STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

vs. Case No. 18-4555EF

TD DEL RIO, LLC,

Respondent.
_____/

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing in this case on May 29, 2019, in Sarasota, Florida.

APPEARANCES

For Petitioner: Paul Joseph Polito, Esquire
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

For Respondent: TD McRae, pro se
Matthew Moralejo, pro se
TD Del Rio, LLC
4608 East Columbus Drive
Tampa, Florida 33605-3210

STATEMENT OF THE ISSUE

The issue is whether Respondent, TD Del Rio, LLC, should pay for investigative costs and expenses and undertake corrective actions that are demanded by the Department of Environmental

Protection (Department), as set forth in the Amended Notice of Violation and Orders for Corrective Action (Amended NOV).

PRELIMINARY STATEMENT

On January 31, 2018, the Department issued a two-count NOV alleging that TD Del Rio, LLC, and David Lynn Dearing, who currently own or previously owned and operated a business on certain property in Tampa, Florida, failed to initiate a site assessment for hazardous substance contamination on the property. The NOV requires certain corrective action and the payment of related costs and investigative expenses. Timely requests for a hearing were filed, and the matter was referred by the Department to the Division of Administrative Hearings to conduct a hearing.

On April 13, 2018, the Department issued an Amended NOV which added a third count alleging that the two parties had failed to initiate a site assessment for petroleum and petroleum product contamination on the property. The Amended NOV requires certain corrective action and the payment of costs and expenses of not less than $1,000.00 incurred by the Department in conducting its investigation.

Prior to the hearing, the Department and Mr. Dearing entered into a settlement agreement to resolve his charges. Therefore, this Recommended Order is directed only to TD Del Rio, LLC, and the style of the case has been amended to reflect this change.

At the hearing, the Department presented the testimony of four witnesses: Mr. McRae, the managing member of the company; Mr. McRae's grandson-in-law, Matthew Moralejo; and two Department employees, Justin Chamberlin and John Sego. TD Del Rio, LLC, was represented by Mr. McRae and Mr. Moralejo. It presented no witnesses. Joint Exhibits 1 through 11 were accepted in evidence. The parties also filed an Amended Joint Pre-hearing Stipulation, which sets forth certain stipulated facts.

A one-volume Transcript of the hearing was prepared. Proposed recommended orders (PROs) were filed by the Department and Respondent, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Background

1. The Department has the authority to institute an administrative action to abate or correct conditions that may create harm to the environment. In this case, it filed an Amended NOV directing the existing and prior owner of certain property to undertake cleanup and cost recovery to redress the discharge of petroleum products and disposal of hazardous waste. The property is located at 4810 South 50th Street, Tampa, Florida, measures approximately 200 by 800 feet, and is further identified as Parcel Number U-03-30-19-1Q3-000112-00001.0. The property is located in an industrial area.

2. Mr. Dearing operated a metal recycling facility on the property during the 1990s. The facility received scrap waste and passed waste through mechanical shears that shredded the waste for sorting and recycling. The Amended NOV alleges that all contamination on the property occurred while Mr. Dearing owned the property. The charges related to his activities have been resolved in a settlement agreement prior to the final hearing in this matter. The terms of the settlement are not of record.

3. TD Del Rio, LLC, is a limited liability company formed in April 2012. It serves as a pension fund for a self-directed Individual Retirement Account for Mr. McRae. The company acquired ownership of the subject property in September 2012 by purchasing a tax deed from Hillsborough County.

4. Respondent agrees that there has been a "discharge," as defined under section 376.301(13), Florida Statutes, of hazardous substances and pollutants (petroleum or petroleum products) on the property prior to September 1, 2012. Such discharges have not been assessed, remediated, or abated.

5. Respondent agrees there has been a "disposal," as defined under section 403.703(9), of hazardous waste into and upon the property prior to September 1, 2012.

6. Respondent agrees that the property is a "facility," as defined under section 376.301(19).

7. Respondent agrees that the property is a "hazardous waste facility," as defined under section 403.703(15).

B. Environmental Testing

8. Pursuant to a contract with the Department, on April 24 through 26, 2012, Ecology & Environmental, Inc. (E & E), performed a detailed inspection of the property to determine if former recycling activities conducted at the property have impacted soil and groundwater beneath the property. The inspection collected samples of soil, sediment, and groundwater. The inspection was conducted in accordance with guidance documents set forth by the United States Environmental Protection Agency regarding sampling locations, sample types, sampling procedures, use of data, data types, and field quality assurance/ quality control samples.

9. Just before E & E issued a final report, Respondent purchased the property at a Hillsborough County tax deed sale.

10. On November 12, 2012, E & E issued a 532-page Comprehensive Environmental Response, Compensation, and Liability Information System Site Inspection Report (Report) detailing analytical results of soil, sediment, and groundwater sampling performed at the property. See Jt. Ex. 1. E & E concluded that the activities conducted prior to April 2012 impacted the soil, sediment, and groundwater at the property.

11. The Department has adopted Soil Cleanup Target Levels (SCTLs), which are derived based on exposure to the human body. The SCTLs account for inhalation, ingestion, and absorption of contamination into people's bodies. The presence of hazardous substances above these levels presents a threat to persons who come into contact with the substances. If a site has no polychlorinated biphenyls (PCBs) or arsenic exceeding the SCTLs, there is no requirement for the owner to complete an assessment or manage exposure at the site.

12. The testing reveals that the following substances are present in the property's soil from both zero to two feet and two to four feet below land surface at concentrations above the Department's SCTLs: arsenic, barium, cadmium, chromium, lead, carbazole, benzo(a)antracene, benzo(a)pyrene, benzo(a)pyrene toxic equivalents, and PCBs.

13. The commercial/industrial SCTL for PCBs is 2,600 ug/kg. This target level is based upon human exposure to PCB contaminants eight hours per day. The residential SCTL, based on 24 hours of exposure per day, is 500 ug/kg.

14. PCBs are found across the majority of the site at concentrations ranging from 940 ug/kg to 38,000 ug/kg, over 14 times higher than the industrial SCTL and 76 times higher than the residential SCTL for soil of 500 ug/kg.

15. The hazardous substances located in the upper two feet of land surface present the greatest potential for exposure due to potential inhalation, ingestion, and absorption of the substances. Some potential exposure pathways include foot traffic on the property stirring up dust which people present on site could then come into skin contact with or inhale.

16. Any work done in or around the site that is intrusive in nature could present exposure pathways.

17. In addition to soil contamination, the following hazardous substances are present in sediment on the property: arsenic, barium, cadmium, chromium, lead, mercury, silver, volatile organic compounds, semi-volatile organic compounds, and PCBs.

18. The following hazardous substances and petroleum products are present in groundwater on the property at concentrations exceeding the Department's Groundwater Cleanup Target Levels (GCTLs): arsenic, barium, xylenes, carbon tetrachloride, isopropylbenzene, methyl tertiary butyl ether, tetrachloroethene, and trichloroethene. For one well sample, the 2012 investigation also reported an exceedance of PCBs of 1.2 ug/kg in groundwater.

19. The presence of tetrachloroethylene and PCBs in groundwater is a specific concern at the property. PCBs are not readily soluble in water; however, tetrachloroethylene can act as

a carrier for the PCBs and mobilize this contaminant to a greater extent vertically from the source area. This is a concern for the area surrounding the property given that the Floridan aquifer, which is a source of potable water for Hillsborough County, is located approximately 300 feet below ground surface in the surrounding area.

20. Because Respondent has not completed a Site Assessment Report (SAR), the full extent of PCBs and other contamination in soil, sediment, and groundwater, including the contaminants' potential threat to the Floridan aquifer, is not known.

21. Respondent did not present any evidence to contradict the findings and conclusions in the Report. Moreover, Respondent has stipulated that there has been a discharge of hazardous substances and petroleum products on the property prior to its purchase of the property in September 2012.

C. Pre-Purchase Investigation of the Property by Respondent

22. In order to minimize liability for petroleum contamination, Mr. McRae must have undertaken "all appropriate inquiry into the previous ownership and use of" the property before he purchased it, as required by section 376.308(1)(c). Mr. McRae failed to do so.

23. Mr. McRae is the founder, manager, and registered agent of the company and has acquired at least 20 other properties through tax deed sales. He also has bought properties

contaminated with petroleum prior to the purchase of the instant property. In addition, he has owned at least 30 gas stations and has hired environmental contractors to remove petroleum tanks for previous gas stations that he bought. Mr. McRae's grandson-in-law, Matthew Moralejo, has no official title with the company, but he helps in running the business, has communicated with the Department, and bought property, including the one at issue here, at Mr. McRae's direction.

24. Mr. McRae and Mr. Moralejo acknowledge that, before the purchase, they conducted very little research into the property, searching only for things "easily accessible or identified with the property," such as code enforcement issues or liens. They conducted visual research of the property by driving by it and looking at its condition. When the property was purchased, "the place was a wreck" and "just full of overgrowth and junk."

25. Good commercial practice in the purchase of property upon which potentially contaminating activities have occurred entails consultation with a person with appropriate knowledge and experience. Before purchasing the property, Mr. McRae did not consult with an environmental attorney or environmental consultant regarding the potential liability associated with property used as a metal recycling site.

26. If Mr. McRae had hired an environmental consultant to assist him in assessing the likelihood of contamination at the

property, it would have been standard practice to find public records about the property, including any prior enforcement actions taken against prior owners and operators of the property, all of which were public record. A consultant likely would have recommended that Mr. McRae conduct a site assessment in accordance with Florida Administrative Code Chapter 62-780.

27. Section 376.308(1)(c) requires that in determining whether all appropriate inquiry was undertaken by a purchaser of contaminated property, it is necessary to consider the "specialized knowledge or experience of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection."

28. Mr. McRae has no specialized knowledge of sites contaminated with hazardous substances. However, as noted above, he has extensive experience regarding the regulation, assessment, and remediation of petroleum-contaminated sites. He has bought multiple properties through tax deed sales, and he has owned at least 30 gas stations. He has hired environmental contractors to remove petroleum tanks from properties he owned. He also is familiar with the Early Detection Incentive Program instituted by

the Department, under which the Department remediates petroleum-contaminated sites.

29. The purchase price of the property in 2002 was $200,000.00, the purchase price in 2012 was $133,100.00, and the taxable value of the property in 2015 was $408,106.00.

30. Past information about the property was reasonably ascertainable. Ownership history of the site is available from the Hillsborough County Property Appraiser's Office, Hillsborough County Clerk of the Circuit Court, and Hillsborough County Environmental Protection Commission (EPC).

31. Information regarding regulatory actions taken at the property also was reasonably ascertainable. There were many documents in existence at the time Respondent purchased the property that showed contamination was present on the property. They included a 1995 warning letter from the EPC to previous owners of the property detailing petroleum contamination present on the property, a 1996 EPC request for a previous owner to submit a plan to address onsite soil contamination, and a field investigation conducted by the Department in April 2012, or five months before Respondent purchased the property.

32. There is no evidence that the documents referenced above were not "reasonably ascertainable information." Although a visual inspection by a lay person would not disclose the presence of contamination at the property, Mr. McRae should have

known to seek information regarding past enforcement history and site investigation performed at the property.

D. Post-Purchase Actions

33. After buying the property, Respondent dug up debris including tires that were approximately four feet below the soil surface. After removing debris from the contaminated soil, Respondent spread the disturbed soil. To make the property more attractive to prospective tenants, Respondent then spread up to four inches of gravel around the property. This amount of gravel did not cover the entirety of the contaminated area and did not break the exposure pathway that the contaminants presented to people on the property. According to a Department expert, two feet of clean fill over the contaminated area would have been an acceptable intermediate step to break the exposure pathway.

34. After spreading the gravel on the property, Respondent leased the property to three tenants: a landscape business; a portalet company; and a storage container facility. The portalet company and storage container tenants both use the property as storage facilities, including loading and unloading portalets and storage containers, when needed. The contaminants present in the soil present a potential for incidental exposure to workers on the site, especially given that workers are constantly stirring up dust by loading and unloading equipment on the property.

E. Department Communications with Respondent

35. On February 14, 2014, the Department sent Mr. McRae a letter informing him that the Department had information indicating that contaminants may have been released or discharged at the property. The letter referenced the 2012 E & E Report, which documented metals, volatile organic compounds, semi-volatile organic compounds, and PCBs in site soils, sediments, and/or groundwater above SCTLs, Sediment Quality Assessment Guidelines, or GCTLs. The letter stated that failure to submit an SAR within 180 days of receipt of the letter, or by August 14, 2014, may subject Respondent to enforcement action to compel such compliance.

36. Matthew Moralejo responded by email on July 17, 2014, and stated, in part, that "we have never conducted any type of business that would have led to the contamination of said property."

37. The same day, the Department responded by email directing Mr. Moralejo to the Department's public database, OCULUS, that provides reports and correspondence regarding facilities regulated by the Department. The Department provided a link to the 2012 Report and the name of a contact person to discuss Respondent's liability as the current property owner, as well as possible cleanup programs that are available when the current owner is not the one causing the contamination.

38. On September 29, 2015, the Department sent another letter, with attachments, to Mr. McRae. The Department stated that "[s]ome limited site assessment activities have been performed [by E & E] at the site historically; however, the work completed and the documents submitted to date do not constitute a complete [SAR] as required by Rule 62-780.600, F.A.C." The Department again requested an SAR, and, in the alternative, offered a meeting to discuss the issues associated with the letter. Again, the letter warned Mr. McRae that if an SAR was not filed within the timeframes required by the rule, he may be subjected to an enforcement action.

39. In August 2016, Mr. Chamberlain, a Department geologist, met with Mr. McRae and Mr. Moralejo at the property. During the meeting, Mr. Chamberlain took photographs of the site and explained his concerns with the property. Specifically, he informed them that the SAR was still outstanding; and he recommended that Respondent hire an environmental consultant to assist them in the site rehabilitation process.

40. In October 2016, Respondent hired an environmental consultant, Mr. Doherty. On November 29, 2016, the Department emailed Mr. Doherty reminding him that an SAR was due by December 13, 2016. Three days later, Mr. Doherty asked that he be given a six-month extension to file an SAR; the Department authorized only a four-month extension, or to April 3, 2017.

41. Mr. Doherty never conducted any sampling at the property and he did not submit an SAR. Mr. McRae explained at hearing that the consultant "never did [any] work, so he didn't get paid."

42. On May 25, 2017, the Department sent another letter to Mr. McRae stating that it had not received an SAR, and, as a final request prior to initiating enforcement action, requested that he provide a summary of all site assessments completed since September 29, 2015, complete installation of groundwater monitoring wells and conduct sampling within 90 days, and submit an SAR by October 23, 2017.

43. Respondent did not comply with any of those requests. To date, an SAR has not been submitted and a site assessment has not been conducted. The Department then issued an NOV, as amended.

44. Given the numerous letters and emails sent to Respondent, and various site inspections, the Department has incurred costs and expenses of at least $500.00 investigating this matter. Respondent does not dispute this amount.

F. Respondent's Defense

45. Respondent essentially contends it is an innocent third-party purchaser because it had nothing to do with the recycling activities conducted on the property during the 1990s. It argues that the clean-up costs requested by the Department

equal or exceed the value of the property and are cost prohibitive. In its PRO, Respondent contends that if the Department reached a settlement with Mr. Dearing, whose company is responsible for the hazardous waste discharge in the 1990s, this should relieve Respondent from any responsibility. It asks that the Department use "compassion" in dealing with him.

CONCLUSIONS OF LAW

46. Section 403.121(2)(b) provides that the Department may institute an administrative proceeding to order the abatement of conditions creating a violation of the law. Because the Department is not requesting the imposition of administrative penalties, it "retains its final-order authority" in this proceeding. § 403.121(2)(d), Fla. Stat.

47. The Department has the burden of proving by a preponderance of the evidence that TD Del Rio, LLC, is responsible for the violations, as alleged in the Amended NOV. Id.

48. Regarding the disposal of hazardous substances, Count I of the Amended NOV charges Respondent with a violation of Florida Administrative Code Rule 62-780.600, which requires persons responsible for site rehabilitation to initiate a site assessment within 60 days of discovering a discharge.

49. The evidence shows that the property is contaminated; TD Del Rio, LLC, as the owner of the property, is a person

responsible for site rehabilitation; and the property is a facility.

50. Section 376.308(1) imposes strict liability on the owner of the facility contaminated with hazardous substances. To establish liability, the Department need only plead and prove that the prohibited discharge or other polluting condition has occurred. See § 376.308(1), Fla. Stat. See also FT Invs., Inc. v. State Dep't of Envtl. Prot., 93 So. 3d 369, 370-71 (Fla. 1st DCA 2012).

51. Respondent can avoid liability only if it can prove that it qualifies for an affirmative defense set forth in section 376.308(2)(d), known as the third-party defense. The third-party defense allows a defendant to escape liability if it can show: (1) a third party's act or omission was the sole cause of the occurrence; (2) the defendant exercised due care with respect to the pollutant concerned, taking into consideration the characteristics of such pollutant, in light of all relevant facts and circumstances; and (3) the defendant took precautions against any foreseeable acts or omissions of any such third party.

52. The evidence shows that Respondent failed to exercise due care. Although requested by the Department to do so on multiple occasions, Respondent did not conduct a site assessment to delineate the general extent of the contamination. By failing to conduct the assessment, the risk to public health and safety,

as well as possible horizontal migration of the contamination onto neighboring properties and vertical migration into groundwater, is not known.

53. Regarding the discharge of petroleum or petroleum products on the property, Count II alleges that Respondent has violated rule 62-780.600 by failing to initiate a site assessment within 60 days of discovering a discharge of petroleum products.

54. The evidence shows that the property is contaminated and Respondent is a person responsible for rehabilitation.

55. To avoid liability for petroleum contamination, Respondent must satisfy not only the third-party defense in paragraph (2)(d) of section 376.308, but also the innocent purchaser defense in paragraph (1)(c).

56. The innocent purchaser defense allows a purchaser of contaminated property to escape liability if the purchaser can show that it: (1) acquired title to property contaminated by the activities of a previous owner or other third party; (2) did not cause or contribute to the discharge; (3) did not know of the polluting condition at the time the owner acquired title; and (4) if title was acquired after July 1, 1992, it undertook, at the time of acquisition, all appropriate inquiry into the previous ownership and use of the property consistent with good commercial or customary practice.

57. As previously found, Respondent failed to conduct all appropriate inquiry. Here, Mr. McRae failed to obtain the assistance of a person with specialized knowledge before purchasing a former metal recycling site located in an industrial area, and he failed to check Department records before purchasing. These considerations are fatal to his claim of being an innocent purchaser.

58. Even if Respondent demonstrated that it has undertaken all appropriate inquiry before purchasing the property and is an innocent purchaser, it also must satisfy the third-party defense and due care standard under paragraph (2)(d).

59. For the reasons previously found, in light of all relevant facts and circumstances, Respondent has failed to exercise due care with respect to pollutants that have contaminated the property.

60. In Count III, the Department seeks to recover its reasonable costs and expenses in tracing the source of the discharge. § 403.141, Fla. Stat. There is no dispute that the Department has incurred at least $500.00 in investigative costs.

61. The corrective action ordered in the Amended NOV is reasonable and should be imposed.

62. In summary, the Department has proven, by a preponderance of the evidence, that the charges in the Amended NOV should be sustained. While Respondent contributed nothing to

the contamination on its property, and all contamination likely occurred during the 1990s, under the statutory scheme in place, absent a demonstration by Respondent that it satisfies the statutory criteria for avoiding liability, Respondent is responsible for the cleanup costs.

RECOMMENDATION

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

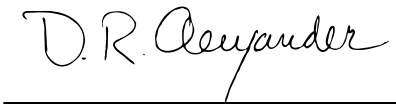
RECOMMENDED that the Department of Environmental Protection enter a final order sustaining the charges in Counts I, II, and III of the Amended NOV. It is further

RECOMMENDED that within 30 days of the final order, Respondent TD Del Rio, LLC, shall commence a site assessment and submit an SAR in accordance with rule 62-780.600. Respondent shall assess and clean up all hazardous substance contamination and petroleum contamination at the property in accordance with chapter 62-780 and the timeframes therein. It is further

RECOMMENDED that within 90 days of the effective date of the final order, Respondent shall pay $500.00 to the Department for costs and expenses. Payment shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall include thereon the notations "OGC Case No. 17-1090" and "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to the State of Florida

Department of Environmental Protection, Southwest District, 13051 North Telecom Parkway, Suite 101, Temple Terrace, Florida 33637.

DONE AND ENTERED this 24th day of July, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 24th day of July, 2019.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.