely that Mr. Fowler, with or without a permit, would have installed a system he clearly would know to be of only one-half (or less) of the adequate size and treatment capability for the residence, if it had been intended to be a separately functioning independent treatment system for the residence.

8. In fact, the "overflow" system was connected through a "T" or "Y" fitting in the sewer line outfall pipe from the house with the original septic tank and drainfield system in the front yard of the residence, so that flow could go to both systems simultaneously from the residential sewer line. There is conflicting testimony as to whether such a dually draining system could work properly. One septic tank contractor testified that it could and could adequately split the flow between the two septic tank and drainfield systems so as to perform adequate treatment without backups or overflows, while a witness for the Department testified that such a split-fitting could cause stoppages and therefore sewage backups. Be that as it may, the installation of the system in a connected fashion to the original system supports Mr. Fowler's testimony and contention that the system installed in the backyard, with 300 square feet of drainfield, was intended as a repair system merely to augment the treatment function being provided by the poorly functioning original system in the front yard.

9. In fact, the preponderant evidence shows that, with the elimination of leakage from the appliances in the house and the

correction of the water-pooling problem caused by improper landscaping, that the system would function adequately thus connected. Indeed, when the plumber or the general contractor for the residence disconnected the original front-yard septic tank system from the overflow system, so that all of the sewage in the house went to the overflow system with the smaller drainfield, that system still functioned adequately for one and one-half years until failure in approximately August 1997.

10. It is undisputed that the Respondent had no part in the unreported and unapproved disconnection of the original front system from the overflow tank and drainfield system in the backyard. The evidence shows a preponderant likelihood that the total system would have functioned adequately indefinitely had the two remained connected so that sewage could flow to the front yard system with the 800 square feet of drainfield, with the excess water flow problems referenced above already corrected.

11. Mr. Brown, the Department environmental specialist and inspector, did not recall specifically whether he had been at the Old Bethel Road site at issue, but testified that it was definitely possible. He testified that the time entry notation he made admitted into evidence as Exhibit No. 3, may have reflected an inspection for a repair job at the Old Bethel Road site. Mr. Brown admitted that he was present on Old Bethel Road in February 1995, but did not recall his purpose of being there. His testimony thus did not contradict the testimony of Trammel Fowler. Mr. Brown also testified that he was aware of problems at the Old Bethel Road site and testified that Mr. Wykle of the

Department and Mr. Sims were also aware of problems at the Old Bethel Road site.

12. Douglas Sims of the Department testified that the two systems, the original front tank and drainfield and the overflow tank and drainfield installed in the backyard by Mr. Fowler could not work together if they were connected. This is belied by testimony of a septic tank contractor, Ken Arnett, who was a rebuttal witness called by the Department. Mr. Arnett testified that he would expect a system of the type contemplated by Mr. Fowler and Mr. Brown to function properly. It thus seems from the preponderant weight of the evidence that the reason the Old Bethel Road residential system quit functioning properly, in approximately August 1997, is that the plumbing contractor, at the behest of the residential building contractor for the residence constructed there, disconnected the overflow system from the original front yard system, so that all the house effluent was going to the overflow system, which was never intended to have a complete, standard-sized drainfield for such a dwelling, prevalent soil conditions, elevations and the like.

13. Mr. Brown, a long time employee of the Department was familiar with the statewide rules affecting septic tank contractors and installation and familiar with local department rules and policies relating to repairs. He testified that for a period of time in the early 1990's, there was an unwritten policy by the Okaloosa County Health Department that some repair permits would be waived for certain repairs provided a final inspection by the Department was made. He stated that if the septic tank

system failed within one year under certain circumstances, a repair permit would be waived as long as the Department was aware of the repair. Mr. Brown could not recall when the policy ended, but estimated it to be sometime between 1995 and 1997. He called the discontinuation of the local policy to waive repair permits a "gradual phase out."

14. Mr. Brown also recalled that the Okaloosa County Health Department's unwritten, local policy concerning waiver of repair permits was known and relied upon by septic tank contractors in certain situations. Cecil Rogers, a long-time septic tank contractor who dealt with the Okaloosa County Health Department regularly, testified that there was a standard policy to allow repairs to be made to septic tank systems that failed within one year without requiring a permit.

15. There thus seems to have been an unwritten policy or practice among septic tank contractors and the Okaloosa County Health Department to the effect that if a system failed within one year and the contractor was willing to repair the system without cost to the homeowner, that the permit would be waived as long as the system or repair could be inspected by the Department. The system originally installed which failed appears to have been installed before the effective date of the rule requiring that a no-charge permit be obtained for repair work. The repair work in question, the installation of the overflow system, appears to have been effected after the effective date of the new rule. It also appears that Mr. Fowler knew of the new rule because of his obtaining a permit for repair work at the

Windsor Circle repair site in 1994. It also would appear that Mr. Brown likely verbally approved and inspected the repair work at the subject site, giving Mr. Fowler the impression that he was authorized to go ahead and make the repair by installing the overflow system.

16. Thus, although he may have technically violated the rule requiring a no-charge permit for repair work, it does not appear that he had any intent to circumvent the authority of the Department, since the preponderant evidence shows that Mr. Brown knew of and approved the installation. Thus, in this regard, a minimal penalty would be warranted. Moreover, after the original septic system at the Old Bethel Road site failed in March of 1994, through no fault of Fowler, Fowler paid to make the repair by installing the overflow system at his own expense. The original new home purchaser at that site, and Mr. Fowler's customer, Mr. Wayne Aaberg, thus did not sustain any personal expenses for the repair work performed by Fowler.

17. The Petitioner did not present any evidence to establish that the repairs made by Fowler caused the septic tank system at Old Bethel Road to fail. The Petitioner, through the testimony of environmental manager Douglas Sims, itself established that the plumbing contractor actually disconnected the front system from the overflow system and made a physical connection only to the rear system installed by Mr. Fowler, rather than Fowler, and without Mr. Fowler's knowledge.

18. The Petitioner, apparently through Douglas Sims, failed to conduct an investigation to determine which party actually was

responsible for physically abandoning or disconnecting the original front system from the home and from the overflow system prior to the charges being filed against Mr. Fowler. Mr. Fowler did not cause the physical disconnection of the two systems and the residence and is not a licensed plumber. He did not, during the course of his contracting business for septic tanks and drainfields make physical connections or disconnections to dwelling units, but instead left that to the responsibility of the general contractor and/or the plumbing contractor.

19. The Petitioner presented no evidence establishing any monetary harm to any customer of the Respondent. The disconnection of the systems which caused the failure was not shown to have been the responsibility nor fault of Mr. Fowler. Rather, any monetary harm to the homeowner who owned the residence when the failure occurred in August 1997, after the original repair installation had been paid for by Mr. Fowler was caused by the plumbing contractor and/or the general contractor, Kemp Brothers, who directed the plumbing contractor to disconnect the original front system from the overflow system. Consequently, any monetary damage caused by fixing the failure which occurred in August 1997, and which engendered the subject dispute, was not caused by Mr. Fowler.

20. Finally, Mr. Douglas Sims of the Department, testified that he knew of two other un-permitted repairs by septic tank contractors which were known to the Department. In both of those cases, the contractors were only issued a Letter of Warning. Mr. Sims testified that if the Respondent herein had made repairs

to the existing system at his own cost after the failure occurring in August of 1997, then the Department would have only issued a Letter of Warning. Mr. Fowler paid to fix the original system in February 1995, but felt that monetary responsibility for the August 1997 failure was not his fault and thus did not offer to pay for that.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties this proceeding. Section 120.57(1), Florida Statues.

22. The Petitioner is an agency of the State of Florida charged with administering a comprehensive program to ensure that on-site sewage treatment and disposal systems are sized, designed constructed, installed, modified and abandoned in compliance with public health considerations in accordance with Section 381.0065(3)(e), Florida Statutes. The Respondent is a septic tank contractor, licensed in accordance with Section 381.0065 and Chapter 64E-6, Florida Administrative Code.

23. The operative statute controlling the Department in this case is, in pertinent part:

> 381.0065 Onsite sewage treatment and disposal systems; regulation.
>
> (1) LEGISLATIVE INTENT. It is the intent of the Legislature that . . . the department shall issue permits for the construction, installation, modification, abandonment, or repair of onsite sewage treatment and disposal systems. . . .
>
> (2) DEFINITIONS. As used in ss.381.0065-381.0067, the term:

* * *

(i) "Onsite sewage treatment and disposal system" means a system that contains a . . . drainfield . . . [and] a septic tank. . . .

* * *

(3) DUTIES AND POWERS OF THE DEPARTMENT OF HEALTH. The department shall:

(a) Adopt rules to administer ss.381.0065-381.0067.

(b) Perform application reviews and site evaluations, issue permits, and conduct inspections and complaint investigations associated with the construction, installation, maintenance, modification, abandonment, or repair of an onsite sewage treatment and disposal system for a residence. . . .

(c) Develop a comprehensive program to ensure that onsite sewage treatment and disposal systems regulated by the department are sized, designed, constructed, installed, repaired, modified, abandoned, and maintained in compliance with this section and rules adopted under this section to prevent groundwater contamination and surface water contamination and to preserve the public health.

* * *

(h) Conduct enforcement activities, including imposing fines, issuing citations . . . for violations of this section . . . or for a violation of any rule adopted under this section. . . .

* * *

(4) PERMITS; INSTALLATION; AND CONDITIONS. A person may not construct, repair, modify, abandon, or operate an onsite sewage treatment and disposal system without first obtaining a permit approved by the department. The department may issue permits to carry out this section.

* * *

(5) ENFORCEMENT; RIGHT OF ENTRY; CITATIONS.

(b)1. The department may issue citations that may contain . . . an order to pay a fine . . . for violations of ss.381.0065-381.0067.

64E-6.003 Permits.

(1) System Construction Permit - No portion of an onsite sewage treatment and disposal system shall be installed, repaired, altered, modified, abandoned or replaced until an "Onsite Sewage Treatment and Disposal System Construction Permit" has been issued on DH Form 4016. * * * A fee shall not be charged for a repair permit issued within 12 months from the date of final authorization of the onsite sewage treatment and disposal system.

(2) System inspection - Before covering with earth and before placing a system into service, a personal installing or constructing any portion of an onsite sewage treatment and disposal system shall notify the county health department of the completion of the construction activities and shall have the system inspected by the department for compliance with the requirements of this Chapter, except as noted in s.10D-6.043(3) for repair installations.
(a) If the system construction is approved after an inspection by the DOH county health department, the department shall issue a "Construction Approval" notice to the installer.

(b) If the system installation does not pass the construction inspection on any type of system installation, the installer shall make all required corrections and notify the DOH county health department of the completion of the work prior to the reinspection of the system. A reinspection fee shall be charged to the installer for each additional inspection leading up to construction approval.

(c) Final installation approval shall not be granted until the DOH county health department has confirmed that all requirements of this Chapter, including

building construction and lot grading are in compliance with plans and specifications submitted with the permit application.

64E-6.004 Application for System Construction Permit.

(1) No person shall cause or allow construction of a system without first applying for an obtaining a construction permit. DH Form 4015 shall be used for recording permit application information.

(2) An application shall be completed in full, signed by the owner or the owner's authorized representative, or a contractor licensed in accordance with Chapter 489, Florida Statutes, and shall be accompanied by all required exhibits and fees. If the owner of a property uses an authorized representative to obtain a new system construction permit, a signed statement from the owner of the property assigning authority for the representative to act on the owner's behalf shall accompany the application.

64E-6.0111 Abandonment of Systems.

(1) Whenever the use of an onsite sewage treatment and disposal system is discontinued . . . the system shall be abandoned within 90 days and any further use of the system for any purpose shall be prohibited.

* * *

(2) The following actions shall be taken, in the order listed, to abandon an onsite sewage treatment and disposal system:

(a) Property owner or agent shall apply for a permit from the department to abandon the existing onsite sewage system and submit the required fee. Upon receiving a permit:

(b) The tank shall be pumped out.

(c) The bottom of the tank shall be opened or ruptured, or the entire tank collapsed so as to prevent the tank from retaining water, and

(d) The tank shall be filled with clean sand or other suitable material, and completely covered with soil.

24. The citation for violation and amended citation has charged the Respondent with three separate violations and proposed a $1,500.00 fine. The Petitioner also charged in the amended citation that the Respondent caused the system installed at 5642 Old Bethel Road, Crestview, Florida to be improperly disconnected and abandoned. The Petitioner also attempted to apply "aggravating factors" in the amended citation, pursuant to Rule Chapter 64E-6.022, Florida Administrative Code. Specifically it is alleged that monetary or other damage was sustained by the registrant's customer, which damage the registrant has not yet relieved as of the time the penalty is to be assessed.

25. The Respondent, presented testimony to the effect that the Petitioner, at material times, had a non-promulgated, unwritten local policy or practice wherein certain septic tank system repairs could be made without an actual written permit, so long as the repair was inspected by a Department inspector. The Department's representative, Mr. Douglas Sims testified that for an unspecified period of time repair permits were waived if the Department inspected the repair. He also admitted the necessity of sending a letter to local septic tank contractors as late as April 1998 reminding that repair permits were in fact needed before repairs would be made to existing systems, some four years after the rule requiring such repair permits purportedly took effect.

26. Another long-time inspector for the Department, Mr. Brown, testified that at least through the early 1990's an unwritten informal policy allowed repair permits to be waived if the Department was aware of the repair. The Petitioner and one witness, Cecil Rogers, testified that local septic tank contractors had relied upon that policy. The evidence also shows that because he obtained a permit for repair work at the Windsor Circle premises, that Mr. Fowler was aware of the changing rule situation concerning the new necessity for obtaining a permit for repair work, albeit at no fee.

27. Thus, the preponderant evidence shows that there was ample opportunity for some confusion as to when non-promulgated local rules or policies were in effect or remained in effect and whether such a policy was in effect at the time the repairs were made at the Old Bethel Road site. The preponderant evidence shows that for some time period before 1995, the Department allowed septic tank contractors under certain circumstances, to make repairs to systems that failed within one year without obtaining a written permit as long as the repair was known to have been needed, made and was inspected by agents of the Petitioner.

28. The greater weight of the evidence shows that the Department was aware of the repairs made by the Respondent and, through Mr. Brown, inspected the repairs at the time they were made by the Respondent. The Department knew through its inspectors and its environmental manager Mr. Sims, that the Old Bethel Road site system had failed within one year and knew that

the nature of the failure was waste water on the surface of the drainfield. The preponderant evidence shows that Mr. Brown inspected the repair when it was made and approved it. While Mr. Brown testified that he did not specifically recall such an inspection, his employee activity reports reflected a visit to an Old Bethel Road location with Mr. Fowler around the same date that Mr. Fowler and the Department have acknowledged that the repairs were made by Fowler. Thus the Department records support Mr. Fowler's contention that the Department was aware of the repair and that Mr. Brown, on behalf of the Department, had approved it. Although it appears that the repair work was done after the effective date of the rule requiring the issuance of a no-fee permit for repair work took effect, the above-found circumstances show that the repair work was effected with the knowledge of the Department and with Mr. Brown's approval and thus without any effort or intent to conceal the un-permitted repair work on the part of the Respondent. Accordingly, it has not been established that the Respondent is blame-worthy to the extent that a fine should be imposed under these circumstances as well as the circumstance that other un-permitted work resulted in only letters of warning being issued to other contractors who

performed such un-permitted repair work, as shown by Mr. Sim's own testimony.

29. The Department has also alleged that the Respondent caused a septic tank system to be disconnected and abandoned without a permit. The preponderant weight of the evidence shows

by the Petitioner's admission, that this violation did not occur at the hands of the Respondent. The Petitioner's representative, Mr. Sims, acknowledged that he had not investigated whether or not the plumbing contractor had caused the disconnection of the system prior to filing a violation. Thus this violation has not been established by preponderant evidence.

30. The Petitioner has also alleged that monetary harm was caused to the registrant's customer, the registrant being the Respondent. No evidence was presented establishing any actual monetary damages to the registrant's customer. The preponderant weight of the evidence indicates that there was no monetary damage cause to the original customer of the registrant, Mr. Wayne Aaberg, by any act or omission of the Respondent. The initial repairs were made to the original system at the Respondent's own expense, with no cost to either the owner or the general contractor. The actual cause of the system failure in approximately August 1997, was the disconnection of the two systems and the Respondent had no responsibility in causing that disconnection. Therefore, it has not been proven that any monetary damage caused by the deficiency in the system, which is at issue in this case, was the responsibility of the Respondent.

31. Finally, in its post-hearing Proposed Recommended Order, the Respondent asserts that it is entitled to attorney's fees as there is purportedly no basis in fact for the alleged violations charged against the Respondent at the time the citation was filed by the Department, that the alleged disconnection of the septic tank system and purported monetary

harm to the customer were not investigated prior to charges being filed by the Department, and that the charges had no basis in law or fact. This purported attorney's fee claim cannot be resolved in this proceeding, however. A separate petition for attorney's fees must be filed within 60 days after the Respondent becomes a "prevailing party" in this case, which cannot occur until a final order disposing of the dispute is entered by the Department. Thereafter, a petition seeking attorney's fees, for instance, on the basis asserted by the Respondent, must be filed initiating a separate proceeding, if the Respondent intends seeking attorney's fees as a "small business party." See Section 57.111, Florida Statutes.

RECOMMENDATION

Accordingly, having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered finding that the Respondent effected repair work to a septic tank and drainfield system without the required written permit but that, in view of the above-found and concluded extenuating circumstances, that a minimal penalty of a letter of warning be issued to the Respondent by the Department and that the citation for violation, in all other respects, be dismissed.

DONE AND ENTERED this 19th day of January, 2000, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 19th day of January, 2000.

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.