

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

JACQUELINE LANE,)	
)	
Petitioner,)	
)	
v.)	OGC CASE NO. 19-1453
)	DOAH CASE NO. 20-3305
INTERNATIONAL PAPER COMPANY and)	
DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondents.)	
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FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on December 15, 2020, 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 April 20, 2020, the Department and International Paper Company (International Paper) (collectively Respondents) executed a Consent Order that requires International Paper to undertake a series of studies to establish the cause of 19 documented occasions from 2015 to 2020 in which International Paper failed to meet its wastewater treatment plant (WWTP) permit limits for chronic whole effluent toxicity (WET) for the *Ceriodaphnia dubia* species.

Petitioner Jacqueline Lane (Petitioner) timely filed a challenge to the Consent Order, which was dismissed by the Department. On June 25, 2020, Petitioner filed her First Amended

Petition. On July 21, 2020, the Department referred this case to DOAH for a formal administrative hearing. The final hearing was scheduled for November 2, 9, and 10, 2020.

On July 30, 2020, Petitioner filed her Second Amended Petition. On August 6, 2020, International Paper filed a Motion to Dismiss Second Amended Petition, which the ALJ denied on August 14, 2020. On August 18, 2020, Petitioner filed a Motion for Summary Judgment to Dismiss Consent Order 19-1453, which the ALJ denied on August 24, 2020.

On August 21, 2020, the Department filed a Motion to Relinquish Jurisdiction to the Department or in the Alternative Motion in Limine and/or Strike, in which it argued that issues unrelated to the 19 failed chronic toxicity samples, and the means established in the Consent Order to bring International Paper back into compliance, should not be considered in this proceeding. On August 25, 2020, the ALJ denied the Motion to Relinquish Jurisdiction, but granted the Motion in Limine and/or Strike, which established the issues for disposition in this case:

3. The scope of this proceeding is limited to whether International failed to meet its wastewater treatment plant permit limits for chronic whole effluent toxicity for the *Ceriodaphnia dubia* species; the reasonableness and efficacy of measures designed to establish the reason(s) for the exceedances; and the reasonableness of the proposed resolution of the exceedances if shown to be caused by International's operation of its wastewater treatment facility.

Order on Motion to Relinquish Jurisdiction and Alternative Motion in Limine and/or Strike (DOAH August 25, 2020) (p. 3).

On September 22, 2020, the parties jointly moved to continue the hearing date. The ALJ granted the motion and rescheduled the hearing for November 9 and 10, 2020.

On November 5, 2020, Respondents filed a Motion in Limine to Exclude from Evidence Petitioner's Exhibits 6 through 9, 18 through 21, 27, and 28 (which in its text also requested

exclusion of Petitioner's Exhibit 29). On November 9, 2020, prior to the commencement of the hearing, Petitioner filed a motion to dismiss.

DOAH held the final hearing on November 9, 2020. At the commencement of the hearing, the outstanding motions were taken up. The ALJ denied the Motion to Dismiss; granted the Motion in Limine as to Petitioner's Exhibits 27 through 29; and reserved ruling on the Motion in Limine regarding Petitioner's Exhibits 6 through 9 and 18 through 21.

At the final hearing, the Department offered the testimony of Krista McGraw, an Environmental Manager in its Northwest District Compliance Assurance Program; and Nancy Ross, a consultant to the Department's Wastewater Management Program. International Paper offered the testimony of Laurie McClain, Project Manager at its Pensacola paper mill; and William Goodfellow, Principal Scientist and Practice Developer for Xponent, Inc., who was accepted as an expert in whole effluent toxicology testing and toxicity reduction evaluation. Petitioner testified on her own behalf and recalled DEP's consultant Nancy Ross.

All parties timely filed proposed recommended orders, which were duly considered by the ALJ in preparation of his RO.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order approving the Consent Order between the Department and International Paper, OGC File No. 19-1453. (RO at p. 20). In doing so, the ALJ found that the standard of review of the Consent Order is whether the Department abused its enforcement discretion in executing the consent order, citing to *M.A.B.E Properties, Inc. v. Dep't of Env't. Prot.*, Case No. 10-2334, FO at 3 (Fla. DOAH Nov. 4, 2010; Fla. DEP Jan. 31, 2011), *aff'd per curiam*, 84 So. 3d 1041 (Fla. 4th DCA 2012). (RO ¶ 54). Specifically, the ALJ found that the subject consent order "is designed to identify the

cause of the 19 exceedances of International Paper’s chronic toxicity limits.” (RO ¶ 54).

Quoting from *M.A.B.E. Properties, Inc.*, the ALJ concluded that “[t]he abuse of discretion standard does not turn on whether the consent order embodies the best possible settlement or even whether a better settlement could have been reached, but, rather, whether the settlement that was reached was reasonable under the circumstances.” *Id.*

The ALJ concluded that the Department’s Consent Order is a reasonable exercise of its enforcement discretion. Specifically, the ALJ concluded that the preponderance of the evidence established that the measures required by the Consent Order were reasonable under the circumstances. (RO ¶ 58).

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 Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to any findings of fact the parties “[have] thereby expressed [their] agreement with, or at least waived any objection to, those findings of fact.” *Env’t. Coal. of Fla., Inc. v. Broward Cnty.*, 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. (2020); *Barfield v. Dep’t of*

Health, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

No party filed any exceptions to the RO objecting to the ALJ's findings, conclusions of law, recommendations or to the DOAH hearing procedures. The Department concurs 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; and

B. The Consent Order between the Department of Environmental Protection and

International Paper Company, OGC File No. 19-1453, is APPROVED.

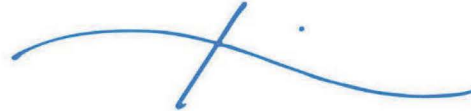
JUDICIAL REVIEW

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 2nd day of March, 2021, 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.



CLERK

March 2, 2021
DATE

CERTIFICATE OF SERVICE

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

mail to:

Jacqueline M. Lane 10738 Lillian Highway Pensacola, Florida 32506 perdidoresident@gmail.com	Gregory M. Munson, Esquire Gunster, Yoakley and Stewart, P.A. Suite 601 215 South Monroe Street Tallahassee, Florida 32301 gmunson@gunster.com
Kirk S. White, Esquire Florida Department of Environmental Protection 3900 Commonwealth Boulevard, MS 35 Tallahassee, Florida 32399-3000 kirk.white@FloridaDEP.gov	

on this 2nd day of March, 2021.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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