

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LANIGER ENTERPRISES OF AMERICA,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 05-1599
)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal administrative hearing in this matter was held on July 10, 2006, in Stuart, Martin County, Florida, before Bram D. E. Canter, a duly-appointed Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: Martin S. Friedman, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent Laniger Enterprises of America, Inc. (Laniger), is entitled to the

renewal of its domestic wastewater facility permit that was denied by Petitioner Department of Environmental Protection (Department).

PRELIMINARY STATEMENT

On April 6, 2005, the Department issued a Notice of Denial, indicating that it was denying Laniger's application to renew its permit to operate a domestic wastewater treatment plant (WWTP) in Jensen Beach, Martin County, Florida. Laniger timely filed a petition challenging the Department's action, and the case was referred to DOAH to conduct an evidentiary hearing.

Upon the joint request of the parties, this permit case was consolidated for hearing with an enforcement case (DOAH Case No. 06-1245EF) arising from the Department's Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment issued on August 12, 2005 (NOV). The NOV contains three counts against Laniger for operating without a permit, failure to submit certain semi-annual progress reports, and for the Department's enforcement costs. In the enforcement case, the Department seeks to impose administrative penalties in the amount of \$9,000 and to require Laniger to cease operation of its WWTP.

Under applicable law, the undersigned must issue a final order in the enforcement case and a recommended order in the

permit case. Therefore, the two orders are being issued separately.

At the hearing, the Department presented the testimony of William Thiel; Timothy Powell; and Joseph May, accepted as an expert in hydrology. The Department's Exhibits 1 through 17 and 20 were admitted into evidence. Laniger presented the testimony of Reginald Burge; John Whitmer, accepted as an expert in design and permitting of wastewater treatment plants; and James Herin, accepted as an expert in the evaluation of groundwater flow and the evaluation of the transport of constituents in groundwater. Laniger's Exhibits 1 through 6 were admitted into evidence.

The two-volume Transcript of the final hearing was filed with DOAH. Laniger and the Department timely filed post-hearing submittals that have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Department is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of Chapter 403, Florida Statutes (2005),¹ and the rules promulgated in Florida Administrative Code Title 62.

2. Laniger is a Florida corporation that owns and operates the WWTP that is the subject of this case, located at

1662 Northeast Dixie Highway, Jensen Beach, Martin County, Florida. The WWTP is referred to in the Department permit documents as the Beacon 21 WWTP.

The WWTP

3. Laniger acquired the WWTP in 1988 in a foreclosure action. At that time, the WWTP was in a "dilapidated" condition and was operating under a consent order with the Department. After acquiring the WWTP, Laniger brought it into compliance with the Department's requirements.

4. Laniger's WWTP is commonly referred to as a "package plant."² The WWTP's treatment processes are extended aeration, chlorination, and effluent disposal to percolation ponds. The WWTP does not have a direct discharge to surface water. It was permitted to treat 99,000 gallons per day (gpd) of wastewater. Its average daily flow during the past year was about 56,000 gallons.

5. The east side of the WWTP site is adjacent to Warner Creek. On the north side of the WWTP site, an earthen berm separates the WWTP's percolation ponds from a drainage ditch that connects to Warner Creek. Warner Creek is a tributary to the St. Lucie River. The St. Lucie River is part of the Indian River Lagoon System.

The Indian River Lagoon Act

6. In 1989, the St. Johns River Water Management District and the South Florida Water Management District jointly produced a Surface Water Improvement and Management (SWIM) Plan for the Indian River Lagoon System ("the lagoon system"). For the purpose of the planning effort, the lagoon system was defined as composed of Mosquito Lagoon, Indian River Lagoon, and Banana River Lagoon. It extends from Ponce de Leon Inlet in Volusia County to Jupiter Inlet in Palm Beach County, a distance of 155 miles.

7. The SWIM Plan identified high levels of nutrients as a major problem affecting water quality in the lagoon system. Domestic wastewater was identified as the major source of the nutrients.

8. The SWIM Plan designated 12 problem areas within the lagoon system and targeted these areas for "research, restoration and conservation projects under the SWIM programs." Department Exhibit 2 at 11-13. Neither Warner Creek nor the area of the St. Lucie River that Warner Creeks flows into is within any of the 12 problem areas identified in the SWIM Plan.

9. With regard to package plants, the SWIM Plan stated:

There are numerous, privately operated, "package" domestic WWTPs which discharge indirectly or directly to the lagoon. These facilities are a continual threat to water quality because of intermittent treatment

process failure, seepage to the lagoon from effluent containment areas, or overflow to the lagoon during storm events. Additionally, because of the large number of "package" plants and the lack of enforcement staff, these facilities are not inspected or monitored as regularly as they should be. Where possible, such plants should be phased out and replaced with centralized sewage collection and treatment facilities.

Department Exhibit 2 at 64.

10. In 1990, the Legislature passed the Indian River Lagoon Act, Chapter 90-262, Laws of Florida. Section 1 of the Act defined the Indian River Lagoon System as including the same water bodies as described in the SWIM Plan, and their tributaries. Section 4 of the Act provided:

(1) Before July 1, 1991, the Department of Environmental Regulation shall identify areas served by package sewage treatment plants which are considered a threat to the water quality of the Indian River Lagoon System.

11. In response to this legislative directive, the Department issued a report in July 1991, entitled "Indian River Lagoon System: Water Quality Threats from Package Wastewater Treatment Plants." The 1991 report found 322 package plants operating within the lagoon system and identified 155 plants as threats to water quality.

12. The 1991 report described the criteria the Department used to determine which package plants were threats:

1. Facilities that have direct discharges to the system were considered threats.

2. Facilities with percolation ponds, absorption fields, or other sub-surface disposal; systems located within 100 feet of the shoreline or within 100 feet of any canal or drainage ditch that discharges or may discharge to the lagoon system during wet periods were considered threats.

* * *

3. Facilities with percolation ponds, absorption fields, or other sub-surface disposal systems located more than 100 feet from surface water bodies in the system were evaluated case-by-case based on [operating history, inspection reports, level of treatment, and facility reliability].

13. Laniger's package plant was listed in the 1991 report as a threat to the water quality of the lagoon system because it was within 100 feet of Warner Creek and the drainage ditch that connects to Warner Creek.

14. Laniger's WWTP was not determined to be a threat based on its wastewater treatment performance. There was no evidence presented that Laniger's WWTP had ever had intermittent treatment process failure, seepage to the lagoon system from effluent containment areas, or overflow during storm events. Those were the concerns related to package plants that were described in the SWIM Plan and the Department's 1991 report.

15. Laniger's WWTP was not determined to be a threat based on evidence that it was causing or contributing to excess

nutrients in Warner Creek or in that part of the St. Lucie River nearest to Laniger's WWTP. No evidence was presented that there are excess nutrients in Warner Creek or in that part of the St. Lucie River nearest to Laniger's WWTP.

16. The Department's 1991 report concluded that the solution for package plants threats was to eliminate the package plants and connect their wastewater flow to centralized sewage collection and treatment facilities. To date, over 90 of the 155 package plants identified in the Department's 1991 report as threats to the water quality of the lagoon system have been connected to centralized sewage collection and treatment systems.

The 1999 Permit and Administrative Order

17. On August 26, 1999, the Department issued Domestic Wastewater Facility Permit No. FLA013879 to Laniger for the operation of its WWTP. Attached to and incorporated into Laniger's 1999 permit was Administrative Order No. AO 99-008-DW43SED. The administrative order indicates it was issued pursuant to Section 403.088(2)(f), Florida Statutes. That statute pertains to discharges that "will not meet permit conditions or applicable statutes and rules" and requires that the permit for such a discharge be accompanied by an order establishing a schedule for achieving compliance.

18. The administrative order contains a finding that the Beacon 21 WWTP is a threat to the water quality of the lagoon system and that the WWTP "has not provided reasonable assurance . . . that operation of the facility will not cause pollution in contravention of chapter 403, F.S., and Chapter 62-610.850 of the Florida Administrative Code." The cited rule provides that "land application projects shall not cause or contribute to violations of water quality standards in surface waters."

19. The administrative order required Laniger to connect its WWTP to a centralized wastewater collection and treatment [facility] "within 150 days of its availability . . . or provide reasonable assurance in accordance with Chapter 620.320(1) of the Florida Administrative Code that continued operation of the wastewater facility is not a threat to the water quality of the Indian River Lagoon System."

20. As a result of an unrelated enforcement action taken by the Department against Martin County, and in lieu of a monetary penalty, Martin County agreed to extend a force main from its centralized sewage collection and treatment facility so that the Laniger WWTP could be connected. The extension of the force main was completed in April 2003.

21. On April 10, 2003, the Department notified Laniger by letter that a centralized wastewater collection and treatment

system "is now available for the connection of Beacon 21." In the notification letter, the Department reminded Laniger of the requirement of the administrative order to connect within 150 days of availability.

22. On May 9, 2003, Laniger's attorney responded, stating that the administrative order allowed Laniger, as an alternative to connecting to the centralized wastewater collection and treatment system, to provide reasonable assurance that the WWTP was not a threat to the water quality of the lagoon system, and Laniger had provided such reasonable assurance. Laniger's attorney also stated, "due to the location of Martin County's wastewater facilities, such facilities are not available as that term is defined in the [administrative] order."

23. On September 29, 2003, the Department issued a warning letter to Laniger for failure to connect to the Martin County force main and for not providing reasonable assurance that the WWTP will not cause pollution in contravention of Chapter 403, Florida Statutes. The Department took no further formal action until it issued the NOV in August 2005. Laniger's challenge of the NOV was consolidated with this permit case.

The Permit Renewal Application

24. In an "enforcement meeting" between Laniger and the Department prior to the expiration of 1999 permit, the Department told Laniger that it would not renew Laniger's WWTP

permit. Later, when Laniger filed its permit renewal application, the Department offered to send the application back so Laniger would not "waste" the filing fee, because the Department knew it was not going to approve the application.

25. Laniger submitted its permit renewal application to the Department on February 15, 2005. The Department considered Laniger's permit application to be complete, but proceeded to prepare the Notice of Denial without any technical review of the application. The Department denied the application on April 6, 2005.

26. The Department's Notice of Permit Denial stated that the permit was denied because Laniger had not connected to the available centralized wastewater collection and treatment system nor provided reasonable assurance that the WWTP "is not impacting water quality within the Indian River Lagoon System." The record evidence showed that the "reasonable assurance" that would have been necessary to satisfy the Department was more than the reasonable assurance the Department usually requires for package plants, and more than the Department would have required if Laniger's WWTP was 100 feet from Warner Creek.

27. Competent substantial evidence was presented that Laniger's WWTP is capable of being operated in accordance with the statutes and rules of Department generally applicable to package wastewater treatment plants.

28. Laniger's 1999 permit expired on August 25, 2004. Laniger has operated the plant continuously since the permit expired.

Whether the Martin County Facility is Available

29. As discussed below in the Conclusions of Law, it is concluded that the Department did not have authority to require Laniger to connect the WWTP to the Martin County force main or to require assurance beyond the reasonable assurance generally required for package treatment plants in order to obtain a permit. However, because considerable evidence and argument was directed to whether the force main was available, that issue will be addressed here.

30. The Martin County force main was not extended to the boundary of the Laniger WWTP site. The force main terminates approximately 150 feet north of the Laniger WWTP site and is separated from the WWTP site by a railroad and railroad right-of-way.

31. Laniger presented undisputed evidence that the cost to connect to the Martin County force main would be approximately \$490,000 and that cost was prohibitively high, given the relatively small number of households served by the WWTP.

32. The Laniger WWTP is subject to rate regulation by the Public Service Commission (PSC). Laniger presented evidence suggesting that connection to the Martin County force main would

result in rates that would not be approved by the PSC. The evidence was speculative and not competent to support a finding regarding PSC action. The evidence does show, however, that PSC rate regulation was not a factor that the Department considered when it determined that the Martin County force main was available.

33. There is no Department rule that defines when a centralized sewage collection and treatment facility is "available."

34. The determination that the Martin County force main was available to Laniger was made informally by members of the Department's compliance staff in the Department's St. Lucie office. Mr. Thiel testified that he considered the force main to be available because it was "in close proximity" to Laniger's WWTP. However, Mr. Thiel admitted that there is a difference of opinion within DEP as to when a facility is available and reasonable persons could disagree about whether a facility was available.

35. Mr. Thiel thought that the cost to connect is a factor to be considered in determining whether a facility is available, but another Department employee did not think cost should be considered. There was no evidence that the Department took into account Laniger's cost to connect in determining that the Martin County force main was available. The Department simply assumed

that the Martin County force main was close enough to the Laniger WWTP site that the cost to Laniger would not be prohibitive. In addition, the Department was aware of other package plants that had connected to centralized sewage collection and treatment facilities that were the same distance or a greater from the package plant, and the Department did not hear from the owners of the package plants that the costs were prohibitive.

36. Timothy Powell of the Department stated that force mains are usually made available by extending the force main so that it is "abutting the property as much as possible." He also stated that he assumed that Martin County would extend its force main under the railroad and to the boundary of the Laniger WWTP site after Laniger agreed to connect. However, there was no evidence to show that this is Martin County's intent, and the Department did not tell Laniger that Laniger did not have to connect to the force main unless Martin County brought the line to the boundary of the WWTP site.

37. If the Department had authority to require Laniger to connect to the Martin County force main when it became available, and in the absence of any rule criteria to determine when a centralized sewage collection and treatment facility is available, the determination would have to be based on reasonableness. Reasonableness in this context must take into

account the cost of the connection. Cost is the inherent reason that Laniger was not required to connect to the Martin County centralized sewage collection and treatment facility without regard to whether the facility was available. Laniger showed that the cost of connecting to the force main is unreasonably high due to the need to construct a line beneath the railroad. Therefore, Laniger proved by a preponderance of the evidence that the Martin County force main is not available.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the parties to and the subject matter in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

39. The Department has regulatory authority over Laniger's WWTP under Sections 403.087 and 403.088, Florida Statutes, and Florida Administrative Code Chapter 62-610.

40. Laniger bears the burden of proof in this case to show by a preponderance of the evidence that it is entitled to the renewal of its operating permit. Department of Transportation v. J. W. C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1979).

41. Laniger presented a prima facie case of its entitlement to the permit. The burden then shifted to the Department to demonstrate that reasonable assurance had not been provided. Id. In order to overcome Laniger's prima facie case for entitlement to the permit renewal, it was incumbent on the

Department to demonstrate its authority to require Laniger to connect to a centralized sewage collection and treatment facility or provide assurance over and above the reasonable assurance generally required for package sewage treatment plants. The Department failed to show it has such authority.

42. There is no Department statute or rule that expressly addresses circumstances under which package sewage treatment plants must connect to centralized sewage collection and treatment facilities. The sole authority upon which the Department relies for requiring Laniger to connect to the Martin County force main is Chapter 90-262, Laws of Florida.³

43. The only relevant authority granted to the Department by Chapter 90-262, Laws of Florida, was to "identify areas served by package sewage treatment plants which are considered a threat to water quality of the Indian River Lagoon System." The law did not create new standards or permitting requirements for package plants. The law did not specify what action the Department was to take with regard to package plants identified as threats.

44. It is a well-established principle recognized by the courts of Florida that an administrative agency possesses no power not granted by statute and any reasonable doubt as to the lawful existence of a particular power must be resolved against the exercise thereof. State ex rel. Greenberg v. Florida State

Board of Dentistry, 297 So. 2d 628 (Fla. 1st DCA 1974), cert. dismissed, 300 So. 2d 900 (Fla. 1974); City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So. 2d 493 (Fla. 1973).

45. The Department's reliance on Section 403.088(2)(f), Florida Statutes, to issue the administrative order in 1999 was misplaced because that section pertains to discharges that "will not meet permit conditions or applicable statutes and rules."⁴ The Department had no basis to believe that Laniger's WWTP would not meet any permit condition, statute, or rule. This section does not provide the Department with authority to impose a compliance schedule solely because the Department identified Laniger's WWTP as a "threat" in a report.

46. The Department denied Laniger's permit application because it contends Laniger failed to provide reasonable assurance that Laniger's WWTP, although operating in compliance with standards generally applicable to package wastewater treatments plants, would not cause or contribute to excess nutrients in the lagoon system. The Department has authority to act to prevent a violation of water quality standards. However, the Department had no factual basis to believe there was an excess nutrient problem in Warner Creek or the area of the St. Lucie River into which Warner Creek flows. Neither the SWIM Plan nor Chapter 90-262, Laws of Florida, established that there were excess nutrients in every part of the 155-mile-long lagoon

system. In fact, the SWIM Plan showed that Laniger's WWTP was not within any of the "problem areas" of the lagoon system. Therefore, the Department had no basis to require additional assurance from Laniger in order to obtain a permit for its WWTP.⁵

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order granting Laniger Enterprises of America, Inc., a renewal of its wastewater treatment plant operating permit. The permit should contain the same conditions as were contained in the 1999 permit, with the exception of those conditions derived from Administrative Order No. AO 99-008-DW43SED.

DONE AND ENTERED this 19th day of September, 2006, in Tallahassee, Leon County, Florida.



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Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of September, 2006.

ENDNOTES

1/ Unless otherwise indicated, all references to the Florida Statutes are to the 2005 codification.

2/ The term "package plant" is not defined in any statute or rule of the Department. However, in the 1991 report of the Department, discussed later in this Recommended Order, the Department defined a package plant as "a manufactured treatment facility that is prefabricated or has a modular design. It typically has a design capacity of less than 1.0 mgd [million gallons per day] and is intended to serve small areas."

3/ No part of the Indian River Lagoon Act of 1990 was codified in the Florida Statutes.

4/ Laniger's failure to comply with the administrative order was subject to enforcement and was the basis for imposing penalties in the Final Order in the companion case because Laniger waived its right to challenge the administrative order.

5/ Whether the Department has a sufficient basis to require additional assurance from any other package plant identified as a threat to the lagoon system is not at issue here.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.