STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Petitioner,	)	
v.	)	**OGC CASE NO. 17-1090**
	)	**DOAH CASE NO. 18-4555EF**
TD DEL RIO, LLC,	)	
Respondent.	)	
_____/		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on July 24, 2019, 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. No party filed exceptions to the ALJ's RO. This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On January 31, 2018, DEP issued a two-count Notice of Violation (NOV) alleging that TD Del Rio, LLC, (TD Del Rio) and David Lynn Dearing, who currently own or previously owned and operated a business on certain property (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 DEP to DOAH to conduct a hearing.

On April 13, 2018, DEP issued an Amended NOV that 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.

Before the hearing, DEP and Mr. Dearing entered into a settlement agreement to resolve his charges; and the style of the case was amended to reflect this settlement.

At the hearing, DEP presented the testimony of four witnesses: Mr. McRae, the managing member of TD Del Rio; Mr. McRae's grandson-in-law, Matthew Moralejo; and two DEP employees, Justin Chamberlin and John Sego. TD Del Rio presented no witnesses. Joint Exhibits 1 through 11 were accepted in evidence. A one-volume Transcript of the hearing was prepared. DEP and TD Del Rio filed Proposed Recommended Orders (PROs), which were considered by the ALJ in preparation of his Recommended Order.

RECOMMENDED ORDER

The ALJ found that during the 1990s, Mr. Dearing operated a metal recycling facility on the Property, which 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 Mr. Dearing's activities were resolved in a settlement agreement before the final hearing. (RO ¶ 2).

On November 12, 2012, Ecology and Environmental, Inc., (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 before April 2012 impacted the soil, sediment, and groundwater at the Property. (RO ¶ 10). TD Del Rio did not present any evidence to contradict the findings and conclusions in the Report.

Moreover, TD Del Rio stipulated that hazardous substances and petroleum products were discharged on the Property before it purchased the Property in September 2012. (RO ¶ 21).

TD Del Rio agrees that (1) hazardous waste was disposed into and upon the Property before it purchased the Property in September 2012, (2) the Property is a "facility," as defined under section 376.301(19), Florida Statutes, (RO ¶ 6), and (3) the Property is a "hazardous waste facility," as defined under section 403.703(15), Florida Statutes. (RO ¶ 7).

The ALJ found that the following hazardous substances are present in sediments on the Property: arsenic, barium, cadmium, chromium, lead, mercury, silver, volatile organic compounds, semi-volatile organic compounds, and PCBs. (RO ¶ 17). The ALJ also found that the following hazardous substances and petroleum products are present in groundwater on the Property at concentrations exceeding DEP's Groundwater Cleanup Target Levels (GCTLs): arsenic, barium, xylenes, carbon tetrachloride, isopropylbenzene, methyl tertiary butyl ether, tetrachloroethene, and trichloroethene. (RO ¶ 18).

To minimize liability for petroleum contamination, TD Del Rio, must have taken "all appropriate inquiry into the previous ownership and use of" the Property before it purchased the Property, as required by section 376.308(1)(c), Florida Statutes. The ALJ found that Mr. McRae failed to do so. (RO ¶ 22). Mr. McRae, the founder, manager, and registered agent of TD Del Rio, has acquired at least 20 other properties through tax deed sales. He also has bought properties contaminated with petroleum before purchase of the instant Property. In addition, the ALJ found he has owned at least 30 gas stations and hired environmental contractors to remove petroleum tanks for previous gas stations he bought. (RO ¶ 23).

Mr. McRae and Mr. Moralejo acknowledged that, before the purchase, they conducted very little research into the Property. (RO ¶ 24). 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. (RO ¶ 25).

Section 376.308(1)(c), Florida Statutes, requires that to determine whether all appropriate inquiry was undertaken by a purchaser of contaminated property, DEP must 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." § 376.308(1)(c), Fla. Stat. (2019). (RO ¶ 27).

Mr. McRae has extensive experience regarding the regulation, assessment, and remediation of petroleum-contaminated sites. (RO ¶ 28). The ALJ found that 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. (RO ¶ 29). When TD Del Rio purchased the Property, many reasonably ascertainable documents existed showing contamination on the Property, as well as information regarding regulatory actions taken at the Property. (RO ¶ 31).

TD Del Rio leased the Property to three tenants: a landscape business; a portalet company; and a storage container facility. The ALJ found that the contaminants present in the soil present a potential for exposure to workers on the site, especially since such workers constantly stir up dust by loading and unloading equipment on the Property. (RO ¶ 34).

On February 14, 2014, DEP sent Mr. McRae a letter informing him DEP 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 a Site Assessment Report (SAR) within 180 days of receipt of the letter may subject TD Del Rio to enforcement action to compel compliance. (RO ¶ 35).

After several communications with DEP, TD Del Rio hired an environmental consultant, to conduct a SAR by December 13, 2016. According to TD Del Rio, their consultant, however, did not sample the Property or conduct a SAR. (RO ¶ 40-41).

On May 25, 2017, DEP sent another letter to TD Del Rio stating it had not received a SAR. (RO ¶ 42). To date, a SAR has not been submitted and a site assessment has not been conducted. DEP then issued the NOV under challenge. (RO ¶ 43).

The ALJ found that DEP has incurred costs and expenses of at least $500.00 investigating this matter. TD Del Rio does not dispute this amount. (RO ¶ 44).

TD Del Rio 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. (RO ¶ 45).

The ALJ recommended in the RO that the Department enter a final order sustaining the charges in Counts I, II, and III of the Amended NOV. (RO at p. 20). The ALJ concluded that TD Del Rio failed to conduct all appropriate inquiry and due care when it purchased a former metal recycling site located in an industrial area but failed to retain an environmental consultant to examine the site and check DEP's records before purchasing it. The ALJ concluded these factors are fatal to TD Del Rio's claim of being an innocent purchaser. (RO ¶ 57). In summary, the ALJ concluded that DEP has proven, by a preponderance of the evidence, that the charges in the Amended NOV should be sustained. (RO ¶ 62).

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 Corrs. 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." *Envtl. Coal. of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. 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. (2019); *Barfield v. Dep't of Health,* 805 So. 2d 1008 (Fla. 1st DCA 2001); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

Neither party filed any exceptions to the RO objecting to the ALJ's findings or recommendations or to the DOAH hearing procedures. The Department agrees with the ALJ's legal conclusions and recommendations.

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 that:

A. The Recommended Order (Exhibit A) is adopted and incorporated by reference herein;

B. The charges in Counts I, II, and III of the Amended Notice of Violation are sustained;

C. Within 30 days of clerking this Final Order, TD Del Rio, LLC, shall commence a site assessment and submit a Site Assessment Report to the Department in accordance with rule 62-780.600, Florida Administrative Code. TD Del Rio, LLC, shall assess and clean up all hazardous substance contamination and petroleum contamination at the Property in accordance with chapter, 62-780, Florida Administrative Code, and the timeframes therein; and

D. Within 90 day of clerking this Final Order, TD Del Rio, LLC, 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.

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 18th day of October, 2019, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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.

Deputy CLERK 10/18/19 DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail to:

TD McRae
TD Del Rio, LLC
4608 East Columbus Drive
Tampa, FL 33605
Macrent1@aol.com

Paul J. Polito
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
paul.polito@FloridaDEP.gov

this 18th day of October, 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

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