STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Petitioner,	)	
vs.	)	Case No. 09-0941EF
NEMI, INC.,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on April 21, 2009, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Karen Bishop, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

For Respondent: Neil Schubert, President
Nemi, Inc.
1898 Stallion Drive
Loxahatchee, Florida 33470-3994

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Nemi, Inc., should pay a $500.00 administrative fine for maintaining an unpermitted stationary installation that is reasonably expected to be a source of water pollution (Count I); whether it should

pay an administrative fine of $9,500.00 for failing to submit a completed Site Assessment Report (SAR) within 270 days of discovery of the discharge of chemical solvents (Count II); whether it should pay investigative costs and expenses in the amount of $1,500.00 incurred by Respondent, Department of Environmental Protection (Department) (Count III); and whether it should take corrective action, as described in the Department's Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment (Notice of Violation) issued on January 23, 2009.

PRELIMINARY STATEMENT

This enforcement action began on January 23, 2009, through the Department's issuance of a three-count Notice of Violation generally alleging that in October 1995 hazardous waste was reported on property located at 6801 Northwest 17th Avenue, Fort Lauderdale, Florida; that subsequent environmental assessments confirmed that an unlawful discharge of contaminants had occurred; that Respondent assumed ownership of the property on September 21, 1999; that on September 12, 2001, Respondent was advised that contamination was present and that it must file a Preliminary Contamination Assessment within sixty days; that Warning Letters were sent to Respondent in April 2006, March 2007, and July 2007 again advising that contamination was on its property and requesting a SAR; that Respondent submitted a Preliminary Site Assessment Report and Addendum in March and

May 2008, respectively; that those two reports indicated exceedances of Department soil and groundwater cleanup target levels on the property; that Respondent was advised in August and October 2008 that its SAR was incomplete and a complete one must be filed no later than November 14, 2008; and that Respondent has failed to submit a complete SAR. In view of the above circumstances, the Notice of Violation advised Respondent that it was maintaining an unpermitted source of pollution that is reasonably expected to be a source of water pollution in violation of Section 403.087(1), Florida Statutes (2008),[1] and that it had failed to submit a completed SAR within 270 days of the discovery of the discharge on the property, as required by Florida Administrative Code Rule 62-780.600(8). For this conduct, the Department proposes to assess a $10,000.00 administrative penalty, recover investigative expenses and costs in the amount of $1,500.00, and require certain corrective actions, including the filing of a completed SAR and the cleanup of the site.

On February 10, 2009, Respondent, through its president, Neil Schuberg, filed a letter requesting a hearing to contest the charges. In his letter, Mr. Schuberg stated that he "dispute[s] being the responsible party"; that he "dispute[s] being the originator of the problem"; and that "[a]ll maps - tests indicate off site source." The matter was referred to the Division of Administrative Hearings on February 18, 2009, with a request that

an administrative law judge be assigned to conduct a formal hearing.

By Notice of Hearing dated March 23, 2009, the matter was scheduled for a final hearing on April 21, 2009, in Fort Lauderdale, Florida. At the final hearing, the Department presented the testimony of Paul A. Wierzbicki, Waste Cleanup Supervisor in the Department's Southeast District Office and accepted as an expert; and Leslie Ann Smith, an Environmental Specialist III in the Department's Southeast District Office. Also, it offered Department Exhibits 1-17, which were received in evidence. Respondent was represented at hearing by its president, Neil Schuberg, who testified on its behalf. Finally, the Department's Request for Official Recognition was granted, and official recognition was taken of the following matters: Sections 403.031, 403.087, 403.121, 403.141, and 403.161, Florida Statutes, and Florida Administrative Code Rule Chapters 62-520, 62-550, 62-780, and 62-777, and Rule 62-701.200.

A Transcript of the hearing was filed on May 4, 2009. By agreement of the parties, proposed final orders were due by May 18, 2009. The Department timely filed a Proposed Final Order, which has been considered in the preparation of this Final Order. On April 30, 2009, Respondent filed a paper with numerous documents attached; the cover sheet stated that "the [attached] exhibits will clearly show that the contamination is from an off-site source." No exhibits had been offered into evidence by

Respondent at hearing.[2] On May 7, 2009, the Department filed a Motion to Strike the exhibits on the ground the record was closed on April 21, 2009. By Order dated May 15, 2009, the Motion to Strike the documents was granted, with the exception of a Florida Supreme Court decision, and those papers which duplicated parts of Department exhibits already received in evidence.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. Respondent is a for-profit corporation registered to do business in the State. Respondent's president and registered agent is Neil Schuberg, who represented the corporation at hearing. Respondent is the owner of a 1.1-acre parcel of real property located at 6801 Northwest 17th Avenue, Fort Lauderdale, Florida. The property is situated in what is known as the Gateway Industrial Center just south of the City of Pompano Beach and midway between the Florida Turnpike and Interstate 95. The parcel is rectangular shaped and is approximately 90 feet wide by 180 feet long. The property is further identified by the Broward County Property Appraiser as Parcel Identification Number 494209050040. A one-story warehouse and parking lot are located on the property, which is currently leased by Respondent to a testing laboratory.

2. The evidence shows that for at least since 1981 David R. Ligh owned the property until his death. After he died, his

widow, Elsie M. Ligh, sold the property in 1994 to Clayton John Pierce subject to a mortgage in the amount of $167,640.00. Mr. Pierce began operating a business on the premises known as Combined Roof Services, Inc.

3. In 1995, Mr. Pierce decided to sell the property. A potential buyer, S & S Propeller Company, retained the services of Buck Eco-Logic, Inc., an environmental consulting firm, to prepare an environmental site assessment for the purpose of "determining the suitability of property for ownership by [S & S Propeller Company]." When it first inspected the site in July 1995, Buck Eco-Logic, Inc., discovered three thirty-five gallon drums and a twenty-gallon black plastic tub, all labeled "hazardous waste" and reflecting that they had contained tetrachloroethene (also known as perchloroethylene) waste. This is a chemical solvent that is typically used by dry cleaning establishments. The labels carried the name and "EPA ID number" of Family Dry Cleaners located at 6804 Stirling Road, Davie, Florida, an address which appears to be around ten to twelve miles south of the subject property. The three drums were lying on their sides on the northern end of an asphalt parking area beneath overgrown Brazilian pepper trees and were empty; the empty twenty-gallon tub was located inside the building on the property. Soil borings on the property performed by Buck Eco-Logic, Inc., revealed concentrations of tetrachloroethene at 10,613 parts per billion, which exceed allowable standards.

Tetrachloroethene and its breakdown products are a solid waste, as defined by Florida Administrative Code Rule 62-701.200(113). A Phase I Environmental Site Assessment (Phase I ESA) dated August 13, 1995, was prepared by the consulting firm and sets forth in detail the results of its inspection. See Department Exhibit 2. The sale was never consummated.

4. Later that year, Mr. Pierce engaged the same consulting firm to perform a Phase II Environmental Site Assessment of the property. That assessment revealed concentrations in groundwater ranging from 8,840 parts per billion to 173,000 parts per billion of tetrachloroethene, which exceed the State Clean Soil Criteria and State Maximum Contaminant Levels. The report, issued on October 13, 1995, was received in evidence as Department Exhibit 3.

5. On October 30, 1995, a Mr. Pivnick, an attorney with the firm of Dombroff & Gilmore, P.A., which represented Mr. Pierce, notified the Department by letter that the empty drums and tub had been discovered on the property. The letter also attached a copy of the Phase I ESA. Mr. Pivnick was instructed by the Department to contact the local police department to report the incident as well as the state warning system for reporting discharges to the environment. Also, the Department contacted other local agencies and the United States Environmental Protection Agency (EPA).

6. In October 1995, Mr. Pierce vacated the premises and ceased operating Combined Roof Services, Inc. In January 1996, he began leasing the property to Sun Valley Industries, also a roofing repair business, until that firm vacated the premises in December 1997.

7. With the use of grant monies, the Department engaged the services of International Technology Corporation to prepare a Preliminary Investigation Report (PIR) for the property. That report was issued on February 13, 1997. See Department Exhibit 4. The PIR recommended that additional monitoring of the site (through shallow monitoring wells, soil samples, groundwater samples, and groundwater flow direction) be made to quantify the presence of chlorinated solvents.

8. Again with the use of grant monies, in 1997 the Department engaged the services of Post, Buckley, Schuh & Jernigan, Inc., to prepare a Site Inspection Report (Report) for the subject property. The Report was issued in March 1998. See Department Exhibit 5. Excessive tetrachloroethene, Cis-1, 2-dichloroethene, and trichloroethylene were detected in ground water samples, while tetrachloroethene was detected in all seven soil samples.

9. On April 2, 1998, Ms. Ligh assigned the mortgage on the property to Nemi, Inc., for around $100,000.00. Mr. Schuberg explained that he was able to purchase it at a discount because Mr. Pierce had ceased making payments on the mortgage and had

warned Ms. Ligh that if she foreclosed on the mortgage, she would be responsible for cleanup costs on the property exceeding a million dollars. While Mr. Schuberg acknowledged that he was aware of a contamination problem on the property, he says the mortgage was purchased as an investment, and he never thought he would actually acquire the property because he believed Mr. Pierce would continue to make the mortgage payments. After failing to make payments on the mortgage, on September 21, 1999, Mr. Pierce executed a Warranty Deed in Lieu of Foreclosure in favor of Nemi, Inc. Based on conversations with Mr. Pierce at that time, Mr. Schuberg says he was under the impression that the spill was much smaller than it actually was, and that it would be cleaned up by the Department. At hearing, Mr. Schuberg characterized Mr. Pierce as "a hustler and a liar."

10. After Mr. Pivnick's report of contamination was received, the Department, along with the Broward County Department of Natural Resource Protection, initiated an investigation (probably in late 1995 or early 1996) in an attempt to verify the source of the contamination. Because Family Dry Cleaners "was on the top of [its] list," the Department first sought to determine whether that firm had actually deposited the drums and tub on the subject property. It learned that in 1994, or a year before the contamination was reported to the Department, Family Dry Cleaners had been evicted by its landlord, Lincoln Park. According to the Department, this "led to a dead-

end" as far as Family Dry Cleaners was concerned. However, that business had been replaced by another tenant, Liberty Dry Cleaners. The Department then attempted to ascertain whether Lincoln Park or the new tenant might have been responsible for transporting the drums and tub to the subject property and dumping the waste. However, the Department was unable to confirm that either of the two had done so.

11. Photographs of the drums and tub were made by Buck Eco-Logic, Inc., when it conducted an assessment in July 1995. Because the empty drums and tub were later removed from the site by unknown persons, the Department was only able to review the photographs when it conducted its investigation. Photographs of the drums indicated that they were larger than the twenty-gallon drums normally used by a dry cleaning establishment, and the labels on the drums were not perforated or dot matrix, which are more typical of those used by dry cleaners. For this reason, and because the empty tub was found inside the building on the property, the Department attempted to determine if Mr. Pierce had purchased the contaminants for use in his operations; it was not able to confirm this fact.

12. The Department also contacted local law enforcement officials to see whether a criminal investigation could be launched. As noted above, however, the drums and tub had been removed by unknown persons while Mr. Pierce still had possession of the property and there was no forensic evidence for law

enforcement officials to examine. The result of the investigation was that the Department was unable to determine who deposited the drums on the site or the exact location where the contents were first dumped.

13. Although Respondent contended that the Department could have easily determined who removed the empty drums and tub from the subject property by examining the manifests of the carriers who engage in that type of business, the Department investigator did not attempt to do this since the yellow pages in the telephone directory reflected at least six pages of transporters in this type of business. Further, there is no evidence that a commercial transporter was even involved.

14. For all of these reasons, the Department looked to the current owner of the property, Respondent, as the entity responsible for site rehabilitation since there were, and still are, contaminants leaching into the groundwater and aquifer system. Specifically, as of 2007, or twelve years after the discharge occurred, the groundwater on Respondent's property was still contaminated with tetrachloroethene, trichloroethylene, and cis-1, 2-dichloroethene exceeding the Department's groundwater standards. Also, the same contaminants exceeded the Department's soil cleanup target levels based on ground water criteria. Because rainfall and surface water continue to come into contact with the contaminated soil, and there is no liner or impervious

cap in place, the installation is reasonably expected to be a source of water pollution.

15. On September 12, 2001, the Department sent a letter by certified mail to Respondent advising that contamination was present on the property, that there were "possible violations of law for which you may be responsible," and that a Preliminary Contamination Assessment (PCA) must be filed within sixty days from the date of the letter. See Department Exhibit 6. Although a meeting of the parties was held on October 4, 2001, a PCA was never filed.

16. On April 27, 2006, March 12, 2007, and July 3, 2007, the Department issued Warning Letters to Respondent advising that an enforcement action would be initiated unless Respondent provided a SAR within a time certain. See Department Exhibits 7, 8, and 9. (The record is silent as to why no formal activity occurred between October 2001 and April 2006.) Exhibit 8 reflects that on November 21, 2006, "analysis results of sampling of one monitoring well were received by the Department." A meeting was later conducted by the parties on January 16, 2007, at which time Respondent agreed to "draft a suitable letter of [its] intentions with regard to conducting the required assessment and send it to the Department on or before January 31, 2007." There is no record of such a letter being sent.

17. In August 2007, Respondent contracted with Florida Environmental Engineering, Inc., to perform a "limited site

assessment report." In March 2008, that firm submitted to the Department a Preliminary Site Assessment Report (PSAR) See Department Exhibit 10. For this service, Respondent paid around $16,000.00. On March 21, 2008, the Department advised Respondent by letter that the PSAR was incomplete and that further information should be provided by April 30, 2008. See Department Exhibit 11. An Addendum to the PSAR was provided on May 5, 2008. See Department Exhibit 12. This report cost Respondent an additional $3,000.00. The PSAR indicated that contaminants (dichloroethene and trichloroethylene) in the water and soil on the property exceeded Department groundwater and soil cleanup target standards and levels. The report concluded, however, that "the discharge to the site is from an offsite source" (west of the property) and that "the property owner is no longer a responsible party."

18. On August 27 and then again on October 22, 2008, the Department issued letters to Respondent advising that "there is not enough data to support the assumption that the discharge is offsite and the contamination is from an offsite source located west of the property." The Department reached this conclusion because, among other reasons, "[t]he contamination does not seem to be delineated towards the northern and southern portions of the site," "[t]here are no horizontal delineation wells to [the] north," the "iso contour maps provided appear to show the vertical delineation of the contamination but not horizontal

delineation [of the plume]," "additional monitoring points need to be [added]," and "the onsite monitoring well, MW-2, shows a very high concentration of Perchloroethylene (PCE) at 81,000 ug/L [microgram per liter] and other contaminants, while the MW-1 does not exhibit groundwater contamination to that extent." See Department Exhibits 14 and 15. In plainer language, Respondent's report was deficient in that all contamination sources were not identified; it failed to delineate the horizontal and vertical extent of soil and groundwater contamination; and it failed to recommend a remedial action to clean up the contamination.

19. The two letters advised that the site assessment was incomplete and that additional information described in the letters must be submitted by November 14, 2008. To date, Respondent has failed to submit the required information. According to Mr. Schuberg, to perform a study that would supply the additional information requested by the Department would cost him around $100,000.00, an amount he is unwilling to pay.

20. More than 270 days has expired since a discharge was discovered on Respondent's property, and it has failed to submit a complete SAR, as described in Florida Administrative Code Rule 62-780.600(8). See also Table A, Fla. Admin. Code R. Ch. 62-780, which prescribes the specific time frame (within 270 days after the discharge is discovered) for submitting this report.

21. The Department has incurred expenses in the amount of $1,500.00 while investigating this matter. See Department Exhibit 17. This amount is not disputed.

22. As corrective action, the Department requests that within ninety days of the effective date of this Final Order, Respondent submit a complete SAR which addresses the deficiencies specified in the Department's August 27, 2008, letter. See Department Exhibit 14. To complete the SAR, additional soil and groundwater samples need to be collected to determine the vertical and horizontal extent of contamination, all source areas must be identified, and a remedial action must be developed to abate the contamination. Finally, the contaminated soil must be removed from the property so that it will no longer discharge into the groundwater. The Notice of Violation requests that upon approval of the SAR, Respondent "shall commence and complete in a timely fashion all further tasks" required by Florida Administrative Code Rule Chapter 62-780. These corrective actions are reasonable and are hereby approved.

23. In calculating the penalty, Respondent has assessed a $500.00 administrative penalty for Respondent maintaining a stationary installation that is reasonably expected to be a source of water pollution without a permit. This is based upon a violation of Section 403.121(5), Florida Statutes, which makes it unlawful to not comply with a regulatory statute's requirement. Under Section 403.121(6), Florida Statutes, the Department has

also assessed a $500.00 per day penalty against Respondent for failing to file a SAR for nineteen days, for a total of $9,500.00. When added to the $500.00 previously assessed, the total administrative penalty is $10,000.00, which is the maximum allowed in this type of proceeding. See § 403.121(2)(a), Fla. Stat.

24. Throughout this process, Mr. Schuberg has contended that the responsibility for cleanup lies with the person or entity actually responsible for placing the drums and tub on the property in 1995. He says that the evidence clearly shows that Family Dry Cleaners is the responsible party. However, the Department and local authorities were never able to confirm who actually dumped the waste on the subject property. Although Mr. Schuberg says it will take "[i]n the hundreds of thousands of dollars" to clean up the site, the evidence shows that when he purchased the mortgage in 1998 and assumed ownership in 1999, he knew the property was contaminated. Mr. Schuberg further stated that because his consultant could never get "answers" from the Department, the consultant was instructed to stop work. However, Mr. Schuberg never contacted the Department to get clarification about what was required. At hearing, Mr. Schuberg also offered a lay opinion that his consultant's report filed in March 2008 proves that in 1995 the contents of the drums and tub were dumped on an offsite asphalt road adjacent to the property, surface water runoff then carried the chemical solvents onto his

property, and the empty drums and tub were left in the parking lot. The Department's expert did not agree with this supposition, and there is no expert testimony to confirm the accuracy of this theory.

25. Respondent has also contended that the property should be cleaned up with state funds. As pointed out by a Department witness, however, one problem is that the property does not meet the definition of a dry cleaner and thus cannot qualify for funds under that program. Then, too, a state-funded cleanup is a last resort which is used only after the Department has exhausted all enforcement remedies. Also, in this era of tight budgets, the Department has a finite amount of funds to use for this purpose, and is limited to cleaning up only a few sites per year. Finally, the responsible party must first acknowledge by affidavit that it lacks the necessary resources to clean up the property before the Department "may" seek cleanup funds. Respondent has not yet filed such an affidavit or admitted liability.

26. In terms of mitigating evidence, Mr. Schuberg conceded that he has not done "a whole lot" to address the contamination problem since acquiring the property in 1999. In 2008, he did expend around $20,000.00 in having a PSAR and Addendum prepared for the Department. In all other respects, he steadfastly refuses to spend any more money on assessments or take

responsibility for the cleanup since he believes that Family Dry Cleaners is the entity responsible for site rehabilitation.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569, 120.57(1), and 403.121, Florida Statutes.

28. Section 403.121(2)(a), Florida Statutes, authorizes the Department "to institute an administrative proceeding to establish liability and to recover damages for any injury to the . . . waters . . . of the state caused by any violation." Under that process, the Department is authorized to initiate an enforcement action to "order the prevention, abatement, or control of the conditions creating the violation or other appropriate corrective action." See § 403.121(2)(b), Fla. Stat.

29. "The department has the burden of proving with the preponderance of the evidence that the respondent is responsible for the violation." § 403.121(2)(d), Fla. Stat. "The administrative law judge shall issue a final order on all matters, including the imposition of an administrative penalty." Id.

30. Count I of the Notice of Violation alleges that Respondent "is maintaining a stationary installation that is reasonably expected to be a source of water pollution on the Property without a permit from the Department," in violation of

Section 403.087(1), Florida Statutes. That statute provides that "[a] stationary installation that is reasonably expected to be a source of air or water pollution must not be operated, maintained, constructed, expanded, or modified without an appropriate and currently valid permit issued by the department." Count II alleges that Respondent "has failed to submit a complete [SAR] within 270 days of the discovery of the discharge on the Property as required by Fla. Admin. Code R. 62-780.800(6)." Count III requests the recovery of expenses in the amount of $1,500.00 incurred to date while investigating this matter.

31. By a preponderance of the evidence, the Department has established that Respondent is the entity responsible for site rehabilitation and that it failed to submit a complete SAR within 270 days after discovery of the contamination on the property (Count II). Therefore, Count II has been sustained. In addition, the reimbursement of investigative expenses in the amount of $1,500.00 is not in dispute (Count III).

32. On the other hand, Count I is more difficult to resolve. To support this allegation, the Department relies on the definition of "installation" found in Section 403.031(4), Florida Statutes; definitions of "installation" and "solid waste management facility" found in Florida Administrative Code Rules 62-520.200 and 62-701.200(118), respectively; and the dictionary definitions of the words "stationary" and "facility," which are not otherwise defined by statute or rule.

33. Section 403.031(4) defines the word "installation" as "any structure, equipment, or facility, or appurtenances thereto, or operation which may emit air or water contaminants in quantities prohibited by rules of the department." Rule 62-520.200 mirrors the statutory definition of an installation. Rule 62-701.200(118) defines the term "solid waste management facility" as follows:

> any solid waste disposal area, volume reduction plant, transfer station, materials recovery facility, or other facility, the purpose of which is resource recovery or the disposal, recycling, processing, or storage of solid waste. The term does not include recovered materials processing facilities which meet the requirements of paragraph 62-701.220(2)(c), F.A.C., except the portion of such facilities, if any, that is used for the management of solid waste.

Finally, the word "stationary" is defined by the American Heritage Dictionary, Fourth Edition, as "not moving," while "facility" is defined by the same source as "something created to serve a particular function."

34. In its Proposed Final Order, the Department appears to argue that the contaminated soil on the property is in a fixed or stationary location; that the soil was created or intended to serve a particular purpose, that is, to store and dispose of tetrachloroethene; and that the storage and disposal has resulted in soil and groundwater contamination. Thus, it posits that the mere presence of a contaminant in the soil, which exceeds

Department standards, constitutes a stationary installation within the meaning of Section 403.087(1).

35. Neither party has cited any administrative decision on this issue. While there are numerous agency decisions involving stationary installations that are subject to Section 403.087(1), the undersigned has found no decision that is factually similar to the circumstances here. With some exceptions, virtually all decisions involve on-going business concerns such as auto salvage operations, service stations, cement plants, dry cleaners, or incinerator plants that typically handle or process hazardous wastes in the course of their business; physical structures such as power plants, pipelines, marinas and docks, or ski facilities which may pollute the air or waters; or control structures or fill placed in water or on land to stop or impede the flow of water.[3]

36. The Department does not contend that Respondent is maintaining a "structure," "equipment," or "appurtenances thereto" which may emit contaminants into the groundwater. Rather, it argues that Respondent is maintaining a "facility" which may cause water pollution. The word "facility" is generally meant to be something built, installed, or established to serve a particular purpose. As that word is commonly understood, Respondent has not built, installed, or established any type of "facility" for the purpose of storing and disposing chemical solvents. Likewise, Respondent is not operating a solid

waste management facility since nothing on his property can be construed as being a facility designed for the purpose of "resource recovery or the disposal, recycling, processing, or storage of solid waste." Therefore, Count I should be dismissed.

37. For the violation in Count II, the Department has proposed to assess a penalty of $500.00 per day for nineteen days, or $9,500.00, as authorized by Section 403.121(6), Florida Statutes. The total penalty does not exceed $10,000.00, which is the maximum allowed per assessment under Section 403.121(2)(a), Florida Statutes.

38. Section 403.121(10), Florida Statutes, allows a responsible party to offer "mitigating circumstances" that may serve as a basis for reducing the administrative penalty. That statute provides as follows:

> (10) The administrative law judge may receive evidence in mitigation. The penalties identified in subsection (3), subsection (4), and subsection (5) may be reduced up to 50 percent by the administrative law judge for mitigating circumstances, including good faith efforts to comply prior to or after discovery of the violations by the department. Upon an affirmative finding that the violation was caused by circumstances beyond the reasonable control of the respondent and could not have been prevented by respondent's due diligence, the administrative law judge may further reduce the penalty.

39. To support a claim of mitigation, there must be "competent, substantial evidence" presented by a respondent. Florida Department of Environmental Protection v. Holmes Dirt

Service, Inc., et al., 864 So. 2d 507, 508 (Fla. 1st DCA 2004)(Benton, J., dissenting). In this case, no mitigating evidence was presented, and Respondent has not shown that the violation was caused by circumstances beyond its control or by exercising due diligence. Therefore, the proposed administrative penalty is approved. See, e.g., Department of Environmental Protection v. Elston, et al., DOAH Case Nos. 03-0626 and 03-2284, 2003 Fla. ENV LEXIS 255 at *43 (DOAH Nov. 5, 2003)(where no factual justification was presented by a respondent for not timely initiating a site assessment, a reduction in the amount of the penalty was not warranted); Department of Environmental Protection v. Leasure, DOAH Case No. 04-3688EF, 2005 Fla. ENV LEXIS 41 (DOAH Feb. 18, 2005)(where no relevant mitigating evidence was presented by the responsible party for the proven violations, the Department's proposed administrative penalties were sustained in the final order).

40. At hearing, and in his post-hearing submittal, Mr. Schuberg relied on the case of Davey Compressor Company v. City of Delray Beach, et al., 639 So. 2d 595 (Fla. 1994), for the proposition that Nemi, Inc., is not responsible for the pollution on its property. That case, however, involved a claim by the City for damages for contamination to its drinking water supply and determined the manner in which damages are measured in repairing or restoring property to its condition prior to injury. Id. at 596. Therefore, it has no bearing on the outcome of this

action. On the issue of liability, the case of Sunshine Jr. Stores, Inc. v. Department of Environmental Protection, 556 So. 2d 1177 (Fla. 1st DCA 1990), rev. den., 564 So. 2d 1085 (Fla. 1990), is more instructive. In that case, Sunshine purchased property from K & F Services, Inc. (K & F), which had operated an Amoco gasoline station on the premises for a number of years. At the time of the purchase, Sunshine knew that three underground storage tanks had been installed on the property but did not know their condition or that any gasoline had leaked from one of the tanks. When Sunshine later attempted to remove the tanks and replace them with modern equipment, it discovered the contamination and reported the discharge to the Department. However, the evidence showed that no gasoline had leaked into the surrounding soil during its ownership of the property. Under this set of facts, a divided court held that K & F was solely responsible for cleaning up the site, and that Sunshine's only responsibility was to cooperate with the cleanup effort by providing reasonable access to the property. In contrast to the facts in the Sunshine case, the evidence here shows that Mr. Schuberg knew that the property was contaminated when he purchased the mortgage in 1998 and assumed ownership in 1999, and the discharge of contaminants into the groundwater has continued for at least eight years during his ownership. Therefore, Nemi, Inc., is the entity responsible for site rehabilitation, and the Department's proposed corrective actions must be undertaken.

41. Finally, Section 403.121(2)(f), Florida Statutes, provides that "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." In this case, the Department is the prevailing party. However, it made no request for the "prevailing party" costs, and it presented no evidence on their amount. Therefore, they are not included in this Final Order.

DISPOSITION

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

ORDERED that the charge in Count I is dismissed; that the charges in Counts II and III are sustained; that Respondent shall pay an administrative penalty of $9,500.00 and $1,500.00 in investigative costs and expenses; and that it take the corrective actions described in Finding of Fact 22. Such fines and costs shall be paid within thirty days of the effective date of this Order by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall note "OGC Case No. 08-2821" and "Ecosystem Management and Restoration Trust Fund" thereon. The payment shall be sent to the Florida Department of Environmental Protection, Attn: Amala Senarath, 400 North Congress Avenue, Suite 200, West Palm Beach, Florida 33401-2913.

DONE AND ORDERED this 29th day of May, 2009, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2009.

ENDNOTES

1/ All references are to the 2008 version of the Florida Statutes.

2/ The documents, marked as Exhibits A through F, include a copy of an undated Stipulation and Order for Settlement in the case of Aronos, Inc. d/b/a Lincoln Park Davie v. Coppola & Kids, Inc. d/b/a Family Dry Cleaners, Case No. COWE 94-2538 (Broward County Ct.), and an affidavit dated January 15, 1999, by K.S. Prasad, an engineer with the Department (Exhibit A); excerpts from Department Exhibits 2, 4, 5, and 10 (Exhibit B); copies of Department field inspection reports dated March 22, 1999, and June 21, 1996 (Exhibit C); a copy of the case of Davey Compressor Company v. City of Delray Beach, et al., 639 So. 2d 595 (Fla. 1994), and papers labeled Grand Ridge Drum and Jorge Leon Dump Site (Exhibit D); a newsletter from the Department website, a document taken from www.ELUS.org, a document taken from the EPA website concerning superfund liability, a document purportedly taken from a Department handbook on disposal by dry cleaners, excerpts from a deposition given by Leslie Smith on February 16, 1999, in a civil action styled John Pierce v. Elsie M. Ligh, Case No. 98-5144-18 (17th Cir., Broward County), and an email dated April 30, 2007, from Paul Wierzbicki to Amala Senarath (Exhibit E); and "many [Department] reports [prepared in 1997] entered into evidence not

for this site" (Exhibit F).

3/ See, e.g., St. Johns River Water Management District v. Schlusemeyer, 1998 Fla. ENV LEXIS 21 (SJRWMD Feb. 11, 1998)(plugging of a drainage ditch considered a stationary installation); Department of Environmental Protection v. All-States Auto Salvage, Inc., DOAH Case No. 93-5517, 1994 Fla. ENV LEXIS 65 (DOAH Mar. 29, 1994, DEP June 8, 1994)(auto salvage operation using solvents that have leaked into the soil considered a stationary installation); Department of Environmental Regulation v. Safety Kleen Corporation, DOAH Case Nos. 90-6665 and 90-7360, 1992 Fla. ENV LEXIS 177 (DOAH July 10, 1992, DER Sept. 22, 1992)(two underground storage tanks used in conjunction with an ongoing business considered a stationary installation).

COPIES FURNISHED:

Lea Crandall, Agency Clerk
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Karen Bishop, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Niel Schuberg, President
Nemi, Inc.
1898 Stallion Drive
Loxahatchee, Florida 33470-3994

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 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.