12-19-03

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENTAL PROTECTION,	
Petitioner,	
vs.	**OGC CASE NO. 02-0447**
THOMAS KERPER and ALL SALVAGED AUTO PARTS, INC.,	**DOAH CASE NO. 02-3907**
Respondents.	

AP

JLJ-CWS

FINAL ORDER

On December 19, 2003, an administrative law judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP") in this proceeding. A copy of the Recommended Order is attached hereto as Exhibit A. Copies of the Recommended Order were served upon counsel for DEP and counsel for Thomas Kerper and All Salvaged Auto Parts, Inc. (collectively "Respondents").

DEP and the Respondents filed Exceptions to the Recommended Order, and DEP filed Responses to the Respondents' Exceptions. The Respondents subsequently filed a Notice of Filing Transcript, a Request to Supplement Exceptions, and proposed Supplemental Exceptions. DEP then filed a Response to the Request to Supplement Exceptions. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

Prior to his death in 2002, Donald Joynt ("Joynt") owned property located at 3141 Sharpe Road, Apopka, Florida (the "Property" or "Facility"). Joynt had operated an

automobile recycling business and junkyard on the Property for many years known as Don's Auto Recycling, Inc. ("Dons Auto"). In September or October of 2000, Thomas Kerper ("Kerper"), moved onto a portion of the Property where he continued to operate his existing automobile parts salvage business, All Salvaged Auto Parts ("ASAP"). Kerper vacated the Property sometime during the first part of March of 2002.

On March 15, 2002, DEP officials inspected the Property in response to a citizen's complaint. On May 3, 2002, DEP issued a Notice of Violation ("NOV") and Order for Corrective Action ("OCA") alleging various environmental violations at the Property site by Kerper, ASAP, Joynt, and Don's Auto. Among the alleged violations in the NOV are a failure to document disposal of hazardous waste, including gasoline and antifreeze; and the failure to document proper disposal of used oil and waste gasoline.

The related OCA issued by DEP directed the Respondents, Joynt, and Don's Auto to comply with certain DEP rules and to perform designated actions at the facility. Included in the OCA, were directives that the alleged violators comply with DEP rules on hazardous waste management, used oil, freon management, and National Pollutant Discharge Elimination System Permitting. The Respondents subsequently filed a Petition for Formal Administrative Hearing challenging the issuance of the NOV and OCA. Joynt and Don's Auto did not join in the petition or file a separate petition.[1]

DOAH PROCEEDINGS

DEP referred the Respondents' petition to DOAH for formal proceedings and Administrative Law Judge, J. Lawrence Johnston ("ALJ"), was assigned to preside over the case. The ALJ held a final administrative hearing in Orlando on October 8-9, 2003,

[1] The ALJ stated in his Finding of Fact 28 that Joynt's heirs have been cooperating with DEP in cleaning up the Facility site while this case has been pending.

and entered his Recommended Order on December 19, 2003. The ALJ concluded in the Recommended Order that the Respondents were "used oil generators" as defined in Rule 62-710.210, Florida Administrative Code (F.A.C), and that the Respondents had operated a "hazardous waste facility" within the purview of §§ 403.703(22) and 403.727(1)(a), Florida Statutes (Fla. Stat.). The ALJ further concluded that the Respondents were jointly and severally liable under § 403.121(2)(b), Fla. Stat., along with Joynt and Don's Auto, to assess and remediate the used oil releases at the Facility as alleged in Count I of the NOV.

RULING ON THE RESPONDENTS' REQUEST TO SUPPLEMENT EXCEPTIONS

With regard to the Respondents' Request to Supplement Exceptions, the chronological order of relevant events in this case is as follows:

1. October 9, 2003 - The two-day DOAH final hearing is concluded.
2. December 19, 2003 - The ALJ's Recommended Order is entered.
3. January 5, 2004 - DEP and the Respondents filed Exceptions.
4. January 15, 2004 - DEP filed Responses to the Respondents' Exceptions.
5. January 23, 2004 - Transcription of testimony at final hearing is completed.
6. January 28, 2004 - Respondents filed a four-volume transcript of the final hearing, together with a Notice of Filing Transcript.
7. February 3, 2004 - Respondents filed "Request to Supplement Exceptions" and proposed Supplemental Exceptions to the Recommended Order.
8. February 13, 2004 - DEP filed a Response [in Opposition to] Respondents' Request to Supplement Exceptions.

The party filing exceptions to an administrative law judge's factual findings has the responsibility to pay for and furnish a copy of the transcript of the DOAH proceedings to the agency reviewing a recommended order. Booker Creek Preservation, Inc. v. Dept. of Environmental Regulation, 415 So.2d 750 (Fla. 1st DCA 1982); Rule 28-106.214(2), F.A.C. In this case, the subject final hearing testimony was not transcribed by the court reporter and filed by the Respondents until after both

parties filed their respective Exceptions to Recommended Order and after DEP filed its Responses to the Respondents' Exceptions.

DEP contends that it will be prejudiced if the Respondents are allowed to file Supplemental Exceptions containing citations to transcripts of testimony not available to the ALJ while preparing his Recommended Order or available to DEP while preparing its Exceptions to Recommended Order and Responses to Respondents' Exceptions. It is undisputed that the counsel of record for DEP and the Respondents advised the ALJ after the evidence had been presented at the final hearing in this case that neither party intended to request a transcript of the hearing. (Recommended Order, page 4.) I would also note that the DOAH final hearing in this case was completed in two days, and the hearing testimony was not transcribed by the court reporter and filed by the Respondents until over three months after this relatively short hearing was concluded.

Under the Florida Administrative Procedure Act (APA) and the Uniform Rules of Procedure (Uniform Rules), a party to an administrative proceeding has 15 days after a DOAH recommended order is entered to file exceptions and no mailing time is added. See § 120.57(1)(k), Fla. Stat., and Rule 28-106.217, F. A.C. In this case, the 15-day deadline for filing exceptions to the ALJ's Recommended Order expired on January 5, 2004. The Respondents could have made a timely request prior to the expiration of the January 5 deadline for an extension of time to file their initial exceptions. See Hamilton County Commissioners v. Dept. of Environmental Regulation, 587 So.2d 1378, 1390 (Fla. 1st DCA 1991) (concluding that DER had the discretion to extend the time for filing exceptions to a recommended order in that case). See also Rule 62-110.106(4), F.A.C. (DEP may grant a requested enlargement of time for any act done pursuant to the

Uniform Rules, if the request is made before the expiration of the subject time period). However, in this case, the Respondents made no timely request for an extension of time to file exceptions and an accompanying transcript prior to January 6, 2004.

The Respondents' proposed Supplemental Exceptions were not filed until February 3, 2004, four weeks after the expiration of the deadline for filing exceptions. The Respondents do not cite to any provisions of the APA or Uniform Rules authorizing a party who has filed timely exceptions to a recommended order to subsequently file contested supplemental exceptions after the deadline for filing exceptions has expired and after an opposing party has filed responses to the initial exceptions.

If the Respondents' Request to Supplement Exceptions containing citations to the recently completed transcripts of testimony were granted, then fundamental notions of due process would require that DEP's counsel of record be allowed the opportunity to file responses to these Supplemental Exceptions and to also file Supplemental Exceptions citing to the transcripts. The Respondents, in turn, should then have the opportunity to file responses to DEP's Supplemental Exceptions. Consequently, an extended administrative review process would be set in motion not contemplated by the APA or the Uniform Rules. Compare Collier Medical Center v. Dept of Health & Rehabilitative Services, 462 So.2d 83, 86 (Fla. 1st DCA 1985) (concluding that allowing a party to produce additional evidence after conclusion of the administrative hearing would set in motion a "never-ending" process not contemplated by the APA).

In view of the above matters, the Respondents' Request to Supplement Exceptions is denied.

RULINGS ON THE RESPONDENTS' EXCEPTIONS

Exception 1

The Respondents' first Exception appears to object to paragraph 32 of the Recommended Order. The ALJ concluded in this paragraph that the Respondents' activities at the Facility site constituted the operation of a "hazardous waste facility" as defined in § 403.703(22), Fla. Stat. The Respondents contend, however, that these activities did not involve the treatment, storage, or disposal of "hazardous wastes." The Respondents thus conclude that their activities at the Facility site are not subject to regulation by DEP under the Resource Conservation and Recovery Act ("RCRA") or the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") and their state counterparts.

The RCRA, codified in 42 USC § 6901 et seq., is a comprehensive federal environmental act regulating solid and hazardous waste.[2] The Supreme Court has observed that the primary purpose of RCRA is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste "so as to minimize the present and future threat to human health and the environment." See Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996). The provisions of CERCLA are codified in 42 USC § 9601 et seq. CERLCA is primarily designed to promote the prompt cleanup of existing toxic waste sites and to provide compensation to persons who have taken the initiative to remediate these environmental hazards. Meghrig, 516

---

[2] For RCRA purposes, the term "hazardous waste" is defined in pertinent part as "a solid waste ... which, because of its quantity, concentration, or physical, chemical, or infectious characteristics may ... pose a substantial present or potential hazard to human health or the environment when improperly transported, disposed of, stored, treated or otherwise managed." See 42 USC § 6903(5). A similar definition is set forth in § 403.703(21), Fla. Stat.

U.S at 483. The authority under CERCLA for recovering past cleanup costs from the responsible parties is an enforcement tool not available under RCRA. Id.

This Exception only contains general citations to RCRA, CLERCLA, and related Florida statutes. There are no specific statutory or rule interpretations advanced by the Respondents in support of their bare assertion that they were not operating a hazardous waste facility at the Property site. I thus view Exception 1 to essentially be a preface to the Respondents' succeeding Exceptions 2 and 3. For the reasons set forth in detail in the rulings below, the Respondents' Exception 1 is denied.

Exceptions 2 and 3

These related Exceptions do not comply with the provisions of § 120.57(1)(k), Fla. Stat. (2003), requiring a party filing exceptions to "clearly identify the disputed portion of the recommended order by page number or paragraph." These two Exceptions, which may object to the ALJ's Conclusions of Law 33 and/or 34, are also insufficient on their merits. Based on his prior findings of fact, the ALJ concluded in paragraph 33 that the Respondents were "used oil generators" as defined in 40 C.F.R. § 279.1.[3] In his related paragraph 34, the ALJ concluded that the Respondents were thus responsible for cleaning up the releases of used oil evidenced by the discolored soils reflected in photographs 5 and 7 on page 2 of DEP Exhibit 20.

In his related Finding of Fact 19, the ALJ found that the "dark-stained soil [at the Facility site] was the result of one or more releases of hydraulic fluid or motor oil." The

[3] 40 C.F.R. § 279.1 defines used oil as "any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities." Rule 62-710.210, F.A.C., "adopts by reference 40 C.F.R. Part 279 revised as of July 1, 1993, and the amendments in the Federal Register dated March 4, 1994 (59 FR 10550), which contain the federal standards for the management of used oil."

Respondents do not contend that the hydraulic fluid or motor oil referred to by the ALJ does not constitute "used oil" as defined in 40 C.F.R. § 279.1. Instead, they contend in Exception 2 that this hydraulic fluid or motor oil was used either in business equipment or in automobiles of employees and thus constituted "recycled used oil" as defined in 40 C.F.R. § 261.6(a)(4) and its Florida counterparts. The Respondents further contend that recycled used oil is not subject to regulation by DEP under RCRA or CERCLA or their state counterparts.

The provisions of 40 C.F.R. § 261.6(a)(4) relied upon by the Respondents state in pertinent part that:

> Used oil that is recycled and is also a hazardous waste solely because it exhibits a hazardous characteristic is not subject to the requirements of parts 260 through 268 of this chapter, but is regulated under part 279 of this chapter. Used oil that is recycled includes any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes, but is not limited to, oil which is re-refined, reclaimed, burned for energy recovery, or reprocessed (emphasis supplied).

As expressly stated in 40 C.F.R. § 261.6(a)(4), even if the used oil released at the Facility site were deemed to be "recycled used oil," it would still be subject to regulation under the provisions of 40 C.F.R., Part 279 (Standards for the Management of Used Oil) adopted by reference into the related state provisions of Chapter 62-710, F.A.C. (Used Oil Management). In this case, the Respondents were charged in Count I of the NOV with the "failure to respond to a release of used oil," which is a violation of 40 C.F.R., Part 279, § 22(d). Thus, the Respondents' suggestion that the used oil released at the Facility site is not subject to regulation by DEP merely because it meets the definition of "recycled used oil" under 40 C.F.R. § 261.6(a)(4), is without merit.

"Recycled used oil" is clearly regulated under 40 C.F.R. § 261.6(a); 40 C.F.R., Part 279; and Chapter 62-710, F.A.C.

As a separate point, the applicability of the "recycled used oil" provisions of 40 C.F.R. § 261.6(a)(4) to this case would require factual findings by the ALJ that the used oil released at the Facility site was "reused" in a manner complying with the above-quoted rule criteria. No such findings of fact were made by the ALJ in his Recommended Order. The Respondents refer to purported testimony of record supporting their contention that the "oil and gas materials found at Kerper's salvage yard were indeed recycled." However, no citations are made to specific pages of the transcript where such testimony is recorded.

Even if there was testimony of record arguably supporting factual findings that the used oil released into the soil at the Facility was "recycled" within the purview of 40 C.F.R. § 261.6(a)4, I have no authority to make such independent findings of fact in this Final Order. See e.g., North Port v. Consolidated Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994); Cohn v. Dept. of Professional Regulation, 477 So.2d 1039, 1047 (Fla. 3d DCA 1985). The scope of agency review of findings of fact in a recommended order is limited to ascertaining whether the existing factual findings are supported by competent substantial evidence of record. North Port, 645 So.2d at 487; § 120.57(1)(l), Fla. Stat.

Finally, the federal courts have rejected contentions that used or waste oil constitutes "recycled oil" once the used or waste oil has been leaked or spilled into the soil. In the leading case of Zands v. Nelson, 779 F.Supp 1254, 1262 (S.D. Cal. 1991), the court ruled that, once petroleum is leaked into the soil (even unintentionally), it cannot be reused or recycled and thus constitutes "discarded material" subject to

regulation under the solid or hazardous waste provisions of the RCRA. See also Edison Electric Institute v. U.S.E.P.A., 2 F.3d 438, 451-452 (D.C. Cir. 1993) (concluding that petroleum wastes originating from underground storage tanks were subject to the hazardous waste provisions of the RCRA); Craig Lyle Ltd. Partnership v. Land of Lakes, Inc., 877 F. Supp 476, 482 (D. Minn. 1995) (concluding that spilled or leaked petroleum from commercial operations constituted solid waste actionable under the RCRA); Recycling, Inc. v. Amoco Oil Co., 856 F.Supp. 671, 678 (N.D. Ga. 1991) (concluding that petroleum leaking from pipeline constituted disposal of solid waste regulated under the RCRA).

The Respondents also contend in their third Exception that the used oil released into the soil at the Facility site is not within DEP's regulatory jurisdiction because this used oil is "petroleum," which is expressly excluded from regulation under CERCLA. However, the CERCLA petroleum exclusion relied upon by the Respondents only applies to alleged violations involving a "hazardous substance" as defined in 42 U.S.C. § 9601(14). Neither Count I of the NOV nor the Recommended Order assert that the Respondents' activities at the Facility site resulted in the release of a CERCLA "hazardous substance" as the basis for invoking DEP's jurisdiction in this case.

To the contrary, as discussed above, Count I of the subject NOV charges the Respondents with the "failure to respond to a release of used oil" under the used oil management provision of 40 C.F.R. § 279.22(d) adopted by reference into Chapter 62-710 F.A.C. These federal and state rules regulating the management of used oil implement the statutory provisions of RCRA, not CERCLA. See, e.g., 42 U.S.C.

§ 6901a(3); and 42 U.S.C. § 6935. Furthermore, as noted above, the federal courts have held that, once petroleum products are leaked or spilled into the soil, they become "discarded materials" regulated by the solid or hazardous waste provisions of the RCRA [and its state counterparts]. Therefore, the CERCLA "petroleum" exclusion provision relied upon by the Respondents is not applicable to the facts of this case involving used oil that has been released into the soil at the Facility site.

Based on the above rulings, the Respondents' Exceptions 2 and 3 are denied.

Exceptions 4, 5, 6, 7, and 8

In these related Exceptions, the Respondents object to the ALJ's ultimate conclusions in paragraphs 34 and 35 of the Recommended order that the evidence was sufficient to prove that Respondents were jointly and severally liable, along with Joynt and Don's Auto Recycling, for cleaning up the releases of used oil evidenced by the discolored soils photographed by DEP's inspectors on March 15, 2002. All of these Exceptions essentially disagree with the ALJ as to the sufficiency of the evidence presented at the DOAH final hearing to support his Findings of Fact 1-27, underlying the challenged Conclusions of Law 34 and 35. I reject these evidentiary-based Exceptions for the following reasons:

1. As noted above, it is the duty of parties filing exceptions to recommended orders to furnish timely transcripts of the DOAH proceedings to reviewing agencies. It is also the duty of parties filing exceptions to recommended orders to "include appropriate and specific citations to the record." See § 120.57(1)(k), Fla. Stat. (2003). I have previously denied the Respondents' belated request to file Supplemental Exceptions in this case containing citations to transcripts of testimony not furnished until over 20 days

after the parties filed their Exceptions to Recommended Order. I also conclude that it would not be appropriate to review these late-filed transcripts of testimony in ruling on the Exceptions to Recommended Order filed by DEP and the Respondents on January 5, 2004. Thus, I am precluded from rejecting the ALJ's Findings of Fact 1-27 because I am unable to determine, "from a review of the entire record," that these factual findings were not based upon competent substantial evidence. See § 120.57(1)(l), Fla. Stat.

2. Even if the appellate courts were to subsequently rule that it is appropriate to review the transcripts of testimony belatedly furnished by the Respondents, I would not reject or modify the ALJ's Findings of Fact 1-27 underlying his related Conclusions of Law 34 and 35. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d. DCA 1995); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987. I thus have no authority to reevaluate the quantity and quality of the evidence presented at the final hearing in this case, beyond making a determination that the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822 (Fla 1st DCA 1996). I conclude that there is some competent substantial evidence of record supporting the ALJ's Findings of Fact 1-27 and related Conclusions of Law 34 and 35. This competent substantial evidence includes the expert testimony at the final hearing of DEP officials, Janine Kraemer and Gloria DePradine (Tr. Vol. I, pages 13-29; and 110-123), the testimony of Gregory Joynt (Tr. Vol. II, pages 219-238), and the photographs on page 2 of DEP Exhibit 20 of the discolored soils at the Facility.

3. The ALJ's key finding in paragraph 19 of the Recommended Order that the Respondents were partially responsible for the releases of used oil at the Facility does require inferences to be drawn from the evidence presented at the DOAH final hearing. Nevertheless, one of the functions of the ALJ is to draw permissible inferences from the evidence presented at the final hearing and make findings based on these inferences. See, e.g., Belleau v. Dept. of Environmental Protection, 695 So.2d 1305 (Fla. 1st DCA 1997); Goin v. Commission of Ethics, 658 So.2d 1131, 1138 (Fla. 1st DCA 1995). I conclude that the ALJ's crucial finding that the Respondents were partially responsible for the releases of used oil at the Facility is a permissible inference drawn from the testimony of Janine Kraemer, Gloria DePradine, Gregory Joynt, and DEP Exhibit 20.

4. The Respondents also contend that it is undisputed that they were not operating their automobile parts salvage business on the Property as of the March 15, 2002, DEP inspection date. Contrary to the Respondents' assertions, it is not undisputed that the Respondents had ceased operation of their business on the Property prior to the time of the subject inspection. Instead, the ALJ observed in his Finding of Fact 14 that "[it] is not clear exactly when Kerper and ASAP were completely off the property." The ALJ did find that the Respondents vacated the Property sometime between March 2 and the evening of March 15, 2002, the day of the DEP inspection. In addition, it is undisputed that the Respondents operated their salvage business on a portion of the Property from around October of 2000 until sometime in the first part of March of 2002. (Rec. Order; paragraphs 7, 14.) Thus, the fact that the Respondents may have vacated the Property a few days before the DEP inspection

took place does not warrant a finding or conclusion that they had no responsibility for the release of used oil at the site as charged in Count I of the NOV.

5. The Respondents further contend that the ALJ erred by ignoring the provisions of § 376.308(4), Fla. Stat., placing the burden on the defendant to "demonstrate the divisibility of damages." The Respondents' reliance on § 376.308(4) is misplaced. DEP is not seeking an award of "damages" from the Respondents under § 376.308 or under § 403.121(2), Fla. Stat. DEP is seeking corrective action from the Respondents, including implementation of an Initial Site Screening Plan to assess and remove all soils contaminated by the used oil discharges. DEP is also seeking to recover its "costs and expenses incurred while investigating and prosecuting this matter." These purported costs and expenses do not constitute "damages" under §§ 376.308(4) or 403.121(2).[4] Moreover, no such costs or expenses are being awarded to DEP in this proceeding. In addition, the record does not reflect that the Respondents have made an attempt to "demonstrate the divisibility of damages" as required by § 376.308(4). To the contrary, the Respondents have consistently maintained throughout this proceeding that they have absolutely no liability for any of the charges set forth in DEP's NOV.

In view of the above rulings, Respondents' Exceptions 4 through 8 are denied.

Exception 9

In their final Exception, the Respondents again fail to comply with the last sentence of § 120.57(1)(k), Fla. Stat. (2003), requiring a party to clearly identity the

[4] The established meaning of "damages" in the context of relief being sought in administrative or judicial actions is the sum of money awarded as compensation for an injury. See, e.g., 17 Fla. Jur. 2d, Damages, § 1.

disputed portion of the recommended order by page number or paragraph. In addition, the issue of the Respondents' entitlement to attorney's fees and costs in this administrative enforcement proceeding is a matter to be determined by the ALJ, not by this agency. See §§ 403.121(2)(f), 57.111(4)(d), and 120.595(1)(c), Fla. Stat. In his Conclusions of Law 40 and 42, the ALJ expressly rejected the Respondents' request for an award of attorney's fees and costs under each of the cited statutory provisions. I decline to reject or modify these legal conclusions of the ALJ. Accordingly, the Respondents' Exception 9 is denied.

RULINGS ON DEP'S EXCEPTIONS

Exception to Finding of Fact No. 28

DEP's first Exception objects to Finding of Fact 28, wherein the ALJ finds that it is unnecessary to address Counts IV, V, and VI of the NOV dealing with the Respondents' failure to document proper disposal of wastes at the Facility. DEP, like any other party in a formal administrative proceeding, is required to furnish transcripts of testimony in support of exceptions to findings of fact in a recommended order. Since DEP did not furnish transcripts of testimony of the DOAH final hearing in support of its Exception to Finding of Fact 28, this Exception is denied on procedural grounds. Nevertheless, with respect to future enforcement proceedings, I do not view the ALJ's statements in Finding of Fact 28 to be controlling precedent. These factual findings adopted, not on their merits, but due solely to a procedural defect in DEP's Exceptions (no transcript), are limited to the particular facts of this case. Accord Barnett v. Wentz, DOAH Case No. 02-3252, OGC Case No. 02-1127 (DEP Final Order Aug. 4, 2003).

Exception to Conclusion of Law No. 31

DEP's second Exception objects to the ALJ's Conclusion of Law 31 (concluding that Counts IV, V, and VI of the NOV are "moot"). Conclusion of Law 31 is thus directly related to Finding of Fact 28, which has been adopted in this Final Order on the basis of a procedural defect (no transcript). Since the ALJ's conclusions in paragraph 31 are integrally connected to his findings in paragraph 28, this Exception of DEP is also denied on procedural grounds. However, as observed in Barnett v. Wentz, supra, an ALJ's contested findings and conclusions adopted in a DEP Final Order due solely to the lack of a transcript of testimony being furnished on administrative review are not deemed to be binding precedent on future actions of this agency.

Exception to Conclusion of Law No. 39

DEP's final Exception objects to Conclusion of Law 39, wherein the ALJ concluded that "DEP should not be considered a prevailing party" under § 403.121(2)(f), Fla. Stat. This legal conclusion was reached by the ALJ despite his preceding conclusion in paragraph 38 that "DEP has not requested relief under this statute." DEP did not object to Conclusion of Law 38, which is adopted in this Final Order. Since DEP has not requested relief under § 403.121(2)(f) in this proceeding, I conclude that the ALJ's interpretation of this statute in Conclusion of Law 39 is unnecessary dictum, which should not be incorporated in this Final Order.[5] DEP's Exception to Conclusion of Law 39 is thus granted to the extent that this Final Order does not address the issue of whether DEP is a "prevailing party" under § 403.121(2)(f).

---

[5] Pursuant to § 120.57(1)(l), Fla. Stat., I find that the treatment of Conclusion of Law 39 as dictum is more reasonable than adopting the ALJ's unnecessary legal conclusion.

It is therefore ORDERED:

A. Limited as to precedent by the above rulings on DEP's Exceptions, the ALJ's Finding of Fact 28 and Conclusion of Law 31 are adopted herein.

B. Conclusion of Law 39 is deemed to be unnecessary dictum and is not adopted.

C. The remainder of the ALJ's Findings of Fact and Conclusions of Law in the Recommended Order are adopted and incorporated by reference herein.

D. The Respondents, along with Joynt and Don's Auto Recycling, are jointly and severally liable for cleaning up the releases of used oil at the Facility evidenced by the discolored soils photographed by DEP's inspectors on March 15, 2002, and shown on page 2 of DEP's Exhibit 20.

E. The Respondents, along with Joynt and Don's Auto Recycling, are also jointly and severally liable for implementation of the Initial Site Screening Plan attached as Exhibit I to DEP's OCA and described on page 3 of the Recommended Order.

F. In the event the results of the Initial Site Screening indicate that further assessment and/or remediation is required, the Respondents, along with Joynt and Don's Auto Recycling, are also jointly and severally liable for completion of the required actions, consistent with the "Corrective Actions for Contaminated Site Case" (DEP Exhibit 16).

G. Counts II through VIII of the NOV are dismissed.

H. The Respondent's Motion for Attorney's Fees and Costs is denied.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to § 120.68, Fla. Stat., by the filing of a Notice of Appeal pursuant to

Rule 9.110, Florida Rules of Appellate Procedure, with the DEP clerk 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 DEP clerk.

DONE AND ORDERED in Tallahassee, Florida, this 15th day of March, 2004.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Colleen M. Castille

COLLEEN M. CASTILLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Cynthia L. Kinsey
Deputy CLERK

3/15/04
DATE

CERTIFICATE OF SERVICE

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

Albert E. Ford II, Esquire
Webb, Wells & Williams, P.A.
994 Lake Destiny Road
Suite 102
Altamonte Springs, FL 32714

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:

David J. Tarbert, Esquire
Jason Sherman, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 16TH day of March, 2004.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

For

J. TERRELL WILLIAMS
Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242