

**STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

<b>GLEND A Q. MAHANEY,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>DEP CASE NO.: 17-0119</b>
	)	<b>DOAH CASE NO.: 17-2518</b>
<b>DEPARTMENT OF ENVIRONMENTAL PROTECTION,</b>	)	
	)	
<b>Respondent.</b>	)	
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**FINAL ORDER**

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on November 15, 2017, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. Neither Petitioner nor the Department filed a proposed recommended order, or exceptions to the ALJ's RO. This matter is now before the Secretary of the Department for final agency action.

**BACKGROUND**

On March 10, 2017, the Department issued an access order (Access Order), which would require Petitioner to provide the Department access to her property located at 15751 Old US Highway 441, in Tavares, Florida, to install temporary groundwater monitoring wells, and collect groundwater samples from the temporary wells and from Petitioner's potable water well. On or about March 29, 2017, Petitioner filed a petition for hearing to challenge the Department's action.

At the final hearing, Petitioner testified on her own behalf and offered no exhibits into evidence. The Department presented the testimony of Department employees Tracy Jewsbury and David Phillips. Respondent's Exhibit 1 was admitted into evidence. Due to disruptions caused by Hurricane Irma, the final hearing transcript was not filed with DOAH until October 27, 2017.

### **SUMMARY OF THE RECOMMENDED ORDER**

The groundwater beneath a parcel of land adjacent to Petitioner's property was contaminated with petroleum when the land was used previously for an auto salvage operation. (RO ¶ 3). Groundwater sampling near the border of Petitioner's property showed groundwater contamination by gasoline constituents which exceeded Groundwater Cleanup Target Levels (GCTLs), which would require cleanup. However, later sampling showed the concentration of contaminants had decreased below GCTLs, probably because of natural attenuation. (RO ¶ 4).

The existing data suggests that any groundwater contamination beneath Petitioner's property is probably now at a level that would not require cleanup. Because the Petitioner has continually requested further investigation, the Department issued the Access Order to examine the potential extent and concentration of any contaminants on Petitioner's property. (RO ¶¶ 5, 7). The Department wants to: (a) install up to five temporary groundwater monitoring wells, (b) collect groundwater samples from the wells, (c) collect a groundwater sample from Petitioner's potable water well, and (d) remove the monitoring wells after the sampling. (RO ¶ 8).

#### **Liability**

Although Petitioner believes petroleum contamination is present on her property and wants it cleaned up, she objects to the liability provision of the Access Order. Paragraph 9(e) of the Access Order states that the Petitioner "shall not be liable for any injury, damage or loss on

the property suffered by the Department, its agents, or employees which is not caused by the [sic] negligence or intentional acts.” (RO ¶ 10). Petitioner insists she should not be liable for injuries or damages suffered by Department’s agents or employees who come on her property for these purposes. She demands that the Department come onto her property “at their own risk.” (RO ¶ 11).

At the final hearing, the Department stated that it did not intend to impose on Petitioner a level of liability different than the liability that would already apply under Florida law. The Department offered to amend Paragraph 9(e) of the Access Order to provide that Petitioner’s “liability, if any, shall be determined in accordance with Florida law.” (RO ¶ 12).

#### Scope of the Investigation

Petitioner furthermore objects that the proposed groundwater sampling is not extensive enough. Petitioner also believes the Department should test for soil contamination. (RO ¶ 13).

The Department’s expert, David Phillips, testified that the proposed monitoring wells are located along the likely path of migration of any contaminated groundwater from the former auto salvage site. (RO ¶ 14). Another Department witness, Tracy Jewsbury, testified that no soil contamination was found on the auto salvage site, so the Department has no reason to expect there would be soil contamination on Petitioner’s property that came from the auto salvage operation. (RO ¶ 15).

In the RO, the ALJ recommended that the Department withdraw the Access Order or, alternatively, that Paragraph 9 (e) of the Access Order be amended to provide that the Petitioner’s potential liability, if any, shall be determined in accordance with Florida law. (RO at page 10).

## CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker*, 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing*, 954 So. 2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrections v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact, the party “has thereby expressed its agreement with, or at least waived any objection to, those findings of fact.” *Env'tl. Coalition of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1<sup>st</sup> DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2017); *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised, it is

ORDERED:

A. The ALJ's Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference; and

B. The Access Order is amended to provide that the Petitioner Glenda Q. Mahaney's potential liability, if any, shall be determined in accordance with Florida law.

**JUDICIAL REVIEW**

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 22<sup>ND</sup> day of January 2018, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



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NOAH VALENSTEIN  
Secretary

Marjory Stoneman Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,  
FLORIDA STATUTES, WITH THE DESIGNATED  
DEPARTMENT CLERK, RECEIPT OF WHICH IS  
HEREBY ACKNOWLEDGED.

Sarah Knisley  
Deputy CLERK

1-22-18  
DATE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by U.S.

Mail to:

Glenda Q. Mahaney  
Post Office Box 123  
Mount Dora, FL 32756

by electronic mail to:


Bill Gwaltney, Esquire  
Department of Environmental Protection  
3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000  
[Bill.Gwaltney@dep.state.fl.us](mailto:Bill.Gwaltney@dep.state.fl.us)

and by electronic filing to:

Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, FL 32399-1550

this 22<sup>ND</sup> day of January, 2018.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

  
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STACEY D. COWLEY  
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000  
Telephone 850/245-2242