

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Petitioner,)
)
vs.) Case No. 10-1249EF
)
PREMIER CONSTRUCTION GROUP,)
INC.,)
)
Respondent.)
_____)

FINAL ORDER

On January 20, 2011, a final administrative hearing was held in this case in Inverness before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Rick A. Suggs
Premier Construction Group
2315 Highway 41, North
Inverness, Florida 34453

STATEMENT OF THE ISSUES

The issues in this case are whether penalties should be imposed and investigative costs and expenses assessed against

Respondent for water supply system violations; and, if so, the amount of the penalties and assessments.

PRELIMINARY STATEMENT

DEP filed and served on Respondent a Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment, DEP OGC File No. 09-3847-09-PW, alleging several water treatment plant violations (the NOV). Respondent disputed most of the charges and requested an administrative hearing. DEP referred the matter to DOAH for assignment to an ALJ.

The matter was heard in Inverness on January 20, 2011. At the hearing, DEP called Emily Wakley, formerly an environmental specialist in water treatment plant regulation, and Rick Suggs, who is Respondent's owner, president, and registered agent. DEP also had its Exhibits 1-14 admitted in evidence. Mr. Suggs also testified in Respondent's case-in-chief. Mr. Suggs admitted the alleged violations but requested a smaller penalty and cost assessment.

A Transcript of the final hearing was filed, and DEP filed a proposed final order (PFO), which has been considered.

(Respondent did not file a PFO.)

FINDINGS OF FACT

1. Respondent, Premier Construction Group, Inc., owns and operates a water treatment plant and associated piping in a commercial building it owns and leases at 2315 Highway 41 North

in Inverness. The water treatment plant consists of a 500-gallon tank that holds groundwater pumped from a well. The water in the tank is treated with chlorine and distributed throughout the building for potable water use. The water system serves 25 or more people daily for at least 60 days a year and serves the same people for over six months a year.

2. Respondent owned and operated the water system for 18 and a half years with no violations. Respondent hired a licensed water treatment plant operator to monitor and ensure compliance with applicable DEP rules.

3. In August 2009, Respondent's licensed operator increased his price substantially. Rick Suggs, as Respondent's owner and president, disputed the increase and asked the licensed operator to reconsider. Family obligations then required Mr. Suggs to travel to South Carolina for an extended period of time, and Respondent did not attend to the matter further.

4. By the end of August 2009, Respondent's licensed operator notified DEP that he would no longer be servicing Respondent's water system as of the end of the month. On August 24, 2009, DEP mailed Respondent a letter relaying this information and putting Respondent on notice that a new licensed operator would have to be hired for September.

5. Notwithstanding Respondent's communications with its licensed operator and DEP in August, Respondent did not hire a new licensed operator. Mr. Suggs testified that Respondent did not know its licensed operator actually quit until later in September. When this was brought to Mr. Suggs' attention, he instructed his office manager to hire a replacement. Respondent thought the matter was resolved, but the supposed replacement did not proceed with the work.

6. While Respondent was without a licensed operator, the residual chlorine in the system dropped to zero when tested by DEP on September 17, 24, and 30 and on October 7 and 13, 2009. As a result, the water system did not comply with disinfection requirements during September and October 2009.

7. Respondent did not notify DEP of its failure to comply with disinfection requirements in September and October 2009.

8. No monthly operation reports were submitted to DEP for Respondent's water system for September or October 2009.

9. No bacteriological samples were collected from Respondent's water system for the months of September and October 2009.

10. Respondent did not notify DEP of its failure to collect bacteriological samples in September and October 2009.

11. While without a licensed operator, Respondent did not provide public notification of its failure to collect bacteriological samples in September and October 2009.

12. Well into October 2009, Respondent became aware that the supposed replacement licensed operator was not doing work for Respondent. Mr. Suggs hired a replacement licensed operator named Mike Watson, who began servicing Respondent's water system on November 17, 2009. Public notification of Respondent's failure to collect bacteriological samples in September and October 2009 was given on November 25, 2009.

13. On December 11, 2009, Respondent submitted a completed DEP Form 62-555.900(22), Certification of Delivery of Public Notice, as to its failure to notify the public of its failure to collect bacteriological samples in September and October 2009.

14. By not having a licensed operator in September and October 2009, Respondent saved \$332.

15. By not having bacteriological samples collected and tested in September and October 2009, Respondent saved \$60.

16. There was evidence that DEP spent approximately \$678 investigating and enforcing the violations. More may have been spent, but no evidence of any additional costs or expenses was presented.

17. There was no evidence of any other water treatment violations by Respondent after October 2009.

18. Although there was a potential that the violations could have posed a health threat, there was no evidence that the public's health actually was threatened by Respondent's violations. The water system was tested on November 18, 2009, and did not have any coliform bacteria.

19. The NOV includes corrective actions (essentially coming into and staying in compliance), which Respondent already has taken.

20. The NOV requests that penalties be paid within 30 days by cashier's check or money order made payable to the "State of Florida Department of Environmental Protection" and including the notations OGC File No. 09-3847-09-PW and "Ecosystem Management and Restoration Trust Fund" to be mailed to DEP's Southwest District office at 13051 North Telecom Parkway, Temple Terrace, Florida 33637.

21. Respondent believes the penalties sought by DEP in this case are excessive. Mr. Suggs cited Respondent's clean record for 18 and a half years, his personal and financial difficulties during the two months when the violations occurred, and his responsiveness in correcting violations beginning in November 2009. Mr. Suggs testified that, during mediation, DEP informed him that the penalties could have totaled \$115,000 if an unexplained "matrix" had been used to calculate the penalties. Mr. Suggs thought \$115,000 was "ludicrous."

Mr. Suggs also requests that the lesser penalties sought in the NOV be further reduced, especially considering that Respondent paid a lawyer \$2,800 for representation earlier in the proceeding, until the lawyer withdrew from the case.

CONCLUSIONS OF LAW

22. This is an administrative proceeding under section 403.121(2), Florida Statutes,^{1/} to impose penalties and require corrective actions. The burden of proof is on DEP. See § 403.121(2)(d), Fla. Stat. DOAH has final order authority. Id.

23. Respondent is a "supplier of water" under section 403.852(8). Respondent's water system is a "public water system" and a "nontransient non-community water system" as defined by section 403.852(2) and (4). Respondent's water system is a "ground water system" as that term is used in Florida Administrative Code Chapters 62-550 and 62-555.

24. DEP proved Count I of the NOV, which alleged a violation of rule 62-555.350(8) for Respondent's failure to employ operation personnel under chapters 62-602 and 62-699 in September and October 2009.

25. DEP proved Counts II through VI of the NOV, which alleged violations of rules 62-555.320(12)(d) and 62-555.350(6) for Respondent's failure to maintain at least 0.2 milligram of

free chlorine residual in its water system on five occasions in September and October 2009.

26. Count VII of the NOV alleged a violation of rule 62-555.350(10)(b)2., and therefore section 403.161, for Respondent's failure to notify DEP of its failure to comply with disinfection requirements in September and October 2009. The rule requires notification by noon of the next business day, but the evidence was that Respondent did not know there was no residual chlorine in the system. The \$1,000 penalty for this violation should not be added to the penalties for Counts I through VI.

27. DEP proved Count VIII of the NOV, which alleged a violation of rules 62-555.350(12)(b) and 62-550.730(1)(d), and therefore section 403.161, for Respondent's failure to timely submit operation reports for September and October 2009, as required by rule 62-555.900(2)-(4).

28. DEP proved Counts IX and X of the NOV, which alleged a violation of rule 62-555.518(2), and therefore section 403.161, for Respondent's failure to take monthly total coliform samples from the water distribution system during the months of September and October 2009, as required for suppliers of water for nontransient non-community water systems.

29. DEP proved Count XI of the NOV, which alleged a violation of rule 62-555.518(11)(b), and therefore section

403.161, for Respondent's failure to report its coliform monitoring violation to DEP within 48 hours of discovery of the violation, as required for public water systems.

30. DEP proved Count XII of the NOV, which alleged a violation of rule 62-560.410(3)(d), and therefore section 403.161, for Respondent's failure to notify the public of the total coliform monitoring violations in September 2009 as soon as possible and not more than 30 days after discovery of the violations.^{2/}

31. DEP proved Count XIII of the NOV, which alleged a violation of rules 62-560.410(10) and 62-550.730(1)(b), and therefore section 403.161, for Respondent's failure to submit a completed Form 62-555.900(22), Certification of Delivery of Public Notice, to DEP within ten days after notifying the public of the total coliform monitoring violations in September and October 2009, as required for suppliers of public water.^{3/}

32. DEP proved \$678 of investigative costs and expenses under Count XIV of the NOV, which are recoverable under section 403.141(1).

33. Even without the \$1,000 penalty sought in Count VII of the NOV, the penalties for Counts I through XIII far exceed \$10,000, which is the maximum for an NOV. See § 403.121(2)(b), (4), (5), and (8), Fla. Stat.

34. Section 403.121(10) allows the ALJ to receive evidence in mitigation and reduce the penalties in subsections (3), (4), and (5) to 50 percent for mitigating circumstances, including good faith efforts to comply prior to or after discovery of the violations by the department. Even without the \$1,000 penalty sought in Count VII of the NOV, if those penalties were cut in half, the total still would exceed the \$10,000 maximum.

35. Section 403.121(10) also allows the ALJ to further reduce penalties 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. No such affirmative finding has been made.


36. Section 403.121(11) provides that penalties "shall be deposited in the Ecosystem Management and Restoration Trust Fund (or another trust fund if designated by statute) and shall be used to fund the restoration of ecosystems, or polluted areas of the state, as defined by the department, to their condition before pollution occurred.

DISPOSITION

Based upon the foregoing Findings of Fact and Conclusions of Law, Respondent shall pay a \$10,000 administrative penalty within 30 days, by cashier's check or money order made payable to the "State of Florida Department of Environmental Protection" and including the notations OGC File No. 09-3847-09-PW and

"Ecosystem Management and Restoration Trust Fund" to be mailed to DEP's Southwest District office at 13051 North Telecom Parkway, Temple Terrace, Florida 33637.

DONE AND ORDERED this 8th day of March, 2011, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
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 8th day of March, 2011.

ENDNOTES

^{1/} Citations to sections refer to the Florida Statutes (2010); citations to rules are to the version of the Florida Administrative Code in effect at the time of the final hearing; chapters will be specified as either Florida Statutes or Florida Administrative Code chapters.

^{2/} In its Prehearing Statement filed on January 12, 2011, DEP conceded that the public notification was timely as to the October 2009 sampling violation.

^{3/} In its Prehearing Statement filed on January 12, 2011, DEP conceded that the filing was untimely only as to the September 2009 monitoring violation; however, in its PFO, DEP contended that the filing was untimely as to both the September and the October 2009 monitoring violations, which was proven by the

evidence. The discrepancy has no effect on the penalty sought by DEP under County XIII.

COPIES FURNISHED:

Rick A. Suggs
Premier Construction Group
2315 Highway 41, North
Inverness, Florida 34453

Howard Evan Fox, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Rick A. Suggs
502 Turner Camp Road
Inverness, Florida 34453

Herschel T. Vinyard, Jr., Secretary
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Tom Beason, General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

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

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.