STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION CLOYD TONEY (Facility 0668502540); JAMES F. JENNINGS (Facility 128626716); JAMES SCELFO (Facility 018500049); DARREL HANEY (Facility 128503387);	OGC CASE NOS.	98-1208
LEO COHEN and MARK GROSBY (Facility)		96-2930
498627087); LEO COHEN and JOHN H		96-3405
ROTH (Facility 498627088); ROBERT C.		98-1974
ACKERT (Facility 498627087); CLOYD		98-2544
TONEY (Facility 538628774); LUELLA R		98-2440
CEASER (Facility 068501883); JACK A.		96-3404
HARKNESS (Facility 158506545); and		98-2050
PETER D. KLEIST (Facility 058500923),		97-0117
		98-1774
Petitioners,		98-2035
and	DOAH CASE NOS.	98-2021
		98-2030
ENVIRONMENTAL CORPORATION OF		98-4535
AMERICA, INC.,		98-4536
		98-4537
Intervenor,		98-4538
		98-4539
vs.		98-4540
		98-4541
DEPARTMENT OF ENVIRONMENTAL		98-4542
PROTECTION,		98-4543
Respondent.		
_____/		

FINAL ORDER

An Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("Department") in these consolidated cases. The Recommended Order indicated that copies were served upon counsel for Petitioners, Cloyd Toney, et al. ("Petitioners"), and upon counsel for Intervenor, Environmental Corporation of America ("ECA"). A copy of the Recommended Order is attached as Exhibit A. Exceptions to the Recommended Order were filed on behalf of Petitioners, ECA and the Department. The Department subsequently filed its Responses to the Exceptions of Petitioner and ECA. The matter is now before the Secretary of the Department for final agency action.

BACKGROUND

Petitioners funded efforts to cleanup petroleum and petroleum product contamination at various "Joy Food Stores" (some, formerly "Coastal Mart") facilities involved in these cases. Petitioners also filed applications with the Department for reimbursement of the cleanup costs under an amnesty program created by § 376.3071, Florida Statutes. This statutory amnesty program applies to owners or operators who notified the Department that their property was contaminated by petroleum or petroleum products. Under the statutory reimbursement program, the facility owner or operator would usually hire a contractor to cleanup petroleum contaminated sites. The contractor would then perform certain petroleum contamination cleanup program tasks ("program tasks") required by the Department, often through subcontractors and suppliers.

The first program task is an Initial Remedial Action ("IRA"). The typical IRA consists of conducting soil borings and taking samples of soil at the site, removal of all contaminated soil identified by the soil samples, and back-filling the excavated area with uncontaminated soil. The next program task is the preparation of a Contamination Assessment Report ("CAR"). The purpose of a CAR is to determine the vertical and horizontal extent of groundwater contamination. The determination of groundwater contamination requires installation and sampling of groundwater wells. The third program task is a Remedial Action Plan ("RAP") whereby a system to remediate the. groundwater at a site is designed and submitted to the Department for approval. The final program task is the Remedial Action ("RA") implementing the system designed and approved in the RAP. Upon completion of a program task, the facility owner, operator, or their designee submits an application to the Department for reimbursement of the cleanup costs at the various sites.

ECA entered into contracts with "funders" to finance the petroleum contamination cleanup costs at the sites involved in the consolidated cases now on review. ECA, purportedly acting on behalf of its "investors," also entered into a series of agreements with Gurr/Omega (an environmental consulting firm) for cleanup of petroleum contamination at the sites. Under these agreements, Gurr/Omega was required to provide all labor, equipment, and materials and to perform all work needed to complete the remediation of the sites selected and approved by ECA. Gurr/Omega was to "complete such performance in strict compliance with all applicable statutes rules and regulations and to the satisfaction of FDEP". Gurr-Omega would submit its invoices for the petroleum cleanup work to ECA, and ECA would pay Gurr/Omega with money obtained from its investors. ECA would

then receive an assignment of Gurr/Omega's right to reimbursement of cleanup costs from the Department.

Each of the Petitioners in these consolidated cases claimed a 15% "second-tier" markup on funds paid to ECA. The payments to ECA also included a 15% "first-tier" markup on sums which ECA indicated were paid to subcontractors for cleanup activities conducted at the various sites. In October of 1996 or later, the Department denied the portions of numerous reimbursement applications filed by Petitioners relating to the 15% "first-tier" markups paid to ECA. Petitioners then filed their petitions challenging the Department's denials of reimbursement for the "first-tier" markups, and the petitions were referred to DOAH for formal administrative proceedings.

The above-captioned cases were consolidated by DOAH, and Administrative Law Judge J. Lawrence Johnston ("ALJ") was assigned to conduct a formal administrative hearing. A DOAH final hearing was held before the ALJ on August 1720, 1999, in Tampa, Florida. Testimony of witnesses and documentary evidence was presented on behalf of Petitioners and the Department. The ALJ subsequently entered a Recommended Order ("RO") in these consolidated cases on December 16, 1999.

RECOMMENDED ORDER

Based on his retrospective application of Ch. 99-379, § 4, Laws of Florida (1999), the ALJ concluded that the Department's 1998 amendments to Rules 62-773.200(9) and 62-773.350(9)-(10), F.A.C., were not applicable to Petitioners' applications for reimbursement of the petroleum contamination cleanup costs at the sites involved in these cases. The ALJ also concluded that Petitioners had established that ECA's activities were integral and essential to site rehabilitation under the applicable rule provisions in effect at the time Petitioners' subject applications for reimbursements of petroleum cleanup costs were filed with the Department. However, the ALJ did conclude that "interest" payments made by ECA to Petitioners, together with ECA's 15% markups thereon and Petitioners' 15% markups on ECA's markups, were not allowable under Rules 62-773.200(12), 62-773.350(4)(e), and 62-773.650(1), F.A.C. (1993).

The ALJ ultimately recommended that the Department enter a final order granting specified claims of Petitioners as set forth on page 62 of the RO for reimbursement of ECA's 15% "first tier" markups, together with Petitioners' 15% markups thereon. The ALJ also recommended that the final order in these cases direct Petitioners to repay to the Department overpayments made to them of interest paid by ECA, together with ECA's 15% markups on the

interest and Petitioners' markups thereon, as specified on page 63 of the RO.

RULINGS ON PETITIONERS' EXCEPTIONS

Exception 1

Petitioners' first Exception takes issue with Findings of Fact 41 of the RO wherein the ALJ found that the subject reimbursement applications submitted to the Department contained no evidence that Petitioners were seeking reimbursement of "interest" payments being made to Petitioners by ECA. In his related Finding of Fact 42, the ALJ also found that the Department first obtained evidence that the reimbursement applications contained interest payments from ECA to Petitioners during the course of prehearing discovery in these consolidated cases. The ALJ further found that, upon such discovery, the Department sought to recover those interest payments, together with any markups thereon. The challenged factual findings of the ALJ in paragraph 41 of the RO are affirmed in this Final Order.

An agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an administrative law judge (formerly "hearing officer") unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence. See subsection 120.57(1)(1), Florida Statutes. Accord Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d DCA 1995); Dietz v. Florida Unemployment Appeals Commission, 634 So.2d 272 (Fla. 4th DCA 1994); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987). I conclude that the ALJ's Finding of Facts 41 and 42 are based on competent substantial evidence of record. This competent substantial evidence includes the expert testimony at the DOAH final hearing of Charles Williams, an environmental administrator in the Department's Bureau of Petroleum Storage Systems. (Tr. Vol. IV, pages 112-215)

In addition, the case law of Florida holds that it is the ALJ's responsibility to weigh the evidence presented in these DOAH proceedings, resolve conflicts therein, judge the credibility of witnesses, and draw permissible inferences from the evidence. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985). Thus, a reviewing agency may not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. Belleau v Dept. of Environmental Protection, 695 So.2d 1305,1307 (Fla. 1st DCA 1997); Mavnard v. Unemployment Appeals Commission, 609 So.2d 143, 145 (Fla. 4th DCA 1992).

I decline to substitute my judgment for that of the ALJ on this evidentiary challenge raised by Petitioners. Accordingly, Petitioners' Exception 1 is denied.

Exception 2a

Petitioner's second Exception does not take exception to any factual findings or legal conclusions in the RO on review. Instead, this exception challenges the ALJ's prehearing ruling denying Petitioners' Motion In Limine requesting that evidence bearing on the Department's claims for recovery of alleged "interest" overpayments to Petitioners be excluded at the DOAH final hearing.

Petitioners first argue that the ALJ lacked jurisdiction to hear the Department's claims for recovery of alleged overpayments of interest to Petitioners based on information obtained during the discovery phase of these proceedings. Petitioners essentially conclude that the scope of these proceedings is limited to matters set forth in their reimbursement applications and in the Department's related Orders of Determinations. This argument of Petitioners overlooks a basic tenet of administrative law that a DOAH formal proceeding wherein an agency action is contested is not merely an administrative review of prior preliminary agency action, but is a de novo proceeding intended to formulate final agency action. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So. 2d 1378,1387 (Fla. 1st DCA 1991); Florida Dept. of Transportation v. J.W.C. Company. Inc., 396 So 2d 778, 785 (Fla. 1st DCA 1981); and McDonald v. Dept. of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

In such de novo formal hearings, neither the Department nor the parties challenging the agency actions are restricted to the matters set forth in the application documents or in the Department's written notices of intent to issue or deny the requested permits or reimbursements. See, e.g., Hamilton County Commissioners, supra, at 1387-1388; DeCarion v. Dept. of Environmental Regulation, 445 So. 2d 619, 621 (Fla. 1st DCA 1984). Therefore, it was not beyond the ALJ's jurisdiction to have considered evidence in these proceedings of alleged overpayments of interest by the Department to Petitioners, even though the interest overpayment issue was not apparent in the "four corners" of the reimbursement applications or the Department's related Orders of Determinations. Hamilton County Commissioners, supra, at 13871388; McDonald, supra, at 584.

Petitioners further contend that the ALJ erred, as a matter of law, by ruling that the Department's interest overpayment claims were "analogous to compulsory counterclaims which should

be determined in these proceedings". Petitioners suggest that the Department should be required to commence separate audit proceedings to recover the alleged interest overpayments. I conclude, however, that the challenged prehearing ruling of the ALJ refusing to limit the scope of the DOAH final hearing as requested by Petitioners does not appear to be a matter over which the Department has "substantive jurisdiction" under § 120.57(1)(1), Florida Statutes (1999).

The Florida courts have indicated that, subsequent to the 1996 amendments to the Administrative Procedure Act, an agency reviewing a DOAH recommended order is precluded from overruling procedural or evidentiary rulings by an administrative law judge, except "in the most extreme cases" where the proceedings "did not comply with the essential requirements of law". See Florida Power & Light Company v. State of Florida Siting Board, 693 So.2d 1025,1028 (Fla. 1st DCA 1997) (Benson, J., concurring). Based on my review of the record, l am unable to conclude that the cases now on review are among those "extreme cases" where procedural or evidentiary rulings of administrative law judges are so egregious as to violate the essential requirements of law.

Consequently, Petitioners' Exception 2a is denied.

Exception 2b

This Exception takes issue with Conclusion of Law 94 of the RO wherein the ALJ rejects Petitioners' attempt to distinguish the seemingly adverse rulings of the Court in Environmental Trust v. Dept. of Environmental Protection, 714 So.2d 493 (Fla. 1st DCA 1998). In Environmental Trust, the court upheld the Department's final order denying reimbursements of sums representing "factoring discounts" for providing funding for the cleanup costs of petroleum contamination at various sites.

The Environmental Trust court upheld the Department's position that the cost of the factoring discounts amounted-to interest on the face amount of the invoices and observed that "[i]nterest is not transformed into a reimbursable item merely because the claimant elects to characterize it as a discount." Id. at 497-498. At page 497 of the Environmental Trust opinion, the court ruled that the "cost represented by the series of discounts for providing capital is not an actual cost of the site rehabilitation work" under § 376.3071 (12)(d), Florida Statutes. At page 500 of the Environmental Trust opinion, the court also ruled that the existing provisions of Rule 62-773 prohibited reimbursement for "interest or carrying charges of any kind", except for certain interest payments designated in the Department's rules which were not applicable to the reimbursement applications in that case. See Rule 62-773.350(4)(e), F.A.C.

In the challenged Conclusion of Law 94, the ALJ concluded in these proceedings that Petitioners' attempt "to distinguish interest payments made nearly simultaneously with receipt of invoice payments from discounts is to elevate form over substance. The two [payments] are equivalent." I concur with these conclusions of the ALJ and conclude that the interest payments at issue here are not distinguishable in substance to the "factoring discounts" ruled to be nonreimbursable in the Environmental Trust decision. I also concur with the ALJ's related conclusions in paragraph 96 of the RO that the subject interest payments made by ECA to Petitioners (and the markups thereon) are not included within those permissible interest payments designated in Rule 62-773.650(1), F.A.C., and are thus not "interest costs incurred" under Rule 62773.200(12), F.A.C.

In view of the above, Petitioners' Exception 2b is denied.

Request for Oral Presentation

Petitioners' Exception ends with a Request for Oral Presentation to the Secretary. This request of Petitioners has been previously denied in a separate "Order Denying Request for Oral Argument" entered on January 10, 2000. This Order Denying Request for Oral Argument is affirmed and incorporated by reference herein. Accordingly, the portion of Petitioners' Exceptions requesting permission to make an oral presentation to the Secretary in these proceedings is denied for the reasons set forth in the prior Order Denying Request for Oral Argument.

RULINGS ON DEPARTMENT'S EXCEPTIONS

Exception 1

The Department's first Exception takes issue with paragraph 89 of the RO containing the ALJ's legal conclusion that Chapter 99-379, § 4, Laws of Florida (1999), should be given retrospective application to the Department's 1998 amendments to Chapter 62-773, F.A.C. I conclude that this Exception of the Department is well taken for the following reasons:

1. Section 4 of Chapter 99-379 amended § 120.54(1)(f), Florida Statutes (Supp. 1998), by adding a sentence thereto that:

> An agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute.

This 1999 amendment to § 120.54(1)(f) was enacted by the Legislature effective June 18,1999. It is undisputed that there is no language in Chapter 99-379 expressing the intent of the Legislature that the provisions of section 4 thereof should be given retrospective application to agency rules adopted prior to the effective date of this act.

2. Absent a clear legislative intent to the contrary, a substantive statute is presumed to act prospectively and to apply only to conduct occurring after the effective date of the statute. See State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983); Fleeman v. Case, 342 So.2d 815 (Fla. 1976); Life Care Centers v. Sawqrass Care Center 683 So.2d 609, 613 (Fla. 1st DCA 1996). A "substantive" statute is one which "creates or imposes a new obligation or duty". See, e.g. L, Gupton v. Villane Key and Saw Shop. Inc., 656 So.2d 475, 477 (Fla. 1995); Young v. Altenhaus, 472 So.2d 1152, 1154 (Fla. 1985). The subject provisions of Section 4 of Ch. 99-379 impose a new obligation or duty on state agencies to not adopt retroactive rules. Therefore, the 1999 amendment to § 120.54(1)(f), F.S., is a substantive statutory provisions which should be applied prospectively only to agency rules adopted after June 18,1999. It is undisputed that the amendments to the petroleum cleanup reimbursement provisions of Rule 62-773, F.A.C., at issue in these proceedings were adopted on August 11, 1998.

3. In addition, section 8 of Chapter 99-379 expresses the clear intent of the Legislature that "[t]his act shall take effect upon becoming a law." It is also undisputed that all sections of Chapter 99-379 became law effective June 18,1999, when the act was approved by the Governor. The Florida Supreme Court has ruled that the Legislature's inclusion of an effective date of a law "effectively rebuts any argument that retroactive application of the law was intended". Dept. of Revenue v. ZuckermanVernon Corp., 354 So. 2d 353, 358 (Fla. 1977 (emphasis supplied). Accord Foreman v. Russo, 624 So.2d 333, 336 (Fla. 4th DCA 1993); Middlebrooks v. Dept. of State, 565 So.2d 727, 728 (Fla. 1st DCA 1990).

4. Finally, l would note that the ALJ's legal conclusions in paragraph 89 of the RO are inconsistent. The ALJ first cited cases approving the general rule of law that administrative rules are presumed to operate prospectively, in the absence of express language to the contrary. However, the ALJ then concluded in the last sentence of his Conclusion of Law 89 that: "[u]nder these circumstances, Section 4 of Chapter 99-379 is not considered to have truly retroactive effect and may be applied retroactively to control these cases." If Section 4 of Chapter 99-379 "is not considered to have truly retroactive effect" as the ALJ correctly concluded, then it is inconsistent for the ALJ to also conclude

in the same sentence that these provisions "may be applied retroactively to control these cases" dealing with Department rule amendments adopted in 1998.

Based on the above rulings, the Department's Exception 1 is granted. Accordingly, the ALJ's legal conclusions in paragraphs 89 and 90 of the RO that the provisions of Section 4 of Chapter 99-379 should be given retroactive application to the Department's 1998 amendments to Rule 62-773 are rejected.

Exception 2

The Department's second and final Exception takes exception to the ALJ's Conclusion of Law 92. In paragraph 92 of the RO, the ALJ concludes that ECA acted in the role of a project coordinator similar to a general contractor in connection with the remediation of the petroleum contamination at the various sites designated in these proceedings. The ALJ further concludes that ECA's contributions were "integral to" and "essential to completion of" site rehabilitation under the pertinent Department rules. The ALJ ultimately concludes in this paragraph that ECA's contributions "were enough to justify ECA's markups under these rules and under Section 376.3071 (4)(c), Florida Statutes".

These legal conclusions of the ALJ, based on his interpretations of statutory and rules provisions which the Department has the duty to implement and enforce, are rejected on the following grounds

1. These statutory and rule interpretations in Conclusion of Law 92 are expressly based on the ALJ's erroneous conclusion that ECA's contributions or actions were "not limited by [the 1998 amendments to] Rule 62-773.350(9)-(11)". In the preceding ruling, I rejected the ALJ's retrospective application of the provisions of Section 4 of Chapter 99-379 to preclude the Department from applying the 1998 amendments to Rule 62-773 to Petitioners' pending reimbursement applications. I thus conclude that the decision in Environmental Trust, supra, is controlling precedent as to these proceedings.

2. In the Environmental Trust opinion, the court observed that reviewing courts "must give great weight to the intent expressed by the agency in determining whether a revised rule imposes new requirements or merely clarifies existing requirements". Id. at 714 So.2d 501. The court then upheld the Department's position that the "revised version" of Rule 62-773 did not establish any new requirements, but only clarified the existing rules relied upon by the Department in reviewing reimbursement applications for petroleum contamination cleanup costs.[1] The court held in Environmental Trust that "the revised

version of Rule 62-773 can be applied retroactively because it merely restates the Department's settled interpretation of the existing rule." Id. at 501.

3. The court ruled in Environmental Trust that "[n]othing in section 376.3071, Florida Statutes (1995), creates an entitlement to recover these expenses." Id. at 501. The court also approved the rule of statutory construction that statutes establishing economic grants or entitlements are strictly construed in favor of the government and against the grantee. Id. at 501. Accord 3 Sutherland Statutory Construction, § 63.02 (5th Ed. 1992). Therefore, any doubts as to whether a particular claim for reimbursement in these proceedings represents an activity integral or essential to the rehabilitation of the subject contaminated sites should be resolved against Petitioners.

4. It is an established rule of administrative law in this state that considerable deference should be accorded to an agency's interpretation of its own rules which it is required to enforce, and that such rule interpretations should not be overturned unless clearly erroneous. See, e.g., Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); State Contracting v. Dept. of Transportation, 709 So 2d 607, 610 (Fla. 1st DCA 1998). Furthermore, an agency's interpretation of its own administrative rules does not have to be the only reasonable interpretation; it is enough if the agency interpretation is a permissible one. Suddath Van Lines, inc. v. Dept. of Environmental Protection, 668 So.2d 209,212 (Fla. 1st DCA 1996); Golfcrest Nursing Home v. State, Aqencv for Health Care Administration, 662 So.2d 1330,1333 (Fla. 1st DCA 1995).

5. Charles Williams, an Environmental Administrator in the Department's Bureau of Petroleum Storage Systems, interpreted the provisions of Rule 62-773, as amended in 1998, at the DOAH final hearing. Mr. Williams testified that ECA must act in the capacity of a general contractor responsible for the project planning and the supervision of subcontractors and vendors while the cleanup activities were being performed in order to be entitled to the markups claimed in these proceedings. (Tr. Vol. IV, pages 123-127) This rule interpretation is supported by the plain language of current Rule 62773.350(9)(e), as amended in 1998.[2] Mr. Williams was of the opinion that, under the Department's rules, ECA was essentially acting in the role of a "funder arranger" rather than a "general contractor". (Tr. Vol. IV, page 125) Mr. Williams also testified that it was Gurr/Omega, not ECA, who acted in the role of general contractor in the cleanup of the subject contaminated sites.[3] (Tr. Vol. IV, page 127) The fact that Gurr/Omega, not ECA, was the "full service contractor" ultimately responsible for employing and supervising

the subcontractors and vendors at the subject contaminated sites is clearly evidenced in the ALJ's unchallenged Findings of Fact 43-48.

Based on the above, the Department's Exception 2 is granted.

CONCLUSION

An agency has the principal responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); Florida Public Employee Council, 79 v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994). The Department is the state agency charged by the Legislature with the duty of enforcing the provisions of § 376.3071, Florida Statutes, and of adopting rules implementing this statutory section. Consequently, the interpretation of the provisions of § 376.3071 and Rule 62-773 are the primary responsibility of the Department.

I conclude that the Department's statutory and rule interpretations challenged in these cases are not "clearly erroneous". To the contrary, these statutory and rule interpretations viewed in light of the Environmental Trust decision and the "strict construction" requirement are permissible interpretations which should not be overturned. It is therefore ORDERED:

A. The portion of the last sentence of Conclusion of Law 89 concluding that Section 4 of Chapter 99-379 "may be applied retroactively to control these cases" is rejected, and all of Conclusions of Law 90, 92, and 93 of the RO are rejected.[4]

B. As modified above, the RO is adopted and incorporated herein by reference.

C. Petitioners' claims for reimbursements of ECA's 15% markups, together with Petitioners' 15% markups thereon, as specified on page 62 of the RO are DENIED.

D. The Department's claims for recovery from Petitioners of interest overpayments made as specified on pages 62-63 of the RO are GRANTED.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, 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 Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 13th day of March, 2000, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

_____

DAVID B. STRUMS, Secretary
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

ENDNOTES

1/ The "revised version" of Rule 62-773 construed by the court in the Environmental Trust decision is the same version now found in Rule 62-773, F.A.C., as amended effective August 11, 1998. Thus, the revised version of Rule 62-773 at issue in the Environmental Trust case is the same version of Rule 62773 at issue in these proceedings.

2/ Rule 62-773.350(9)(e), as amended in 1998, reads as follows:

(e) No markup shall be applied by any entity, other than an unrelated third party designated as the person responsible for conducting site rehabilitation, that did not provide a necessary and documented service that is integral to site rehabilitation by actively managing and overseeing the activities of the subcontractors and vendors while the site rehabilitation work was being performed. Necessary services integral to site rehabilitation include: negotiation of contracts with subcontrators and vendors; development of specifications and solicitation of quotes for equipment and supplies; scheduling and coordination of subcontrator activities; and on-site supervision of activities performed by subcontrators.

3/ Mr. Williams further testified that the Department's review of the reimbursement documentation provided by Petitioners revealed that ECA did virtually nothing related to the site cleanups, "other than a cover letter or invoice". (Tr. Vol. IV, page 172)

4/ These legal conclusions of the ALJ are rejected for the reasons set forth in detail in the above rulings granting the Department's Exceptions. I find that my substituted legal conclusions are as reasonable or more reasonable than those legal conclusions of the ALJ that were rejected in this Final Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

Bradford C. Vassey, Esquire
Environmental Corporation of America
205 South Hoover Street, Suite 101
Tampa, FL 33609

Carter B. McCain, Esquire
MacFarlane, Ferguson & McMullen
400 North Tampa Street, Suite 2300
Tampa, FL 33601

Ann Cole, Clerk and
J. Lawrence Johnston, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

J. A. Spejenkowski, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 14th day of March, 2000.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

_____

TERRELL WILLIAMS
Assistant General Counsel
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/488-9314