STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner, vs. POLO NORTH COUNTRY CLUB, INC., Respondent.	)	Case No. 09-5068EF

FINAL ORDER

On March 3, 2010, a final administrative hearing was held in this case by video teleconference at sites in West Palm Beach and Tallahassee before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner, Department of Environmental Protection (DEP), should impose on Respondent, Polo North Country Club, Inc. (Polo North), an administrative penalty in the amount of $10,000, require Polo North to take corrective action, and require payment of DEP's investigative costs for allegedly violating rules relating to above-ground storage tank (AST) systems.

PRELIMINARY STATEMENT

On August 24, 2009, DEP issued a Notice of Violation, Orders for Corrective Action, and Civil Penalty Assessment (NOV) directed to Polo North. The NOV alleged: Count I, failure to maintain financial responsibility; Count II, failure to maintain registration; Count III, failure to maintain records and provide site access; Count IV, failure to properly store used oil; Count V, failure to properly close the ASTs; and Count VI, responsibility for DEP's investigative costs. Polo North denied the charges and requested a hearing, and the matter was referred to DOAH.

The matter initially was scheduled for a final hearing on October 1, 2009, but the hearing was rescheduled several times before being held on March 3, 2010.

The parties filed a Joint Pre-Hearing Stipulation. At the hearing, the parties had one Joint Exhibit admitted in evidence. DEP called two witnesses: Judy Dolan, DEP Environmental

Specialist III; and Serina Jones, a storage tank inspector with the Martin County Health Department. DEP also had its Exhibits 1-2 and 5-20 admitted in evidence. Polo North called two witnesses: Ed Gifford, general manager of the Martin Downs Country Club; and Glenn Straub, president of Polo North. Polo North also had its Exhibits 1-3 admitted in evidence. The pertinent statutes and rules were officially recognized. It was stipulated that Polo North does not own the ASTs in question.

The parties did not request a transcript of the final hearing but requested and were given until March 23, 2010, to file proposed final orders, which have been considered.

FINDINGS OF FACT

1. Polo North is an active Florida for-profit corporation that has owned property at 4300 Southwest Mallard Creek Trail in Palm City in Martin County (the Property), the home of the Martin Downs Country Club (the Club), since December 31, 2007.

2. When Polo North purchased the Property and took over operation of the Club, it had an AST system consisting of two stationary ASTs, together with their associated piping and dispensers. The ASTs were fully enclosed and had a capacity in excess of 550 gallons; they were in a secondary containment area consisting of a concrete slab and walls. The parties stipulated that Polo North did not purchase or own the ASTs. However, the ASTs contained vehicular fuel used by Polo North for lawn

maintenance and associated activities in the operation of the Club. As such, Polo North was responsible for the ASTs.

3. The previous owner's financial responsibility insurance policy for the ASTs expired on February 17, 2007. No subsequent financial responsibility insurance of any kind has been maintained for the ASTs since that date, either by the previous owner or by Polo North.

4. DEP regulates ASTs like the two that were at the Club when Polo North took over. Under contract, Martin County inspects regulated facilities for DEP. If violations noted during inspections are not corrected, the County refers the matter to DEP for enforcement.

5. During an annual compliance inspection of the Facility (i.e., the AST System on the Property) on February 21, 2008, the County noted that there was no method of financial responsibility in place for the ASTs at the Club and no certification of financial responsibility available for review. It also was noted that no updated registration form for the ASTs had been submitted to DEP. An inspection report was prepared by the County and given to a representative of Polo North explaining the alleged violations and the corrective actions to be taken--namely, get and provide a certificate of financial responsibility, update the registration form, and have the necessary documentation available for review at the Facility. On February 21, 2008, the County mailed a non-compliance letter to Polo North explaining the

alleged violations and the corrective actions to be taken and documented within 30 days.

6. Not having received a response from Polo North indicating that corrective action had been taken, the County referred the matter to DEP for enforcement. On June 16, 2008, DEP re-inspected the Facility and noted the same violations as before, no corrective action having been taken. In addition, it was noted that two additional ASTs had been placed in the secondary containment area but not connected to piping and a dispenser. The additional ASTs had a capacity of less than 550 gallons each, which is below the threshold for regulation by DEP. The placement of the unregulated ASTs in the secondary containment area was not ideal because they were squeezed between the regulated ASTs and the containment wall, but this was not cited as an additional violation.

7. Despite having notice of the inspection on June 16, 2008, no Facility representative was present at the time to unlock the dispensers for inspection. However, the dispensers had been inspected during the annual inspection done on February 21, 2008, and were found to have been new since the previous annual inspection and in acceptable condition.

8. At some point in time during the summer of 2008, Glenn Straub, the President of Polo North, discussed the matter with representatives of the County and DEP. He questioned why Polo North was being cited and why enforcement action was being

taken. He took the position that Polo North had the financial ability to put up a bond or self-insure any risk from the regulated ASTs, which he said Polo North did not own. He recalled being told by DEP and the County that a closure plan would be required.

9. Without notifying DEP, Polo North initiated action with the County to close the regulated ASTs at the Club. On June 27, 2008, Polo North submitted a closure plan to the County Health Department, Storage Tank Section, which reviewed the plan on June 30, 2008.

10. On September 15, 2008, DEP issued a warning letter to Polo North. The warning letter explained the violations, required corrective action, and stated that the proposed penalty was $6,500 plus $500 for costs and expenses. Polo North did not respond to the warning letter. At some point in time not disclosed by the evidence, Polo North disconnected the regulated ASTs and connected the two unregulated 550-gallon ASTs.

11. On March 11, 2009, DEP and the County conducted another inspection. DEP found the Facility still to be in violation because: there still was no evidence of financial responsibility for the regulated ASTs; the regulated ASTs still contained potentially explosive petroleum vapors, indicating that they had not been thoroughly and properly cleaned out for closure; there was an additional tank in the secondary containment area containing used oil; the used oil tank was squeezed between one

of the (disconnected) regulated ASTs and the containment wall so that it was impossible to inspect the used oil tank or the inside of the containment wall to assess their integrity; there was evidence that the pipe connection between an unregulated AST and the dispenser was weeping product onto the floor of the containment area; there was water with a petroleum sheen and sludge in the drain area in the floor of the containment area, making it impossible to inspect the bottom of the drain to determine if there was a leak to the ground; there was evidence of used oil spills or leaks from the used oil tank, which had some rust and was banged up and out-of-shape; there was evidence of possible discharges to the ground via cracks in, or possibly defects in the design of, the secondary containment area; and the regulated ASTs had not been taken out of service and "permanently closed" in accordance with DEP's closure requirements, in part because a closure assessment was required due to the possible discharges. An inspection report was prepared and given to a representative of Polo North explaining the alleged continuing and new violations to be resolved in the pending enforcement proceeding.

12. Since March 11, 2009, all violations have been corrected except for the closure assessment, the permanent closure of the regulated ASTs (which have been cleaned and removed from the site) in accordance with DEP requirements, and the provision of evidence of financial responsibility. The owner

registration for the regulated ASTs also has not been updated, but it now has been stipulated that ownership of those ASTs has not changed.

13. Mr. Straub testified that Polo North can self-insure or obtain a bond to insure against the cost of corrective action and third-party liability that might arise due to a discharge or discharges from the regulated ASTs. Since the closure assessment has not been done, and the details of Polo North's financial condition were not presented during the hearing, the evidence does not corroborate Mr. Straub's testimony. To the contrary, there was evidence that Polo North switched to unregulated ASTs to eliminate the need to demonstrate financial responsibility.

14. It would appear from the evidence that extensive damage from a discharge or discharges from the regulated ASTs is unlikely, but this cannot be ascertained without a closure assessment.

15. DEP presented no evidence of its investigative costs and, in its Proposed Final Order, withdrew Count VI of its NOV.

CONCLUSIONS OF LAW

16. Section 403.121(2), Florida Statutes, prescribes the administrative enforcement process for DEP "to establish liability and to recover damages for any injury to the air, waters, or property . . . of the state caused by any violation." Under that process, DEP is authorized to "institute an administrative proceeding to order the prevention, abatement, or

control of the conditions creating the violation or other appropriate corrective action." § 403.121(2)(b), Fla. Stat. The process is initiated by "the department's serving of a written notice of violation upon the alleged violator by certified mail." § 403.121(2)(c), Fla. Stat. If a hearing is requested by the alleged violator, "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. After the hearing, "the administrative law judge shall issue a final order on all matters, including the imposition of an administrative penalty." Id.

17. Florida Administrative Code Rule[1] 62-762.301(1) provides that the AST "requirements of this chapter, unless specified otherwise, apply to owners and operators of facilities, or owner and operators of aboveground storage tank systems with individual storage capacities greater than 550 gallons, that contain or contained" vehicular fuel or pollutants.

18. Rule 62-762.201(52) defines "operator" as "any person operating a facility, whether by lease, contract, or other form of agreement."

19. Rule 62-762.201(55) defines "owner" as "any person defined in Section 376.301(23), F.S., owning a facility."

20. Under Rule 62-762.201(28): "'Facility' means a nonresidential location containing, or that contained, any stationary tank or tanks containing, or that contained regulated

substances, and that have, or had, individual capacities greater than 550 gallons for AST systems."

21. Count I of the NOV charges a failure to demonstrate financial responsibility. Under Rule 62-762.401(3), either the owner or operator of a facility must demonstrate financial responsibility, i.e., the ability to pay for corrective action and third-party liability resulting from a discharge at the facility. The financial responsibility demonstration "shall be made . . . in accordance with C.F.R. Title 40, Part 280, Subpart H . . . ." Fla. Admin. Code R. 62-762.401(3)(a)2. For the facility in question, financial responsibility is required for "a minimum of $500,000.00 per incident and $1 million annual aggregate." Fla. Admin. Code R. 62-762.401(3)(b)1. The evidence proved that financial responsibility was not demonstrated as required by Rule 62-762.401(3). "If the owner and operator of a tank are separate persons, only one person is required to demonstrate financial responsibility. However, both persons are liable in event of noncompliance." Fla. Admin. Code R. 62-762.401(3)(a)1. Polo North is liable for failing to comply with Rule 62-762.401(3). Count I of the NOV was proven.

22. Count II of the NOV charges a failure to update the AST system's registration. Under Rule 62-762.401(1), either the owner or operator of an AST system must register the system. In this case, it was not proven that the system was not registered or that there was a need to update the registration since the

owner of the ASTs had not changed. Count II of the NOV was not proven.

23. Count III of the NOV charges a failure to keep proper records for and allow access to the Facility for inspection. Under Rule 62-762.711(1), it was necessary to maintain records for the Facility in permanent form and to make them available for inspection, as well as to allow access to the site for inspection.

24. The evidence did not prove that records were not maintained properly but, rather, that some records did not exist--namely, the subjects of Counts I and II, which are the appropriate charges. The evidence did not prove a record-keeping violation.

25. There was evidence that, on one inspection, no representative of Polo North was present at the appointed time for the inspection and that the inspectors could not access the Facility's locked dispensers on that occasion. But that did not constitute a failure to allow access to "the site," it only occurred one time, and there was no evidence as to the circumstances of why it occurred, and the condition of the dispensers was not the focus of the re-inspection. Count III of the NOV was not proven.

26. Count IV of the NOV charged a failure to properly store used oil. Rule 62-762-710.401(6) requires used oil to be stored in containers that are "clearly labeled with the words 'used oil'

and are in good condition (no severe rusting, apparent structural defects or deterioration) with no visible oil leakage." The tank Polo North was using to store used oil may have been banged up and out-of-shape, and there was some rust, but it was not proven that the rusting was severe, that the defects were structural, or that the tank was deteriorated. However, the tank was not labeled "used oil," which proved Count IV of the NOV.

27. Count V of the NOV charges the failure to properly close a tank system. Rule 62-762-710.801 addresses out-of-service and closure requirements for regulated ASTs, and paragraph (4) states that "an assessment shall be performed to determine if a discharge from the system or system components has occurred." The evidence is undisputed that no closure assessment has been performed.

28. Polo North argued in its Proposed Findings of Fact and Conclusions of Law that, under Rule 62-762.801(3)[sic], no closure or closure assessment is required for ten years from March 2009, when the regulated ASTs were taken out-of-service, because they were in a secondary containment area. Rule 62-762.801(2)a.3. states: "Systems with secondary containment installed and operated in accordance with this chapter may remain in a continuous out-of-service status for ten years. After this period, the system shall be returned to service or closed in accordance with subsection 62-762.801(3), F.A.C." But it is clear from the evidence that Polo North was not just taking the

regulated ASTs out-of-service, it was closing them in accordance with the closure plan submitted to the County. In addition, it is clear that, once the ASTs were replaced and removed from the secondary containment area, Rule 62-762.801(2)a.3. did not apply to Polo North's regulated ASTs.[2] To the contrary, Rule 62-762.801(4)(a) clearly states: "At time of closure, [or] replacement, . . . an assessment shall be performed to determine if a discharge from the system or system components has occurred." For these reasons, Polo North's argument has no merit.

29. In its Proposed Final Order, DEP withdrew Count VI seeking its investigative costs.

30. The proven rule violations also constitute violations of Sections 376.302 and 403.161, Florida Statutes.

31. Under Section 403.121(4)(a), Florida Statutes, the appropriate penalty for Count I is $5,000. Under Section 403.121(5)(a), Florida Statutes, the appropriate penalty for Count IV is $500. Under Section 403.121(3)(g), Florida Statutes, the appropriate penalty for Count V is $1,000. Under paragraph (6) of the statute, it is appropriate to double the penalty for Count V for a continuing violation. Neither increasing nor decreasing these penalties under paragraphs (6), (7), (8), or (10) of the statute is warranted under the facts of this case.

DISPOSITION

Based upon the foregoing Findings of Fact and Conclusions of Law, the charges under Counts I, IV, and V of the NOV are sustained, and Polo North shall:

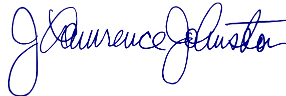
1. Pay administrative penalties in the total amount of $7,500, payable within 30 days by check or money order to the Department of Environmental Protection with the notations "OGC Case No. 09-0071" and "Ecosystem Management and Restoration Trust Fund." Payment shall be mailed to DEP's Southeast District, 400 North Congress Avenue, Suite 200, West Palm Beach, Florida 33401.

2. Immediately commence the required closure assessment and, within 45 days, submit a completed Closure Assessment Report to DEP, as required by the applicable rules.

3. If the closure assessment reveals contamination at the facility in question, immediately undertake corrective actions in accordance with Rule 62-762.821(2) and Rule Chapter 62-770.

4. If the closure report reveals any non-petroleum contamination, it shall be addressed in accordance with Chapters 376 and 403, Florida Statutes, and applicable DEP rules.

DONE AND ORDERED this 22nd day of April, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of April, 2010.

ENDNOTES

1/ All rule references are to the Florida Administrative Code.

2/ See Rule 62-762.201(72): "'Secondary containment' means a release detection and prevention system that meets the performance standards of paragraph 62-762.501(1)(e), F.A.C., and includes dispenser liners, piping sumps, double-walled tanks and piping systems, or single-walled tanks or piping systems that are contained within a liner or an impervious containment area. A Release Prevention Barrier, as specified in API Standard 650, Appendix I, is considered secondary containment for field-erected aboveground storage tank bottoms."

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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.