STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner, vs. THOMAS KERPER and ALL SALVAGED AUTO PARTS, INC., Respondents.	)	Case No. 02-3907

RECOMMENDED ORDER

On October 8-9, 2003, the final administrative hearing was held in this case in Orlando, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: David J. Tarbert, Esquire
Jason Sherman, Esquire
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

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

STATEMENT OF THE ISSUE

The issue in this case is whether the Notice of Violation (NOV) and Orders for Corrective Action (OCA) filed by the Department of Environmental Protection (DEP) against Respondents,

Thomas Kerper (Kerper) and All Salvaged Auto Parts, Inc. (ASAP), in DEP OGC File No. 02-0447 should be sustained.

PRELIMINARY STATEMENT

On May 3, 2002, DEP issued an NOV and OCA directed to Donald Joynt (Joynt), Don's Auto Recycling, Inc. (Don's Auto Recycling), Kerper, and ASAP in DEP OGC File No. 02-0447. The NOV alleged environmental violations by Don's Auto Recycling, managed by Joynt, and by ASAP, managed by Kerper, at a Facility owned by Joynt located at 3141 Sharpe Road, Apopka, Florida. Specifically, the alleged violations included: Count I, failure to respond to used oil releases; Count II, failure to perform a waste determination on an estimated three 55-gallon drums and three 5-gallon containers with unknown contents, on used oil filters, and on burned and buried lead acid batteries; Count III, failure to clearly mark or label containers of used oil; Count IV, failure to document disposal of hazardous waste including gasoline, waste antifreeze, and waste batteries; Count V, failure to document proper disposal of used oil and waste gasoline; Count VI, failure to document reclamation of freon; Count VII, allowing contaminated stormwater to drain into low areas onsite and offsite without proper pollution controls and stormwater permits; and Count VIII, responsibility for DEP investigative costs "of not less than $500.00" The OCA required: compliance with DEP rules on "hazardous waste management," "used oil," "freon management," National Pollutant Discharge Elimination System Permitting

(NPDES); cessation of used oil discharges to ground surface; contract with a reliable consulting firm and/or laboratory to conduct a specified Initial Site Screening Plan,[1] and waste determination; label all used oil containers; maintain records documenting disposal of used oil, used oil filters, waste antifreeze, waste mineral spirits/gasoline, waste batteries, waste tires, and reclaimed freon; provide written documentation that the Facility has filed a Notice of Intent (NOI) for a Multi-Sector Generic Permit (MSGP) as required by the applicable NPDES rule; develop and implement a Stormwater Pollution Prevention Plan (SWPPP) as required in the NPDES MSGP; and pay DEP's costs and expenses in the amount of $500.

The Notice of Rights attached to the NOV and OCA provides that the allegations in the NOV and the OCA "will be adopted by the Department in a Final Order if the Respondents fail to timely file a petition for a formal hearing or informal hearing, pursuant to Section 403.121, F.S." Joynt and Don's Auto Recycling did not request a hearing, reportedly opting to negotiate a settlement. Kerper and ASAP filed a Petition for Formal Administrative Hearing (Petition) on July 12, 2002. However, the Petition was not referred to the Division of Administrative Hearings (DOAH) until October 7, 2002.

The final administrative hearing was first scheduled for February 12-13, 2003, in Orlando, Florida. However, DEP filed an unopposed motion for a continuance on the ground that Joynt had

died, and that DEP had to ascertain whether his heirs would conclude the settlement being negotiated between DEP and Joynt at the time of his death. The case was placed in abeyance until May 5, 2003. On May 16, 2003, DEP reported that it was "ready for hearing on the Petition whenever the Petitioner decides to pursue it." On May 29, 2003, the caption was corrected to reflect that DEP was the Petitioner, and the final hearing was rescheduled for August 21-22, 2003. Respondents' Agreed Request for Continuance was granted, and the final hearing again was rescheduled, this time to October 8-9, 2003. A subsequent motion by Respondents to again continue the final hearing was opposed by DEP, and was denied on October 6, 2003. On the next day, Respondents filed a Motion for Attorney's Fees.

At the final hearing, DEP called the following witnesses: Janine Kraemer (expert); Gloria DePradine (expert); Mark Naughton (expert); Mark Overstreet (expert); Raymond Thompson; and Gregory Joynt. DEP also had DEP Exhibits 1 through 20 admitted in evidence. Respondents called the following witnesses: Vincent Wolle; Rafael Rivera; Sandra Lovejoy; David Beerbower (expert); José Luis Benitez; Thomas Kerper; Gabriel Lynch; and Sue Walsh. Respondents also had Respondents' Exhibits 1 through 10 admitted in evidence. In rebuttal, DEP recalled Janine Kraemer and called Lee Burson.

After presentation of evidence, neither party requested a transcript of the final hearing. The parties requested and were

given until November 3, 2003, in which to file proposed recommended orders (PROs). DEP filed its PRO on the due date; Respondents filed their PRO the next day.

On December 1, 2003, Respondents filed a Renewed Motion for Attorney's Fees, which DEP moved to strike on December 5, 2003, as amounting to an unauthorized supplement to Respondents' PRO.

On December 17, 2003, a Final Order was entered. However, the Final Order inadvertently overlooked the sentence at the end of Section 403.121(2)(d), Florida Statutes (2003), stating: "The Department retains its final-order authority in all administrative actions that do not request the imposition of administrative penalties." As a result, the purported Final Order is withdrawn. See Taylor v. Dept. of Prof. Reg., 520 So. 2d 557 (Fla. 1988).

FINDINGS OF FACT

1. The real property located at 3141 Sharpe Road, Apopka, Florida, is owned by the heirs of Donald Joynt, who owned it for the 30 years prior to his death in 2002. The property consists of approximately 40 acres in the shape of a right triangle with the west side bordered by Sharpe Road, the south side by a potting soil business, and the northeast side (the hypotenuse of the right triangle) bordered by a railroad track. Prior to his death, Joynt used the property primarily for the purpose of operating a junkyard and recycling business ultimately entitled Don's Auto Recycling.

2. At some time before 2000, Joynt became desirous of selling his property. He offered it to a neighbor named José Luis Benitez for $600,000. Benitez counter-offered for between $350,000 and $400,000 because he thought it would cost $200,000 to $250,000 to clean the property up. Joynt rejected the counter-offer, and asked Benitez to help him find a buyer who would pay more than Benitez. At some point, Joynt listed the property with a real estate broker for $600,000.

3. In 1999, Kerper was operating an automobile parts salvage business at a location near Joynt's property. Kerper needed a new location to move his business and inventory. A real estate broker showed him Joynt's property. The broker told Kerper that the seller's broker said the property was clean and had no environmental problems. The broker also told Kerper that Orange County had recently purchased an easement for $300,000 to run a drainage ditch through the property to a local lake, which was true. While this gave Kerper some level of assurance, the broker advised Kerper to have an environmental assessment done before going forward with the sale.

4. After being shown the property by the broker, Kerper spoke with Joynt directly. It was agreed that they could save the real estate commission and split the savings by waiting until the listing expired. Joynt personally assured Kerper that there were no environmental issues, as evidenced by Orange County's purchase of the easement for a drainage ditch. In late March of

2000, after expiration of the real estate commission, Kerper and Joynt entered into an informal agreement allegedly written on a scrap of paper, which was not placed in evidence. Kerper testified that the agreement was for him to buy the property for $500,000, with $100,000 down, and the balance payable over time at seven percent interest. He also testified that the required $100,000 down payment would be payable in installments, with $25,000 payable whenever Joynt cleaned 25 percent of the site to make it usable by Kerper for his business operations.

5. When it came time for Kerper to move onto Joynt's property, Kerper discovered that Joynt had not done any clean-up or removed any of his property from the site. Used cars, car parts, and tires that belonged to Joynt remained throughout the site. According to Kerper, it was agreed that Kerper would help Joynt clean off the western half of the property, which was split approximately in half by a stream, while Joynt worked on cleaning off the eastern half of the property.[2]

6. Starting from the gate at Sharpe Road, Kerper began removing junk from the western side to the eastern side of the site for Joynt to remove from the property. Pieces of equipment and used car parts that had been left there by Joynt were removed from this section of the property. When enough space was cleared off, Kerper began setting up his auto salvage operations on the western side. He used a bulldozer to level the driveways and spread powdered concrete where the ground was soft. He also used

the bulldozer to level an area near the scale house, which was on the western side of the property, but continued to be used by Joynt for Don's Auto Recycling business. In doing this work, his workers encountered steel reinforcement bars, which Kerper had them cut with a torch. Some tires and battery casings also were visible in the ground. Kerper had several truckloads of fill dumped in the area and installed a concrete pad for storing and dismantling automobiles.

7. In September or October of 2000, Kerper was evicted from his prior business location, and he had to move to Joynt's property regardless of its condition. As he increased business operations on the cleared spaces, Kerper continued to clear more space on the western side of the property. Another concrete pad was installed farther to the north. Eventually, Kerper was operating ASAP on approximately ten acres on the western side of the 40-acre site.

8. As Kerper continued to move north, his heavy equipment began encountering assorted kinds of buried material. When a buried propane tank exploded, Kerper stopped working his heavy equipment in the area and confronted Joynt. Joynt denied any knowledge of buried tanks and stated they must have been placed there by someone else. Joynt told Kerper he would let Kerper move his operations to the east side of the property when Joynt finished cleaning it up, and then Joynt would finish clearing the western side for Kerper. Kerper agreed, and continued making

payments on the required down payment. According to Kerper, he eventually paid $90,000 of the down payment.

9. By August of 2001, Kerper began to have serious misgivings about Joynt's promises and the condition of the site, and he decided to seek advice. Kerper hired David Beerbower, vice-president of Universal Engineering, to perform an assessment of the northern portion of his side of the site (in the vicinity where the exploding tanks were encountered). During his assessment on August 20, 2001, Beerbower observed various automotive parts including numerous crushed fuel tanks, antifreeze containers, and motor oil containers being excavated from the upper three feet of soil. It was determined by Beerbower, and stated in his written report to Kerper, dated September 21, 2001, that these parts appeared to have been buried there several years ago. This determination, which DEP does not dispute, was based on the high level of compaction of the soil found around these items that could be attributed to either the passing of a significant amount of time or a bulldozer passing over the items. Since the excavations Beerbower observed were in a separate location from where Kerper had already bulldozed, the soil compaction around these items could not be attributed to Kerper's bulldozing. It was stated in Beerbower's letter that the "amount of buried automotive debris qualifies this area essentially as an illicit landfill."

10. Mark Naughton from the Risk Management Division of the Orange County Environmental Protection Division (OCEPD), which runs the petroleum storage tank and cleanup program for Orange County under contract with DEP, was also present during the time Beerbower conducted his assessment. Naughton agreed with Beerbower's assessment that Kerper is not liable for the assessment or remediation of this area. Naughton also advised Kerper to move ASAP off Naughton's property and to seek legal advice from attorney Anna Long, who used to be the Manager of OCEPD.

11. Meanwhile, according to Kerper, Joynt changed his position and began to maintain that it was Kerper's responsibility to clean up the western side of the property. Given the newly-discovered environmental condition of the property, Kerper did not feel it was in his best interest to purchase the property "as is," and contacted Long to help him negotiate to extricate himself from his arrangement with Joynt. While negotiations proceeded, Kerper began to scale down ASAP's operations in anticipation of relocating. Kerper began fixing up more whole automobiles for resale, and had a car crusher used in connection with ASAP's business begin crushing more cars for removal from the site for recycling.

12. Eventually, Long had Beerbower conduct another assessment of portions of Joynt's property to try to establish responsibility for contamination as between Kerper and Joynt. On

February 13, 2001, Beerbower took a surface water sample from a "drain pipe under the north driveway," a soil sample "where the car crusher was," and another soil sample from "the sandblasting area." The evidence was not clear as to the exact location of these samples, particularly the soil samples, as described in Beerbower's written report to Long dated March 11, 2002. But it appears that the "car crusher" refers to the location of Respondents' car crusher operation in the northern part of the site, just across the northern driveway; it appears that the sandblasting area refers to a location used by Joynt on the eastern side of the property, but located just east of the trailers used by Kerper for his offices. These samples were analyzed and found not to contain volatile organic compounds (VOC) or total recoverable petroleum hydrocarbons (TRPH) in excess of Florida's cleanup target levels.

13. Kerper continued to operate his junkyard until the beginning of March of 2002. On March 5, 2002, Long filed a citizen's complaint with OCEPD on Kerper's behalf. While acknowledging that Kerper was operating on the site at the same time as Joynt in recent years, the complaint alleged Kerper's discovery that Joynt had been burying waste batteries, tires, and gasoline tanks on the property and covering the burial sites with broken concrete pieces. The complaint alleged that Kerper had been moving his personal property off of the site since August of 2001, when he backed out of his "lease to purchase" agreement

with Joynt, and would be "completely off the property by 3/10/02."

14. It is not clear exactly when Kerper and ASAP were completely off the property. The testimony and evidence on the point is inconsistent. Kerper, after some confusion, placed the date at March 9, 2002. His wife said it was March 2, 2002. An attorney representing Kerper and ASAP in an eviction proceeding filed by Joynt and his wife, filed a notice "that as of the evening of March 15, 2002, [ASAP had] vacated the property." In any event, the evidence seemed clear that Kerper and ASAP did not go on Joynt's property on or after March 15, 2002.

15. On March 15, 2002, DEP representatives inspected Joynt's property in response to Long's complaint. Kerper remained outside the front gate of the property and did not participate in the inspection. This inspection covered the entire property including the section that had been occupied by Kerper and ASAP.

16. Joynt told the DEP inspectors that Respondents were responsible for a 55-gallon drum found tipped over on its side on the western half of the site and leaking a substance that appeared to be used oil from a hole in the side of the drum. DEP's inspectors righted the drum, which still was partly full of its contents. There also were several other unlabeled 55-gallon drums and 5-gallon containers "of unknown fluids"; a burn pile containing burned oil filters, battery casings, and electrical

wiring; other broken battery casings; and an area of dark-stained soil which appeared to be soaked with used oil. Joynt accepted responsibility for other contamination on the site, but told DEP that Kerper and ASAP were responsible for these items. Kerper denied the allegations.

17. As to the leaking oil drum, Kerper first contended that DEP did not prove that the overturned drum contained used oil. But the evidence was clear that DEP's inspectors were in a position to determine that the liquid was oily. Respondents also contended that the drum would have been empty, not still partly full, if Kerper or ASAP had left it on its side at the site when they vacated the property several days earlier. Kerper alleged that Joynt could have put the hole in the drum and turned it over shortly before the arrival of DEP's inspectors. But, as stated, it was not clear when Kerper and ASAP vacated the site, and it was not clear from the evidence that Respondents were not responsible.

18. Similarly, the other unlabeled drums and containers were in a part of the site occupied and used by Respondents. Despite Kerper's denials, it is not clear from the evidence that they belonged to Joynt or that they were placed where DEP found them after Respondents vacated the site. Testimony that Respondents had containers properly labeled "used oil," "antifreeze," and "gasoline" inside one of the trailers on the site did not negate the existence of unlabeled drums and

containers on the site. However, there was no proof whatsoever as to what the closed drums and containers held. But some were open, and DEP's inspectors could see that these held an oily substance (possibly hydraulic fluid), mixed with other substances.

19. As to the dark-stained soil, none of it was tested, and Respondents contended that it was just naturally darker in color or possibly wet from water or some other liquid, DEP's witness conceded could explain the color variation. (Natural reasons such as different soil or rainwater probably do not explain the color variations in the site.) Joynt told DEP's inspectors that the discoloration seen by them on March 15, 2002, was from a hydraulic hose on a piece of heavy equipment that burst earlier. The evidence was not clear who Joynt was saying owned and operated the equipment. But Respondents also blamed Joynt's employees for repeatedly blowing hoses on aged heavy equipment all over the site. It is found that the dark-stained soil probably was the result of one or more releases of hydraulic fluid or motor oil. However, the testimony and evidence was not clear that all of the releases were Joynt's doing and that Respondents bear no responsibility at all for the releases observed on March 15, 2002, in the areas where Respondents were operating.

20. Respondents were able only to produce documentation of proper disposal of 232 gallons of oily water through IPC/Magnum,

dated February 13, 2002, and 29 batteries through Battery World, dated March 8 and 14, 2002.

21. The testimony of Kerper and others was that Respondents generally removed gasoline from automobiles and placed it in a marked container for reuse within a day or two by Respondents and their employees. The testimony was that used oil and antifreeze generally also were removed from automobiles and placed in marked containers until proper disposition. The testimony was that batteries were removed from automobiles and that most were given to one of the employees to sell for a dollar apiece. There was no documentation to support this testimony.

22. There was testimony that, when Respondents had cars crushed, E & H Car Crushing Co., Inc., managed the collection and proper disposition of gasoline, used oil, and batteries. But the documentation placed in evidence contained no description of the wastes removed, but only provided a weight calculation of the materials removed from Respondents' facility.

23. There was testimony that Gabriel Lynch, who was properly licensed, removed freon from automobiles at Respondents' facility every two to three days, or upon request. Respondents would trade the freon Lynch recovered and used in his business, Gabe's Auto Tech, for repair work on Respondents' vehicles. However, no documentation of these transactions was produced. (Lynch testified that he did not know it was required that he provide documentation to Respondents.)

24. Runoff from where Respondents were operating on Joynt's property entered the stream running north-south through the center of the property. Neither Joynt nor Respondents had a stormwater permit or an exemption from stormwater permitting.

25. Kerper argued that his duties were limited to managerial responsibilities for ASAP, and that he was not at any time responsible for ASAP's day-to-day operations and did not conduct any activities that may or could have resulted in hazardous waste or petroleum discharge violations so as to be liable as an "operator." But the evidence was clear that Kerper was involved in ASAP's day-to-day operations.

26. While the evidence did not totally absolve Respondents from the allegations in the NOV, several people testified on Respondents' behalf as to their practice of properly disposing of hazardous materials generated by his business. For example, Rafael Rivera, a former employee, testified that Kerper would get mad at him if any gas or oil was spilled and left on the ground or was not disposed of properly. Meanwhile, it appeared that environmental problems at Joynt's site existed for years before the arrival of Respondents. Mrs. Sandra Lovejoy, a neighboring property owner for the past 30 years, testified that she had experienced problems with her water quality, such as a foul smell or funny taste, for many years before Respondents moved onto Joynt's property. An inspection was conducted by OCEPD in September of 2000, in response to Lovejoy's complaint regarding

fuel odor and a drinking well which was no longer in service. In part, OCEPD's written report on the complaint found "[m]any spots of surficial petroleum contamination . . . from gasoline, motor oil and other petroleum products leaking or spilled from the junk vehicles" at Don's Auto Recycling and included a recommendation "referring this site to the FDEP task force that has been put together to inspect and deal with junk yard facilities," although "[n]o Petroleum Cleanup issues were found at [that] time." For reasons not explained by the evidence, it does not appear that Don's Recycling was referred to any task force, or that OCEPD followed up on the reported contamination.

27. Respondents contend that this entire proceeding against them was part of a vendetta against Kerper for going to the local television station to expose the condition of the site, the failure of OCEPD and DEP to follow up on the September 2000, report and recommendation, and Orange County's purchase of a north-south drainage easement through the western portion of the property in 2000. The evidence did not prove this contention. However, it is clear that Joynt was responsible for the condition of most of the 40-acre site, not Respondents, and that Joynt shared responsibility with Respondents for the conditions alleged in the NOV.

28. While this case has been pending, Joynt's heirs have cooperated with DEP in cleaning up the site, and DEP acknowledged in its PRO that several items in the OCA--specifically, those

relating to Counts II, III, and VII of the NOV--are moot and unnecessary in light of Respondents' eviction from the property and subsequent cleanup operations by Joynt's heirs. It also is suggested that the corrective actions requested in DEP's PRO to address Counts IV, V, and VI of the NOV--relating to failure to document proper disposal of wastes--are unnecessary. It seems clear that, to the extent such disposals occurred, any available documentation would have been placed in evidence during the final hearing. Ordering that they be produced within 30 days of the Final Order, as suggested in DEP's PRO, would be a futile act.

29. Count VIII of the NOV alleged costs "of not less than $500. In its PRO, DEP requested recovery of $1,367.31 of costs. Some of these costs--$867.31--were itemized in the PRO. The balance appears to relate to the $500 alleged in the NOV. There was no evidence introduced at the final hearing as to any of these alleged costs, and the costs itemized in the PRO seem to represent travel costs of counsel for DEP.

CONCLUSIONS OF LAW

30. Section 403.121(2), Florida Statutes, provides for administrative remedies and states in pertinent part:

> (a) The department may institute an administrative proceeding to establish liability and to recover damages for any injury to the air, waters, or property, including animal, plant, or aquatic life, of the state caused by any violation. The department may order that the violator pay a specified sum as damages to the state.
> (b) If the department has reason to believe a violation has occurred, it may

> institute an administrative proceeding to order the prevention, abatement, or control of the conditions creating the violation or other appropriate corrective action. Except for violations involving hazardous wastes, asbestos, or underground injection, the department shall proceed administratively in all cases in which the department seeks administrative penalties that do not exceed $10,000 per assessment as calculated in accordance with subsections (3), (4), (5), (6), and (7). The department shall not impose administrative penalties in excess of $10,000 in a notice of violation. . . .
>
> (c) An administrative proceeding shall be instituted by the department's serving of a written notice of violation upon the alleged violator by certified mail. . . . The notice shall specify the provision of the law, rule, regulation, permit, certification, or order of the department alleged to be violated and the facts alleged to constitute a violation thereof. An order for corrective action, penalty assessment, or damages may be included with the notice. . . .
>
> (d) If a person timely files a petition challenging a notice of violation, that person will thereafter be referred to as the respondent. . . . The department has the burden of proving with the preponderance of the evidence that the respondent is responsible for the violation. No administrative penalties should be imposed unless the department satisfies that burden. Following the close of the hearing, the administrative law judge shall issue a final order on all matters, including the imposition of an administrative penalty. . . . The Department retains its final-order authority in all administrative actions that do not request the imposition of administrative penalties.

31. As indicated in the Findings of Fact, it is only necessary to address Count I of the NOV regarding the releases of used oil. The rest of the NOV is moot.

32. Under Section 403.727(1)(a), Florida Statutes (2003), it is unlawful for the operator of a hazardous waste facility to fail to comply with DEP rules. Under the definition in Section 403.703(22), Florida Statutes, "'[h]azardous waste facility' means any building, site, structure, or equipment at or by which hazardous waste is disposed of, stored, or treated." Contrary to Respondents' arguments, it is concluded that they operated a "hazardous waste facility" on Joynt's property.

33. Florida Administrative Code Rule 62-710.210, governing "Used Oil Management," adopts 40 C.F.R. Part 279. Under the definitions in 40 C.F.R. s. 279.1, "used oil" is defined 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." In addition, "used oil generator" is defined as "any person, by site, whose act or process produces used oil or whose act causes used oil to become subject to regulation." According to those definitions, Respondents are "used oil generators."

34. Under 40 C.F.R. s. 279.22(d), "used oil generators" are obligated to respond to any release of used oil to the environment by stopping the release, containing the release, and cleaning up and managing the release. The evidence was sufficient to prove that Respondents were responsible, 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 (DEP Exhibit 20, photographs 5 and 7 on page 2 of the Exhibit).

35. Respondents contend that only Joynt and Don's Auto Recycling should be responsible for cleaning up the oil releases observed on March 15, 2002. In support of this contention, they cite the defense authorized by Section 403.727(5)(d), Florida Statutes, for "a person alleged to be in violation of this act, who shall plead and prove that the alleged violation was solely the result of . . . : (d) [a]n act or omission of a third party other than an employee or agent of the defendant or other than one whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the defendant . . . ." As found, Respondents' evidence was not sufficient to prove that the used oil releases observed on March 15, 2002, were solely the result of the acts or omissions of Joynt and Don's Auto Recycling or some other third party. As a result, it is concluded that Respondents are jointly and severally liable for them, along with Joynt and Don's Auto Recycling. It is appropriate under Section 403.121(2)(b), Florida Statutes, to order them to assess and remediate the used oil releases observed on March 15, 2002, as alleged under Count I of the NOV.

36. Count VIII of the NOV relates to costs recovery. Section 403.141(1), Florida Statutes, provides:

> Whoever commits a violation specified in s. 403.161(1) is liable to the state for any damage caused to the air, waters, or property, including animal, plant, or aquatic

> life, of the state and for reasonable costs and expenses of the state in tracing the source of the discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including animal, plant, and aquatic life, of the state to their former condition, and furthermore is subject to the judicial imposition of a civil penalty for each offense in an amount of not more than $10,000 per offense. However, the court may receive evidence in mitigation.

(Emphasis added.) Section 403.161(1)(a), Florida Statutes, makes it a violation for any person to violate or fail to comply with any DEP rule.

37. Count VIII of the NOV alleged that DEP "incurred expenses to date while investigating this matter in the amount of not less than $500.00." But there was no proof whatsoever as to the expenses incurred as of the date of the NOV, and none of the costs or expenses itemized in DEP's PRO appear to be for any of the purposes described in Section 403.141(1), Florida Statutes.

38. Section 403.121(2)(f), Florida Statutes, provides:

> In any administrative proceeding brought by the department, the prevailing party shall recover all costs as provided in ss. 57.041 and 57.071. The costs must be included in the final order. The respondent is the prevailing party when an order is entered awarding no penalties to the department and such order has not been reversed on appeal or the time for seeking judicial review has expired. The respondent shall be entitled to an award of attorney's fees if the administrative law judge determines that the notice of violation issued by the department seeking the imposition of administrative penalties was not substantially justified as defined in s. 57.111(3)(e). No award of

> attorney's fees as provided by this subsection shall exceed $15,000.

Respondents cited this statute in their Motion for Attorney's Fees and Costs, but DEP has not requested relief under this statute.

39. Even if DEP had requested relief under Section 403.121(2)(f), Florida Statutes, it is concluded that DEP should not be considered to be the prevailing party. Although DEP prevailed on Count I over Respondents' opposition, DEP unnecessarily litigated moot points under Counts II through VII of the NOV, forcing Respondents to defend against them at the final hearing.

40. It also is concluded that Respondents should not recover costs under Section 403.121(2)(f), Florida Statutes, because, while no penalties are being awarded to DEP, DEP never asked for the imposition of penalties against Respondents in this case. As to Respondents' request for an award of attorney's fees under this statute, Respondents did not prove that the NOV and OCA were not substantially justified at the time they were issued.

41. Respondents have not itemized or proven any costs or expenses; they request an evidentiary hearing this purpose. Meanwhile, DEP has alleged but not proven costs and has not requested any further proceedings to determine them. However, DEP's PRO requested $867.31 for what appears to be travel expenses of its counsel as part of its request for a total of

$1,367.31. Travel expenses of counsel are not among the costs recoverable under Sections 57.041 and 57.071, Florida Statutes. Under those statutes, the only recoverable costs applicable to this case would have been "legal costs and charges" and the "expense of the court reporter for per diem" (no transcript having been ordered, and the limited provision for recovery of "[e]xpert witness fees" under Section 57.071(2), Florida Statutes, having been held unconstitutional in Estate of Cort v. Broward County Sheriff, 807 So. 2d 736 (Fla. 4th DCA 2002).) See Miller v. Hayman, 766 So. 2d 1116 (Fla. 4th DCA 2000). Cf. also Statewide Uniform Guidelines for Taxation of Costs in Civil Actions.

42. Respondents' Motion for Attorney's Fees and Costs also requested an award of attorney's fees and costs under Sections 57.111 and 120.595(1)(c), Florida Statutes (2003). Those requests also have no merit under the facts of this case.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order providing:

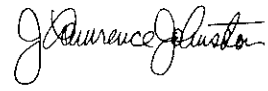
1. Under Count I of the NOV, Respondents shall be jointly and severally liable, along with Donald Joynt and Don's Auto Recycling, for cleaning up the releases of used oil evidenced by the discolored soils photographed by DEP's inspectors on

March 15, 2002 (DEP Exhibit 20, photographs 5 and 7 on page 2 of the exhibit). As such, they shall be responsible, along with Donald Joynt and Don's Auto Recycling, for implementation of DEP's Initial Site Screening Plan to assess and remove all contaminated soils resulting from those releases. If the results of the Initial Site Screening indicate that further assessment and/or remediation of the contamination is required, Respondents shall also participate, along with Donald Joynt and Don's Auto Recycling, in completing the required work, consistent with the "Corrective Actions for Contaminated Site Cases" (DEP Exhibit 16).

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

3. Respondents' Motion for Attorney's Fees and Costs is denied.

DONE AND ENTERED this 19th day of December, 2003, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of December, 2003.

ENDNOTES

[1]/ The OCA stated: "Corrective Action activities shall be conducted as outlined in the 'Corrective Actions for Contamination Site Cases' attached as EXHIBIT I . . . ." But the attached Exhibit I was an Initial Site Screening Plan. It would appear from the OCA that a contamination assessment plan and remediation plan would follow depending on the results from the screening plan.

[2]/ Throughout the hearing, witnesses confused the eastern and western sides of the property. DEP's PRO also seemed to confuse the two. These findings reflect an attempt to resolve the confusion based on the greater weight of the evidence, including Respondents' Exhibits 2, 3 and 8.

COPIES FURNISHED:

David J. Tarbert, Esquire
Jason Sherman, Esquire
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

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

Kathy C. Carter, Agency Clerk
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Teri L. Donaldson, General Counsel
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

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.