

11-12-03

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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ADMINISTRATIVE
LAW DIVISION

ASHER G. SULLIVAN, JR., d/b/a
ST. AUGUSTINE TRUST,

Petitioner,

and

ASSAD O. KNIO and SELMA KNIO,

Intervenors,

vs.

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondent.

AP

CAS-CLOS

OGC CASE NO.: 02-1914
DOAH CASE NO.: 02-4850

FINAL ORDER

On November 12, 2003, an Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order in this formal administrative proceeding. Copies of the Recommended Order were served upon counsels for the Petitioner, Asher G. Sullivan, Jr., d/b/a St. Augustine Trust ("Petitioner"), Intervenors, Assad and Selma Knio ("Intervenors"), and the Department of Environmental Protection ("DEP"). A copy of the DOAH Recommended Order is attached hereto as Exhibit A. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

The Petitioner is the owner of commercial property located on State Road 207 in Elkton, St. John's County, Florida (the "Site"). The Site contained several underground petroleum storage tanks ("UPSTs") when purchased by the Petitioner around 1995. The Petitioner has not operated a petroleum facility or gas station on the Site, but was made aware of the existence of the UPSTs prior to the purchase of the property. Due to the existence of these UPSTs, the Site now owned by the Petitioner was designated as a petroleum storage facility regulated by DEP (the "Facility").

In September of 1997, DEP issued to the Petitioner a "Notice of Eligibility" entitling the Facility to restoration coverage under the Florida Petroleum Liability Restoration and Insurance Program ("FPLRIP") set forth in § 376.3072, Florida Statutes. The stated effective term of the FPLRIP coverage of the Petitioner's Facility pursuant to this 1997 Notice of Eligibility was from September 3, 1997, to and including September 3, 1998.

The FPLRIP provides funding assistance for the cleanup of discharges at petroleum storage facilities regulated by DEP, provided the owner or operator "is a participant in the third-party liability insurance program or otherwise meets applicable financial responsibility requirements." See § 376.3072(2)(a)1, Florida Statutes. DEP relied upon a "Florida Storage Tank Third-Party and Corrective Action Insurance Policy" issued to the Petitioner by Commerce and Industry Insurance Company (the "Policy") in making the determination in September of 1997 that the Petitioner had satisfied the FPLRIP financial responsibility requirements at that time.

On or about September 15, 1998, a contractor removed all of the UPSTs from the Site. On the same date, the contractor notified the Petitioner of the discovery of a discharge of petroleum on the property. On September 17, 1998, the contractor filed a "Discharge Report Form" with DEP confirming the discovery of this petroleum discharge as of September 15, 1998. The Petitioner subsequently filed a claim with DEP seeking coverage under the FPLRIP for the cleanup of the petroleum discharge at the Facility.

On October 21, 2002, DEP made a written determination that Petitioner's Facility was not eligible for FPLRIP coverage because the Facility was "not properly enrolled in FPLRIP after September 3, 1998." The Petitioner then filed a timely petition contesting DEP's determination of the Facility's ineligibility for FPLRIP coverage. The matter was forwarded to DOAH for formal administrative proceedings, and a final hearing was held on September 4, 2003, before Administrative Law Judge Charles A. Stampelos ("ALJ").

RECOMMENDED ORDER

The ALJ found that the Policy issued to the Petitioner in September of 1997 had expired or lapsed by its express language on September 3, 1998. The ALJ also found that the Petitioner had been notified by letter dated August 2, 1998, of the opportunity to renew the Policy, but the Petitioner "did not respond to the letter because . . . the tanks were due to be pulled out before September 3, [1998]." The ALJ thus concluded that the Facility is not eligible for FPLRIP coverage because the Petitioner failed to prove it had third-party and excess liability insurance coverage in effect on September 17, 1998, the date the petroleum discharge was reported to DEP. The ALJ ultimately recommended that DEP enter a final order denying restoration coverage for Petitioner's Facility under the FPLRIP.

RULINGS ON THE PETITIONER'S EXCEPTION

The Petitioner filed a single Exception to the Recommended Order. This Exception does not object to the ALJ's basic legal conclusion that the subject Facility is not eligible for financial assistance under the FPLRIP because of the Petitioner's failure to prove it had third-party and excess liability insurance coverage in effect on the date the petroleum discharge was reported to DEP. The Petitioner's Exception also does not object to the ALJ's related recommendation that DEP enter a final order holding that the "Petitioner is not eligible for restoration coverage under FPLRIP."

Instead, the only objection set forth in the Petitioner's Exception is to the ALJ's statement in Finding of Fact No. 13 that:

Stated otherwise, here, the Policy had a \$150,000 deductible, and FPLRIP provides the first \$150,000 worth of coverage subject to a deductible. Section 376.3072(2)(d)2.d.

The Petitioner contends that there is no competent substantial evidence supporting the ALJ's finding that the \$150,000 coverage designated in the FPLRIP is a Policy "deductible." This contention of the Petitioner appears to have merit.

The Policy at issue here was admitted into evidence at the DOAH final hearing as "Petitioner's Ex. No. 1." Section V (Limit of Liability and Deductible) of the Policy states in pertinent part on page 7 that:

The deductible under **Coverage B** will not apply to any **Claims for Corrective Action** resulting from **Confirmed Releases** from **Storage Tanks Systems** whose owners qualify for and are eligible for reimbursement from the . . . Florida Petroleum Liability and Restoration Insurance Program.¹ This insurance is excess to the Florida Inland Protection Trust Fund. (underlined emphasis supplied)

¹ Coverage B under the subject Policy applies to Corrective Action and states in part that: "The Company will pay reasonable and necessary costs on behalf of the Insured that the Insured becomes legally obligated to pay for Corrective Action as a result of a Confirmed Release from a Storage Tank System."

The quoted terms of the Policy expressly state that there is no deductible applicable to claims for corrective action resulting from confirmed releases of petroleum from storage tank systems whose owners are eligible for reimbursement from the FPLRIP. In addition, these Policy terms describe the benefits thereunder as “excess” insurance. Thus, by its very terms, the Policy views a payment to the insured under the FPLRIP as a base or primary payment, rather than a payment that constitutes a deductible under the Corrective Action portion of the Policy.

In view of the above, I find that there is no competent substantial evidence of record supporting the ALJ’s finding in paragraph 13 of the Recommended Order that the \$150,000 maximum coverage designated in the FPLRIP constitutes a “deductible” under the Policy. Accordingly, the Petitioner’s Exception is granted.

RULINGS ON DEP’S EXCEPTIONS

Exception Nos. 1 and 3

DEP first and third Exceptions are clerical in nature and do not object to any critical findings or conclusions of the ALJ. Instead, DEP objects to the ALJ’s use of the term “letter” in describing the document dated October 21, 2002, containing DEP’s determination that the Facility was not eligible for restoration coverage under the FPLRIP after September 3, 1998. DEP suggests that the term “order” should be substituted for letter in the second paragraph of the Preliminary Statement and in line 12 of Finding of Fact 46 of the Recommended Order.

Nevertheless, the two terms, letter and order, are not mutually exclusive. An agency “order” may be issued in the form of a letter or in the form of a more official document containing a case style and other attributes of a formal ruling. I would also

note that the document in question was apparently not admitted into evidence in the DOAH proceeding and is not a part of the record in this case. In any event, it is undisputed that the subject DEP document dated October 21, 2002, contained an official agency determination that the Facility was ineligible to participate in the FPLRIP after September 3, 1998. I thus decline to rule that the ALJ's reference to this document as a "letter" is erroneous. DEP's Exception Nos. 1 and 3 are denied.

Exception No. 2

DEP's second Exception is also purely clerical in nature. DEP suggests that, for clarification purposes, the word "regulated" should be inserted between the existing words "FDEP" and "Facility" on line 5 of the ALJ's Finding of Fact 1. This clerical Exception is granted.

It is therefore ORDERED:


- A. The ALJ's Finding of Fact 1 is modified by adding the clarifying word "regulated" on line 5.
- B. The ALJ's Finding of Fact 13 is modified by deleting therefrom the language that: "Stated otherwise, here, the Policy had a \$150,000 deductible."
- C. As modified by paragraphs A and B above, the Recommended Order is otherwise adopted and incorporated by reference herein.
- D. The Petitioner is INELIGIBLE for restoration coverage under the FPLRIP with respect to the reported discharge at its regulated Facility bearing FDEP No. 558515938 as set forth in the Discharge Report Form filed with DEP on September 17, 1998.

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 14 day of January, 2004, in Tallahassee, Florida.

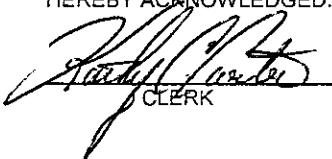
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



DAVID B. STRUHS
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.


CLERK

1/14/04
DATE

CERTIFICATE OF SERVICE

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

Sidney F. Ansbacher, Esquire
Upchurch, Bailey and Upchurch, P.A.
Post Office Drawer 3007
St. Augustine, FL 32085-3007

Gary S. Edinger, Esquire
305 Northeast First Street
Gainesville, FL 32601

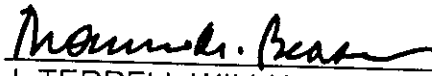
Ann Cole, Clerk and
Charles A. Stampelos, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Stan M. Warden, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 15th day of January, 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