STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner, vs. LANIGER ENTERPRISES OF AMERICA, INC., Respondent.	)	Case No. 06-1245EF

FINAL 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

For Petitioner: Ronda L. Moore, Esquire
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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 liable to Petitioner

Department of Environmental Protection (Department) for penalties and costs for the violations alleged in the Department's Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment (NOV).

PRELIMINARY STATEMENT

On August 12, 2005, the Department issued a three-count NOV against Laniger, pursuant to Section 403.121, Florida Statutes (2005),[1] for Laniger's alleged failure to timely apply for renewal of its domestic wastewater treatment facility permit, for Laniger's alleged failure to submit certain semi-annual progress reports, and for the Department's enforcement costs. The Department seeks to impose administrative penalties in the amount of $9,000, to require Laniger to take specified corrective actions, and to recover the Department's enforcement costs. Laniger filed a petition to challenge the NOV and the Department referred the matter to DOAH to conduct an evidentiary hearing. Pursuant to Section 403.121(2), Florida Statutes, the Department is the "petitioner" in an administrative enforcement proceeding.

Upon the joint request of the parties, this enforcement case was consolidated for hearing with a permit case (DOAH Case 05-1599) arising from the Department's noticed intent to deny Laniger's application to renew its operating permit for its domestic wastewater treatment plant (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, 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, an expert in design and permitting of wastewater treatment plants; and James Herin, 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 Final Order.[2]

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, 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."[3] 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 the water quality of 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 St. Lucie River area near Laniger's WWTP 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.
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> * * *
>
> 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. The Department notified Laniger that its WWTP was listed as a threat to the water quality of the lagoon system soon after the 1991 report was issued.

15. The Department's 1991 report concluded that the solution for package plants threats was to replace them with centralized sewage collection and treatment facilities. To date, over 90 of the 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

16. 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.

17. 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 [sic] 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."

18. Most of the parties' evidence and argument was directed to the following requirements of the administrative order:

> 1. Beacon 21 WWTP shall connect to the centralized wastewater collection and treatment within 150 days of its availability and properly abandoned facility [sic] or provide reasonable assurance in accordance with Chapter 62-620.320(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 and will not cause pollution in contravention of chapter 403, F.S. and Chapter 62-610.850 of the Florida Administrative Code.
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> * * *
>
> (3) Beacon 21 WWTP shall provide this office with semi annual reports outlining progress toward compliance with the time frames specified in paragraph 1 of this section, beginning on the issuance date of permit number FLA013879-002-DW3P.

19. The administrative order contained a "Notice of Rights" which informed Laniger of the procedures that had to be followed to challenge the administrative order. Laniger did not challenge the administrative order.

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. The 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.

Correspondence Regarding Compliance Issues

22. On August 21, 2001, following an inspection of the Laniger WWTP, the Department sent Laniger a letter that identified some deficiencies, one of which was Laniger's failure to submit the semi-annual progress reports required by the administrative order. Reginald Burge, president of Laniger and owner of the WWTP, responded by letter to William Thiel of the Department, stating that, "All reports were sent to the West Palm Beach office. Copies are attached."

23. Mr. Thiel testified that the progress reports were not attached to Laniger's letter and he informed Laniger that the reports were not attached. Mr. Burge testified that he subsequently hand-delivered the reports. At the hearing, it was disclosed that Laniger believed its semi-annual groundwater monitoring reports satisfied the requirement for progress reports and it was the monitoring reports that Mr. Burge was referring to in his correspondence and which he hand-delivered to the Department. Laniger's position in this regard, however,

was not made clear in its correspondence to the Department and the Department apparently never understood Laniger's position until after issuance of the NOV.

24. 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.

25. On May 9, 2003, the Department received a response from Laniger's attorney, 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. It was also stated in the letter from Laniger's attorney that "due to the location of Martin County's wastewater facilities, such facilities are not available as that term is defined in the [administrative] Order."[4]

26. On May 29, 2003, the Department replied, pointing out that the administrative order had found that reasonable assurance was not provided at the time of the issuance of the permit in 1999, and Laniger had made no "improvements or

upgrades to the facility." The Department also reiterated that the progress reports had not been submitted.

27. On September 29, 2003, the Department issued a formal 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 progress reports were not mentioned in the Warning Letter.

28. The Department took no further formal action until it issued the NOV in August 2005.

Count I: Failure to Timely File for Permit Renewal and Operating Without a Permit

29. Count I of the NOV alleges that Laniger failed to submit its permit renewal application at least 180 days prior to the expiration of the 1999 permit, failed to obtain renewal of its permit, and is operating the WWTP without a valid permit.

30. The date that was 180 days before the expiration of the 1999 permit was on or about February 27, 2004. Laniger did not submit its permit renewal application until February 15, 2005.

31. In an "enforcement meeting" between Laniger and the Department following the issuance of the warning letter in September 2003, the Department told Laniger that it would not renew Laniger's WWTP permit. It was not established in the

record whether this enforcement meeting took place before or after February 27, 2004.

32. When Laniger filed its permit renewal application in February 2005, 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. Laniger requested that the Department to act on the permit application, and the Department denied the application on April 6, 2005. 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." Laniger filed a petition challenging the permit denial and that petition is the subject of DOAH Case 05-1599, which was consolidated for hearing with this enforcement case.

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

Count II: Failure to Submit Progress Reports

34. Count II of the NOV alleges that Laniger failed to comply with the requirement of the administrative order to provide the Department with semi-annual reports of Laniger's progress toward connecting to a centralized sewage collection and treatment facility or providing reasonable assurances that

continued operation of the WWTP would not be a threat to the water quality of the lagoon system. Laniger maintains that its groundwater monitoring reports satisfied the requirement for the semi-annual progress reports because they showed that the WWTP was meeting applicable water quality standards.

35. The requirement for groundwater monitoring reports was set forth in a separate section of Laniger's permit from the requirement to provide the semi-annual progress reports. The monitoring reports were for the purpose of demonstrating whether the WWTP was violating drinking water quality standards in the groundwater beneath the WWTP site. They served a different purpose than the progress reports, which were to describe steps taken by Laniger to connect to a centralized sewage collection and treatment facility. Laniger's submittal of the groundwater monitoring reports did not satisfy the requirement for submitting semi-annual progress reports.

36. There was testimony presented by the Department to suggest that it believed the semi-annual progress reports were also applicable to Laniger's demonstration of reasonable assurances that the WWTP was not a threat to the water quality of the lagoon system. However, the progress reports were for the express purpose of "outlining progress toward compliance with the time frames specified in paragraph 1." (emphasis added) The only time frame mentioned in paragraph 1 of the

administrative order is connection to an available centralized wastewater collection and treatment facility "within 150 days of its availability." There is no reasonable construction of the wording of this condition that would require Laniger to submit semi-annual progress reports related to reasonable assurances that the WWTP is not a threat to the water quality of the lagoon system.

Count III: Department Costs

37. In Count III of the NOV, the Department demands $1,000.00 for its reasonable costs incurred in this case. Laniger did not dispute the Department's costs.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the parties to and the subject matter in this proceeding pursuant to Sections 120.569, 120.57(1), and 403.121, Florida Statutes.

39. Section 403.161(1)(b), Florida Statutes, provides that it is a violation of Chapter 403, Florida Statutes, to fail to obtain any permit required by this chapter or by rule or regulation, or to violate or fail to comply with any rule, order, or permit adopted or issued by the Department pursuant to its lawful authority.

40. Section 403.121(2)(b), Florida Statutes, provides that 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. This section also provides that the Department shall proceed administratively in all cases where the Department seeks administrative penalties of $10,000 or less. In this case, the Department is seeking administrative penalties of $9,000.

41. In administrative enforcement proceedings brought pursuant to Section 403.121, Florida Statutes, the Department has the burden to prove the alleged violations by a preponderance of the evidence. § 403.121(2)(d), Fla. Stat.

Count I

42. Florida Administrative Code Rule 62-620.410(5) requires an applicant to apply to the Department to renew an existing permit at least 180 days before the expiration date of the existing permit. This requirement was also stated in Laniger's permit. Laniger does not dispute that it failed to apply for renewal of its WWTP permit 180 days prior to the expiration of the 1999 permit. However, the Department is not demanding that Laniger pay a penalty for this violation.

43. Count I of the NOV also charges Laniger with operating without a permit. Florida Administrative Code Rule 62-600.700(1) requires a domestic wastewater treatment and effluent disposal facility to have a Department permit to operate. There

is no dispute that Laniger has continuously operated its WWTP after August 25, 2004, without a permit.

44. Laniger is liable for operating without a permit from the expiration of its permit on August 25, 2004, until the Department denied Laniger's application to renew the permit on April 5, 2005. However, Laniger cannot be held liable for operating without a permit after April 5, 2005, because, as concluded in the companion permit case, Laniger was entitled to issuance of the renewal permit.[5]

45. Section 403.121(3)(b), Florida Statutes, provides that for failure to obtain a required wastewater permit the Department shall assess a penalty of $1,000. Section 403.121(6), Florida Statutes, provides that the administrative penalty can be assessed for each additional day during which a violation occurs. The Department demands that an additional penalty be imposed for each of the four quarters of the year that have passed since the 1999 permit expired, for a total penalty for Count I of $4,000. As stated above, Laniger cannot be held liable for operating without a permit after April 5, 2005. Laniger is only liable for operating without a permit for a period of 2 1/3 quarters. Therefore, consistent with the approach taken by the Department, it is concluded that the penalty for this violation, before application of mitigating factors, should be $2,333.

46. Section 403.121(10), Florida Statutes, provides that an administrative law judge may "reduce up to 50 percent the penalty imposed for mitigating factors." A mitigating factor in regard to Laniger's failure to file its permit renewal application in time to avoid operating without a permit was the Department's statement to Laniger that it did not intend to approve the permit, and the Department's subsequent attempt to return Laniger's permit application. These actions show clearly that no matter when Laniger had applied for renewal of its permit, it would have been summarily denied by the Department. It is concluded, therefore, that the penalty should be reduced to $1,500.

Count II

47. The Department asserts in Count II of its NOV that Laniger violated Section 403.161(1)(b), Florida Statutes, when it did not comply with the requirement of the administrative order to submit the semi-annual reports of Laniger's progress in connecting to a centralized sewage collection and treatment facility. The Department met its burden to prove by a preponderance of the evidence that Laniger is liable for the violation alleged in Count II of the NOV.

48. Section 403.121(4)(f), Florida Statutes, provides that failing to submit required reports is a violation for which a $500.00 penalty can be imposed. Section 403.121(6), Florida

Statutes, provides that the administrative penalty can be assessed for each additional day during which a violation occurs. In its NOV, the Department demands $500 for each of the ten semi-annual reports that Laniger failed to submit between August 26, 1999, and August 25, 2004, for a total penalty of $5,000.

49. Section 403.121(10), Florida Statutes, provides that an administrative law judge may "reduce up to 50 percent the penalty imposed for mitigating factors." Mitigating factors regarding Laniger's failure to submit semi-annual progress reports are that (1) Laniger believed that its semi-annual groundwater monitoring reports satisfied the requirement for semi-annual progress reports and, although that was an error, it was not completely unreasonable given the wording of the condition in the administrative order, and (2) the usefulness of the progress reports prior to the availability of a centralized sewage collection and treatment facility was not made clear by the Department, and the Department's long delay in doing anything about Laniger's failure to file the reports suggests the Department did not considered the progress reports to be very important. It is concluded, therefore, that the penalty should be reduced 50 percent, to $2,500.

Count III

50. The Department presented evidence in support of its claim to $1,000 in reasonable costs. Because the Department is the prevailing party in this enforcement case, it is entitled to recover these costs. § 403.121(2)(f), Fla. Stat.

Orders for Corrective Action

51. In its NOV, the Department demands that Laniger enter into a wastewater service agreement with Martin County and apply to the Department for approval to connect to the Martin County force main within 120 days. The NOV also requires Laniger to submit an "inactivation/abandonment" plan to the Department within 60 days of Laniger's receipt of the permit to connect to the Martin County force main.

52. Because in the Recommended Order in the consolidated permit case the undersigned concludes that Laniger is entitled to the renewal of its permit, these corrective actions demanded by the Department are rejected.

DISPOSITION

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

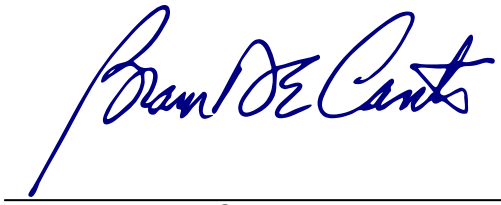
1. For violating Count I of the NOV, Laniger shall pay a penalty of $1,500;

2. For violating Count II of the NOV, Laniger shall pay a penalty of $2,500;

3. Laniger shall pay the Department's costs of $1,000;

4. Laniger's payment of the penalties and costs, described above, shall be made within fifteen days of the date of this Final Order, payable to the "State of Florida Department of Environmental Protection," and shall include thereon the notations "OGC Case No. 05-0319" and "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to State of Florida Department of Environmental Protection, Southeast District Branch Office, 1801 Southeast Hillmoor Drive, Suite C-204, Port St. Lucie, Florida 34952.

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



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Filed with the Clerk of the
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this 19th day of September, 2006.

ENDNOTES

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

2/ Counsel for the Department stated that "a proposed final order is not contemplated" under Section 403.121, Florida Statutes, but one was submitted by the Department "at the request of the administrative law judge." Section 403.121(2)(h), Florida Statutes, provides that "Chapter 120 shall apply" to administrative enforcement proceedings. Providing the parties an opportunity to file post-hearing submittals is just as appropriate in an enforcement proceeding as in any other Chapter 120 hearings involving disputed issues of material fact, and is contemplated in Florida Administrative Code Rule 28-106.215. Moreover, the undersigned did not request post-hearing submittals, but merely established the deadline for them, "if filed."

3/ 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 Final 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."

4/ Laniger presented evidence at the final hearing in support of its claim that the Martin County force main was not available because Laniger's cost to connect to the force main would be prohibitively large.

5/ In the permit case, it is concluded that Department lacks authority to require Laniger to connect to a centralized sewage collection and treatment facility or provide assurance beyond the reasonable assurance generally required for package sewage treatment plants. The Department's sole reliance on Chapter 90-262, Laws of Florida, is insufficient because that law merely directed the Department 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 located within the lagoon system. There was no basis shown by the Department to impose additional requirements on Laniger beyond the requirements that would have been applicable to Laniger's WWTP if it had been located 100 feet from Warner Creek.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.