STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

3250 W. BEAVER STREET, LLC,

Petitioner,

v. **OGC CASE NO. 08-2568**

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.
_____/

FINAL ORDER

This matter is before me for entry of a Final Order pursuant to sections 120.57(2) and 120.569, Florida Statutes (2014), Florida Administrative Code Chapter 28-106, Part III, the Order Appointing Presiding Officer dated November 26, 2013, and the Order Establishing Informal Proceeding dated July 19, 2012. The issues raised in the Petition filed by 3250 W. Beaver Street, LLC ("3250" or "Petitioner") were submitted to me in memoranda of law. No oral argument was requested or held.

APPEARANCES

For Petitioner: Robert D. Fingar, Esq.
Guilday, Schwartz, Simpson, West, Hatch & Lowe, P.A.
1983 Centre Pointe Boulevard, Suite 200
Tallahassee, Florida 32308

For Respondent: Sarah M. Doar, Esq.
Senior Assistant General Counsel
State of Florida Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUES

3250's Petition presents the issue of whether petroleum contamination in the central portion of the subject property that was reported to the Department in 2005 is eligible for state-funded cleanup under either the Abandoned Tank Restoration Program ("ATRP"), section 376.305(6), Florida Statutes, or the Petroleum Cleanup Participation Program ("PCPP"), section 376.3071(13), Florida Statutes.

PRELIMINARY STATEMENT

On or about June 1, 2010, Petitioner submitted to the Department applications seeking eligibility into the ATRP or the PCPP.[1] On July 6, 2010, the Department issued letters finding the contamination ineligible for participation in the ATRP or the PCPP.

On July 27, 2010, 3250 filed with the Department a Petition for Formal Administrative

---

[1] 3250 initiated a separate administrative proceeding in 2008 that was the subject of a short opinion from the First District Court of Appeal. That earlier litigation is not relevant here, except that it prompted 3250's 2010 filing of the ATRP and PCPP applications that are at issue in this proceeding. For completeness sake, that prior litigation is briefly summarized as follows. On October 20, 2008, 3250 filed a Petition for Administrative Hearing with the Department seeking state restoration funding assistance for cleanup of the contamination at the central portion of the property. On March 13, 2009, the Department issued a "Final Order of Dismissal with Prejudice" of the October 2008 Petition. 3250 timely appealed the Order of Dismissal with Prejudice to the First District Court of Appeal. Before completion of the appellate briefings, the Department moved to relinquish jurisdiction. On October 20, 2009, the First District Court entered a one-sentence order which stated, "Upon consideration of appellee's motion for relinquishment of jurisdiction, we reverse the order on appeal and remand to the agency with directions to vacate its order [of dismissal with prejudice] and allow appellant to amend its petition." See 3250 W. Beaver Street, LLC v. Dep't of Envtl. Protection, 19 So. 3d 447 (Fla. 1st DCA 2009). On December 3, 2009, the Department issued an Order Vacating Final Order and Dismissing Petition with Leave to Amend. The substance of that Order was to vacate the Department's earlier March 13, 2009 Order of Dismissal With Prejudice, and once again dismiss the October 20, 2008 Petition but, this time, with leave to file an amended petition within 15 days of the Order Vacating. On December 11, 2009, 3250 filed an Amended Petition that asserted the subject contamination is eligible for cleanup under either the ATRP or PCPP. After further administrative litigation, on April 28, 2010, the Administrative Law Judge entered an Order Closing File that relinquished jurisdiction to the Department and allowed 3250 to file its June 1, 2010 applications for state restoration funding assistance under the ATRP or PCPP for the contamination at the central portion of the property. See 3250 W. Beaver Street, LLC v. Dep't of Envtl. Protection, Order Closing File, Case No. 10-0631 (Fla. DOAH April 28, 2010). The Department's denial of those applications is the subject of the proceeding pending before me.

Hearing ("Petition"). In the Petition, 3250 challenges the Department's orders of ineligibility into the ATRP and PCPP. The orders of ineligibility, as well as a number of other documents, are attached to the Petition.

On August 11, 2010, the Department forwarded the Petition to the Division of Administrative Hearings ("DOAH") and requested the assignment of an Administrative Law Judge ("ALJ"). After undertaking some discovery, on October 27, 2010, 3250 and the Department jointly filed a Motion to Relinquish Jurisdiction on the basis that there were no material facts in dispute with respect to the issue of whether the contamination reported in 2005 was eligible for ATRP or PCPP. On November 1, 2010, ALJ Bram Canter granted the Joint Motion and entered an Order Closing File and Relinquishing Jurisdiction.

The Department now has jurisdiction to resolve this dispute. On July 19, 2012, the Department issued an Order Establishing Informal Proceeding. After the originally assigned Presiding Officer left the employ of the Department, the undersigned was reassigned as the Presiding Officer in this matter in a Department Order dated November 26, 2013.

The parties have filed separate Memoranda of Law. 3250 also filed a Statement of Undisputed Facts to which the Department has filed a response. The Department's response contains a number of factual statements to which 3250 has filed no objection. Although the Department takes issue with a number of factual assertions set forth in 3250's Statement of Undisputed Facts, none of those disputed facts are material to my ruling herein.

In an Order dated September 30, 2014, I asked the parties to stipulate to two additional facts. The parties stipulated to one of the statements; however, they did not stipulate to the second statement. Following the parties failure to stipulate to the second statement, on May 12, 2015, I issued an Order indicating my intention to remand this matter back to DOAH, unless I received an objection from *either* party. On June 15, 2015, the Department so objected. 3250 submitted no response to the Department's filed objection. After further review of the record before me, it is evident that the statement is not a disputed material fact. Therefore, remand is

unnecessary.[2]

On December 22, 2014, I requested additional documents be provided for supplementation of the record. On March 19, 2015, the Department filed a Motion for Reconsideration of the order for supplementation. That filing notes that 3250 did not concur with the Department's Motion, but 3250 never filed a response to the Motion for Reconsideration. The Department's Motion for Reconsideration is hereby granted.

FINDINGS OF FACT

1. The property at issue in this proceeding is located at 3250 West Beaver Street, Jacksonville, Florida ("Property"). It currently is a vacant fenced parcel used as an overflow parking lot by Severt Trucking, Inc. The Department's facility identification number for the Property is 9100021.

OWNERSHIP HISTORY OF THE PROPERTY

2. Prior to June 1990, the Property was owned by Petroleum Installation Company.

3. On June 22, 1990, Esther J. Hough, as Trustee of Petroleum Installation Company, an involuntarily dissolved corporation, conveyed the property by Special Warranty Deed to herself as Personal Representative of the Estate of Frederick Hough ("the Hough Estate").

4. On October 10, 1996, the heirs of the Hough Estate conveyed the Property to Charles R. and Carolyn S. Price (the "Prices") by Warranty Deed.

5. The Prices did not install or operate any underground storage tanks ("USTs") at

---

[2] 3250 has never asserted that the second statement is material. Even if the statement were a disputed material fact, the case law is clear that "when a party at an informal hearing does not request that a formal hearing be convened after the discovery of the existence of a disputed issue of material fact, the party waives the right to proceed under section 120.57(1)." Meller v. Fla. Real Estate Comm'n, 902 So. 2d 325, 328 n.4 (Fla. 5th DCA 2005); see also Gonzalez v. Dep't of Health, 120 So. 3d 234, 237 (Fla. 1st DCA 2013). 3250 has not requested this informal proceeding be terminated in lieu of a formal hearing, and it is its right to have this matter proceed informally.

the Property.

6. On February 19, 2003, 3250 purchased the Property from the Prices.

PETROLEUM CONTAMINATION AT THE PROPERTY

7. On January 4, 1991, three USTs ("first UST system") were removed from the northwest and north-central portions of the Property ("Original Site").

8. During the closure of the first UST system, petroleum contamination was discovered in the surrounding soil and was reported to the Department in a Discharge Notification Form filed by the Hough Estate on or about January 9, 1991.

9. The 1991 Discharge Notification Form pertained to the petroleum contamination at the Original Site that was associated with the first UST system.

10. On or about January 9, 1991, the Hough Estate submitted an application form to the Department seeking ATRP eligibility for the contamination discovered at the Original Site.

11. On March 6, 1991, the Department issued an order of eligibility for the Original Site into the ATRP.

12. In or about 2000, concentrations of petroleum constituents also were discovered in the central portion of the Property ("Second Site").[3]

13. In April 2001, the presence of an additional UST was discovered (and the

---

[3] In its proposed statement of undisputed facts (proposed fact 11), 3250 states that "[u]pon receipt of the sampling results [taken in 2000], the Department did not assert that the contamination in the central portion of the Property was not eligible for state-funded remediation." The Department had no obligation to make such a determination at that time. Assessment activities are intended to determine the extent of the contamination. See Fla. Admin. Code R. 62-770.600 (repealed in 2013 and now found at 62-780.600). In 2000, the additional USTs at the Second Site had not yet been discovered. Therefore, the assessment activities at that time would have been to determine the extent of the contamination from the first UST system. In the course of these and subsequent assessment activities, it became clear that there was additional contamination in the central portion of the Property and the source of that contamination was different than the source of contamination for the Original Site. Regardless, 3250 does not assert in its memorandum of law that the Department is equitably estopped by any of these circumstances and, furthermore, has not alleged facts to support each and every element of an equitable estoppel defense. See Dep't of Revenue v. Hobbs, 368 So.2d 367, 368 (Fla. 1st DCA 1979), appeal dismissed, 378 So.2d 345 (Fla. 1979) (equitable estoppel must be specifically pled); Trawick, Fla. Prac. And Proc., §§ 6:5 and 11:4 (each element of a defense must be specifically pled). As such, 3250's proposed fact 11 is immaterial.

presence of other USTs was suspected) in the central portion of the Property when the Price's designated cleanup contractor punctured the previously unknown UST while taking soil samples at the Property.[4] [5]

14. In May 2003, 3250 designated MACTEC Engineering and Consulting, Inc. ("Mactec") as its cleanup contractor to continue the assessment and cleanup activities associated with contamination at the Original Site covered under the ATRP.

15. After further investigation by Mactec in or about October 2003, a total of five USTs ("second UST system") were confirmed in the central portion of the Property. In December 2005, Gregory Severt had the 5 USTs in the central portion of the Property permanently closed.[6]

16. During the closure of the second UST system, the presence of petroleum contamination at the Second Site was confirmed in the soil surrounding these USTs. On or about December 16, 2005, Gregory Severt filed a Discharge Reporting Form ("DRF") with the Department that reported the petroleum contamination at the Second Site. This was the first DRF submitted for the petroleum contamination at the Second Site.

---

[4] Similar to its proposed fact 11 (discussed in footnote 3 above), 3250's proposed statements of undisputed fact 14, 15 and 16 (among others) are also red herrings. In those proposed facts, 3250 makes statements which incorrectly imply that the Department should have required further investigation to "confirm" the presence of the USTs once the additional UST was discovered in 2001. The Department had no obligation to undertake these actions and 3250 cites to none. Under state-funded petroleum cleanups, the property owner's designated cleanup contractor formally submits proposed assessment and clean up actions to the Department for review and approval. See § 376.30711(1)(b), Fla. Stat. (2001). There is no requirement in law that the Department "order" any further investigation to "confirm" the presence of the additional USTs. Regardless, as noted in finding of fact 15, during the course of subsequent assessment activities, a total of five additional USTs were found in the central portion of the Property.

[5] Attached to 3250's Petition are excerpts of reports, date-stamped as being filed with the Department in 2001, that describe this information as well as the prior discovery of contamination in the central portion of the Property. These documents, whether in hard-copy or electronic form, are public records of the Department (and the City of Jacksonville) readily available before 3250 purchased the Property in February 2003. See generally § 119.07, Fla. Stat.

[6] Mr. Severt apparently controls the day-to-day operations of 3250.

17. The source of the petroleum contamination discovered at the Original Site in 1991 is different than the source of petroleum contamination subsequently discovered at the Second Site.

18. As indicated in the Department's subsequently issued Site Rehabilitation Completion Order ("SRCO"), 3250's designated contractor, Mactec, prepared and submitted to the Department a Site Assessment Report Addendum and No Further Action Proposal dated February 18, 2005 for the contamination at the Original Site.

19. Based on Mactec's Site Assessment Report Addendum and its associated No Further Action Proposal, the Department issued a SRCO on June 9, 2005, for the discharge reported on January 4, 1991 at the Original Site and covered under the ATRP. With the entry of the SRCO, the state-funded cleanup of the petroleum contamination at the Original Site was complete.[7]

20. On May 19, 2006, the Department issued an Administrative Complaint (also referred to as a Notice of Violation), pursuant to section 403.121(2), Florida Statutes, against 3250, Severt Trucking, Inc. and Gregory Severt (collectively "Defendants") for various environmental violations including failure to assess and remediate the contamination at the Second Site.

21. The Administrative Complaint resulted in a November 6, 2006 Final Order that required 3250 to clean up the petroleum contamination associated with the second UST system in accordance with Florida Administrative Code Chapter 62-770. Defendants did not appeal the Final Order.

22. On August 27, 2007, the Department filed a Civil Complaint in the Fourth Judicial

---

[7] 3250 nor any other party challenged the Department's June 9, 2005 SRCO that the ATRP cleanup for the Original Site has been completed. 3250 has now waived its ability to challenge the SRCO and cannot collaterally attack that agency order in this administrative litigation. South Fla. Regional Planning Council v. Fla. Land and Water Adjudicatory Comm., 372 So. 2d 159, 166 (Fla. 3d DCA 1979); United Wisconsin Life Insurance Co. v. Fla. Dep't of Insurance, 831 So. 2d 239, 240 (Fla. 1st DCA 2002).

Circuit in Duval County, Florida, to enforce the November 2006 Final Order.

23. On February 25, 2009, Circuit Judge Hugh Carithers entered a Final Judgment in favor of the Department. Among other things, the Final Judgment ordered 3250 to assess and clean up the petroleum contamination associated with the second UST system in accordance with Florida Administrative Code Chapter 62-770.

24. None of the Defendants appealed Judge Carithers' Final Judgment.[8] As such, that Final Judgment, and not this administrative proceeding, establishes the liability for cleanup of the petroleum contamination at the Second Site.[9]

25. On or about June 1, 2010, 3250 filed applications with the Department for participation in both the ATRP and PCPP for contamination associated with the second UST system.

26. On July 6, 2010, the Department issued orders of ineligibility for the Second Site in both the ATRP and PCPP.

27. On July 27, 2010, 3250 filed a Petition for Formal Administrative Hearing that is at issue here. The July 27 Petition challenges the Department's July 6 orders of ineligibility.

28. The Petition was initially referred to DOAH and was assigned DOAH Case No. 10-7448. Subsequently, the parties agreed that there was no disputed issues of fact and on

---

[8] 3250 initially appealed a December 29, 2008 Order Denying Motion for Relief from Final Order & Motion to Stay to Allow for Exhaustion of Administrative Remedies. Subsequently, Respondents voluntarily dismissed their appeal of that Order. See 3250 W. Beaver Street, LLC v. Fla. Dep't of Envtl. Protection, Case No. 1D09-515 (Fla. 1st DCA 2009).

[9] In its July 27, 2010 Petition, 3250 alleges that "assuming arguendo that the Property is not eligible for state restoration funding assistance, Petitioner has a defense to cleanup liability under Section 376.308(1)(c) or (2)(d), Florida Statutes." Petition for Administrative Hearing at Page 8, ¶ 10. The viability of any such defenses have been resolved through Judge Carithers' Final Judgment, and that Judgment may not be collaterally attacked here. United Wisconsin Life Insurance Co., 831 So. 2d 239, 240 (Fla. 1st DCA 2002). Regardless, 3250 has abandoned these arguments as no mention of any defense to liability is found in its Memorandum of Law. Moreover, there is no evidence in the record that, prior to its acquisition of the Property, 3250 undertook the requisite due diligence with respect to contamination at the Property or the potential presence of additional USTs. See generally Fla. Dep't of Envtl. Protection v. FT Investments, Inc., 2011 WL 4350412 (Fla. DEP 2011), aff'd, 93 So. 3d 369 (Fla. 1st DCA 2012), cert. denied, 108 So. 3d 654 (Fla. 2012).

October 27, 2010 jointly moved for relinquishment of jurisdiction for proceedings by informal hearing. On November 1, 2010, the ALJ entered an Order Closing File and Relinquishing Jurisdiction.

29. There are no disputed issues of material fact.

CONCLUSIONS OF LAW

30. The Department has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(2), Florida Statutes.

The Parties

31. 3250 has standing in this proceeding.

32. The Department has the statutory duty to determine eligibility for restoration coverage under ATRP and PCPP.

Burden of Proof

33. This is a de novo proceeding designed to formulate final agency action. 3250 has applied for restoration coverage under ATRP and PCPP. 3250 has the burden of showing by a preponderance of the "credible and credited evidence" entitlement to restoration coverage under these programs. Dep't of Transp. v. J.W.C., Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981); Envtl. Trust v. Fla. Dep't of Envtl. Prot., 714 So. 2d 493, 497 (Fla. 1st DCA 1998).

34. "Statutes establishing economic grants or entitlements are strictly construed in favor of the government and against the grantee." Envtl. Trust, 714 So. 2d at 497.

Florida's State-Funded Petroleum Cleanup Programs

35. Beginning in 1986, the Florida legislature created a series of different State-funded petroleum cleanup programs. These programs include the Early Detection Incentive Program ("EDI," § 376.3071(10), Fla. Stat.), the ATRP (§ 376.305(6)), the Petroleum Liability and Restoration Insurance Program ("PLRIP," § 376.3072), the PCPP (§ 376.3071(13)), and the Innocent Victim Petroleum Storage System Restoration Program ("IVPSSRP," § 376.30715).

36. All of these programs have different eligibility requirements and apply to different petroleum contamination scenarios.

37. The question here is whether the petroleum contamination at the Second Site is eligible for either the ATRP or PCPP programs.

ATRP Eligibility

38. The ATRP was created in 1990 by the Florida Legislature. It is a state-funded program for the "cleanup of sites that have abandoned petroleum storage systems." § 376.305(6), Fla. Stat.

39. The ATRP does not cover the closure of storage tank systems, as the storage tank systems must be closed prior to a determination of eligibility into the ATRP. § 376.305(6)(b), Fla. Stat.

40. The application deadline for the ATRP was originally March 31, 1991, but was extended by the 1991 Legislature until June 30, 1992. The 1994 Legislature reopened the ATRP application deadline until June 30, 1996. § 376.305(6)(a), Fla. Stat.

41. Since June 30, 1996, eligibility into the ATRP has been closed, with two limited exceptions. The ATRP application deadline is waived indefinitely 1) for owners financially unable to comply with the tank closure requirements of the program, and 2) for current owners that purchased the site prior to July 1, 1990 and where operations as a petroleum storage or retail business ceased prior to January 1, 1985. §§ 376.305(6)(b), 376.30715, Fla. Stat.

42. Neither of these exceptions to the June 30, 1996 ATRP application deadline applies here.

43. Department rules regarding eligibility into the ATRP state as follows:

> (3) Eligibility for the Abandoned Tank Restoration Program.
> (a) To be eligible for the Abandoned Tank Restoration Program, the current owner or operator of a property which contains or contained an abandoned storage system must:
> 1. Demonstrate that the owner or operator of the petroleum storage system when

it was in service decided not to continue in business for consumption, use, or sale of petroleum products at that facility.

2. Have documented contamination from the abandoned petroleum storage system;

3. Have not stored petroleum products for consumption, use or sale at that facility after March 1, 1990;

4. Have properly closed the abandoned petroleum storage system; and

5. Submit an application to the Department on Forms 62-769.900(3) and (4), F.A.C., which shall be postmarked on or before June 30, 1992.[10]

(b) The following shall not be eligible for participation in the Abandoned Tank Restoration Program:

1. Sites eligible for cleanup pursuant to Section 376.3071(9) and (12), F.S., the Early Detection Incentive Program, or the Florida Petroleum Liability and Restoration Insurance Program pursuant to Section 376.3072, F.S.;

2. Sites owned or operated by the Federal Government;

3. Sites with leaking tanks that store pollutants that are not petroleum products as defined in Section 376.301, F.S.;

4. Sites where the Department has been denied access; or

5. Petroleum contamination discovered after the application deadline of June 30, 1992.[11]

Fla. Admin. Code R. 62-769.800(3).

44. 3250 clearly does not meet a number the ATRP eligibility requirements for the Second Site.

45. First, petroleum contamination discovered after the application deadline is not eligible for participation in the ATRP. Fla. Admin. Code R. 62-769.800(3)(b)5.

46. In the context of petroleum contamination, the term "discovery" is a term of art to which the Department has adopted a specific definition. The Department defines "discovery" to mean: "(a) Either actual knowledge or knowledge of facts that could reasonably lead to actual knowledge of the existence of an incident, discharge, or an unmaintained storage tank system; or (b) Discovery as specified in the Petroleum Contamination Site Cleanup Criteria subsection 62-770.200(10), F.A.C." See Fla. Admin. Code R. 62-761.200(13).

---

[10] This application deadline was extended by statute to June 30, 1996. See § 376.305(6)(a), Fla. Stat.

[11] See footnote 10.

47. Rule 62-770.200 defines "discovery" to mean:[12]

> (a) Observance or detection of free product in boreholes, wells, open drainage ditches, open excavations or trenches, or on nearby surface water, or petroleum or petroleum products in excess of 0.01 foot in thickness in sewer lines, subsurface utility conduits or vaults, unless the product has been removed and it was confirmed that a release into the environment did not occur;
>
> (b) Observance of visually stained soil or odor of petroleum products resulting from a discharge of used oil equal to, or exceeding, 25 gallons on a pervious surface [see paragraph 62-770.160(1)(c), F.A.C., for cleanup requirements applicable to discharges of less than 25 gallons];
>
> (c) Discharges of petroleum or petroleum products equal to, or exceeding, 25 gallons on a pervious surface [see paragraph 62-770.160(1)(c), F.A.C., for cleanup requirements applicable to discharges of less than 25 gallons];
>
> (d) Results of analytical test on a groundwater sample that exceed the CTLs referenced in Chapter 62-777, F.A.C., Table I, groundwater criteria column for the petroleum products' contaminants of concern listed in Table A of this chapter; or
>
> (e) Results of analytical test on a soil sample that exceed the lower of the direct exposure residential CTLs and leachability based on groundwater criteria CTLs specified in Chapter 62-777, F.A.C., Table II for the petroleum products' contaminants of concern listed in Table A of this chapter.

48. Whether the exact date of "discovery" of the petroleum contamination at the Second Site is deemed to be 1) in 2000 when contamination was first found at the Second Site, 2) in 2001 when the additional UST was uncovered, or 3) in 2005 when the Second UST System was closed and Mr. Severt submitted the DRF for the Second Site, all of these dates of "discovery" are well after the 1996 deadline. Petroleum contamination discovered after the application deadline is ineligible for the ATRP. Fla. Admin. Code R. 62-769.800(3)(b)5.

49. Second, 3250 plainly did not meet the application deadline for the Second Site. 3250 did not submit an ATRP application for the Second Site until June 1, 2010, more than a decade after the 1996 deadline. Although an ATRP application was submitted for the Original Site before the June 30, 1996 deadline, that application does not cover the Second Site.

50. The ATRP does not provide restoration coverage for petroleum contamination associated with all abandoned storage tanks. Only petroleum contamination associated with

---

[12] Chapter 62-770 was repealed in 2013 and this definition of "discovery" is now found in Rule 62-780.210(5)(b).

abandoned storage tanks reported to the Department by the application deadline are potentially ATRP eligible.

51. To illustrate, if abandoned tanks and associated contamination were both discovered today (or any time after the application deadline) at a hypothetical site without any previously known tanks or petroleum contamination, there can be no dispute that site would be ineligible for the ATRP, unless one of the two previously discussed exceptions to the application deadline applied.

52. 3250's interpretation would effectively read a third exception into the statute for undiscovered, abandoned tanks and petroleum contamination anywhere on a property where other contamination has previously been found eligible for the ATRP. No such statutory exception exists and exceptions cannot be read into a statute. Cont'l Assurance Co. v. Carroll, 485 So. 2d 406, 409 (Fla. 1986); Debary Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Regulation, 112 So. 3d 157, 166 (Fla. 1st DCA 2013), rev'd on other grounds, 155 So. 3d 1137 (Fla. 2014).

53. To the extent that the statute is unclear on the matter, it is the Department (not 3250) that gets deference on its interpretation of the statute. See, e.g., Fla. Power Corp. v. Fla. Dep't of Envtl. Regulation, 431 So. 2d 684, 685 (Fla. 1st DCA 1983).

54. Section 376.305(6) uses the terms "site," "property" and "facility." These terms are not interchangeable. Maddox v. State, 923 So. 2d 442, 446 (Fla. 2006) ("[T]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended."). "Facility" is specifically defined in section 376.301(18), Florida Statutes. "Property" is not defined in statute, but connotes the "real property." See § 376.301(36), Fla. Stat. (relating "real property owner" to the entity holding title to real property); Fla. Admin. Code R. 62-780.200(40) (same).

55. When 3250 submitted its ATRP application for the Second Site, "site" was defined by rule to mean "any contiguous land, sediment, surface water, or groundwater area

upon or into which a discharge of petroleum or petroleum products has occurred or for which evidence exists that such a discharge has occurred." See Fla. Admin. Code R. 62-770.200(52), (39) (repealed in 2013); see also § 376.301(10), Fla. Stat. (definition of "contaminated site"); Fla. Admin. Code R. 62-769.200(13) (definition of "site" in original ATRP rule that was subsequently repealed). Stated otherwise, a "site" is a contiguous plume of petroleum contamination from a particular discharge.

56. Applying this definition, the ATRP is "site" specific such that if contamination has migrated onto an adjacent property, the ATRP will cover the contiguous contamination associated with the tank discharge on both "properties," as the ATRP treats this as a single "site."

57. If "site" were synonymous with the term "property," then contamination that migrated onto an adjacent property would be a different "property" and, thus, a different "site" under the ATRP. Under this interpretation, migrated contamination on the adjacent "property" would not be covered under the ATRP as it would constitute a different "property" and "site." Given the statutory scheme, having a plume only partially redressed under the ATRP because it happens to cross a property boundary is an unreasonable result.

58. While such an interpretation would support 3250's claim that its entire "property" is the "site" for purposes of ATRP eligibility, as demonstrated by the previous example, this interpretation would produce absurd results.[13] "[S]tatutory constructions which lead to absurd or unreasonable results" must be avoided. Thomas v. S. Fla. Water Mgmt. Dist., 864 So.2d 455, 457 (Fla. 5th DCA 2003).

59. 3250's interpretation would shift the burden of undiscovered USTs and

[13] 3250's actions (as well as its designated cleanup contractor's actions in submitting a No Further Action proposal for the Original Site) belie its subsequent arguments made in support of ATRP eligibility for the Second Site. If the 1991 Order of Eligibility covered *both* the Original Site and the Second Site, then there would have been no reason for 3250 to have submitted a second ATRP application in 2010 seeking eligibility for the Second Site. 3250 would have simply challenged the Department's 2005 issuance of the SRCO for the Original Site as being premature for failure to also cover the Second Site.

contamination to the Department, and thus, Florida's taxpayers. In situations such as the instant case, it would result in a windfall for subsequent purchasers who do not perform the required pre-purchase due diligence.[14]

60. "Where possible, courts must . . . construe related statutory provisions in harmony with one another." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla.1992). The Department's interpretation of "site" does just that and avoids all of the potential pitfalls of 3250's contrary reading.

61. Therefore, the 1991 ATRP application only applies to the Original Site, and all the prerequisites for ATRP eligibility for the Second Site have not been met.

PCPP Eligibility

62. The PCPP is a program created in 1996 whereby the State of Florida cost-shares the cleanup of eligible petroleum contaminated sites up to $400,000. § 376.3071(13), Fla. Stat.

63. In order to participate in PCPP, an applicant must have submitted to the Department a DRF prior to January 1, 1995, or a written report of the contamination "incident" to the Department prior to January 1, 1999. § 376.3071(13)(a), Fla. Stat. "Sites reported to the department after December 31, 1998, are not eligible for the program." Id.

64. No written report of the contamination incident at the Second Site was submitted to the Department prior to January 1, 1999 and 3250 does not assert that such a written report was timely submitted.

---

[14] The statute places an affirmative obligation on purchasers of property after July 1, 1992, to undertake appropriate environmental due diligence in order to avoid the strict liability for any petroleum contamination thereon. §§ 376.308(1)(c), 376.305(6)(e), Fla. Stat. The burden is squarely on the prospective purchaser to carefully investigate the environmental condition of the Property and act accordingly. Part of such environmental investigation is determining whether any storage tanks and associated contamination may exist at the property. Here, the record is clear that an additional storage tank was located in the central portion of the Property in 2001 and other storage tanks were suspected. The related documents containing this information are public records, pursuant to chapter 119, Florida Statutes, at the time 3250 acquired the Property.

65. Rather, 3250 asserts that, even though the DRF for the petroleum contamination at the Second Site was not submitted to the Department until 2005, years after the statutory January 1, 1995 reporting deadline, the 1991 DRF for the Original Site should also cover the subsequently discovered contamination at the Second Site.

66. Under 3250's novel interpretation of the statute, any DRF filed before January 1, 1995 for any specific discharge at any particular contaminated site on a property makes all petroleum contamination located anywhere else on the property also timely reported to the Department, even if the contamination is not discovered until years (or decades) after the 1995 reporting deadline. Such an interpretation would result in the Department's (and ultimately the taxpayers of the State of Florida) eternal obligation to bear the cost of cleaning up any subsequently discovered, but untimely reported, pre-1995 petroleum contamination at a property that also meets the other requirements of the PCPP. Not only would 3250's interpretation create a perpetual legal responsibility on the Department's part, its interpretation also would result in a windfall to subsequent purchasers, such as 3250, at taxpayer expense.

67. If the Legislature wanted to create a cleanup program covering any petroleum discharge occurring on anywhere on a property before 1995 once a single incident of contamination was timely reported, it would have simply said so. Instead, the Legislature placed specific reporting deadlines in the statute to cut-off the otherwise never-ending liability to the State and taxpayers.

68. As demonstrated in its order of ineligibility, the Department implements the PCPP on an incident-specific and site-specific basis. The reporting of the discovery of a petroleum contamination on one part of the property by the statutory deadline does not automatically make other distinct incidents of petroleum contamination elsewhere on the property timely reported for purposes of coverage in the PCPP.

69. Apart from eligibility into PCPP, these independent incidents must be separately reported to the Department under regulatory reporting requirements for the discovery of

contamination. Department regulations specifically place an affirmative obligation on the facility owner or operator to report, by the filing of a DRF, *each* "discovery" of unreported petroleum contamination within 24 hours or before the close of the next business day.[15] Fla. Admin. Code. R. 62-761.450(3); 62-780.210(1)(a) (formerly 62-770.250).[16]

70. Given that these reporting requirements predated the legislature's creation of the PCPP, the meaning of the statement in section 376.3071(13)(a)1 that the "Department shall accept any discharge reporting form received prior to January 1, 1995, as an application for [the PCPP], and the facility owner or operator need not reapply" becomes clear. The filing of a separate application for the PCPP is unnecessary for a specific discovery of contamination that has already been reported to the Department through the filing of a DRF. However, the incident and location specific context of a DRF makes equally clear that a separate DRF (or written report) must be timely filed for each independent discovery of contamination for separate coverage in the PCPP.

71. This interpretation benefits the public as a single property can have multiple "sites" which are eligible for the PCPP, with each eligible site "eligible for up to $400,000 of site rehabilitation funding assistance."[17] § 376.3071(13)(b), Fla. Stat. Therefore, different discharge incidents on different "sites" on the same property may independently be covered under the PCPP, with the combined funding for all these eligible discharges exceeding the $400,000

---

[15] As discussed in paragraphs 46 – 47 above, "discovery" is defined as "(a) Either actual knowledge or knowledge of facts that could reasonably lead to actual knowledge of the existence of an incident, discharge, or an unmaintained storage tank system; or (b) Discovery as specified in the Petroleum Contamination Site Cleanup Criteria subsection 62-770.200(10), F.A.C." Fla. Admin. Code R. 62-761.200(13).

[16] In 2013, the Department consolidated its various cleanup rules into Florida Administrative Code Chapter 62-780 which now contains the regulatory requirements for the cleanup of all contaminated sites, regardless of whether the contamination is a pollutant, hazardous substance, drycleaning solvent, or petroleum or petroleum product. Before 2013, the Department's rules regulating the cleanup of petroleum and petroleum products was located in Florida Administrative Code Chapter 62-770.

[17] The discussion in paragraphs 54 - 58 above regarding the different meanings of the terms "site" and "property" in the ATRP are equally applicable to the PCPP and will not be repeated here.

funding cap for any single discharge. 3250's alternate interpretation (that a single timely DRF covers the entire property) logically precludes the $400,000 cap from being exceeded, regardless of the number of independent incidents of contamination across the property.

72. Of the thousands of sites found eligible for the PCPP, 3250 has cited no example where the Department has implemented the PCPP in a manner inconsistent with its application here.[18]

73. The Department's interpretation of the statutes it enforces is afforded great deference and will not be overturned by a reviewing state court unless the interpretation is clearly erroneous. Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); Miles v. Florida A & M Univ., 813 So.2d 242, 245 (Fla. 1st DCA 2002). Under Florida law, the agency's interpretation "does not have to be the only one, or even the most desirable. It is enough if it is a permissible one . . . ." Little Munyon Island, Inc. v. Dep't of Envtl. Regulation, 492 So.2d 735, 737 (Fla. 1st DCA 1986); see also Fla. Dep't of Agric. v. Sun Gardens Citrus, LLP, 780 So.2d 922, 926 (Fla. 2d DCA 2001) (That other interpretations may seem more reasonable than the agency's interpretation is irrelevant.); Pershing v. Dep't of Banking and Fin., 591 So.2d 991, 993 (Fla. 1st DCA 1991) (same).

74. Because the discovery of contamination at the Second Site was not reported by the statutory deadlines, this contamination is not eligible for coverage under the PCPP.

---

[18] The ruling in D'Alto v. Department of Environmental Protection, 860 So. 2d 1003 (Fla. 1st DCA 2003) is consistent with the Department's implementation of the PCPP here. In D'Alto, the Department denied eligibility into the PCPP, determining an EDI application filed in 1988 was not the equivalent of a DRF. The First District Court overturned the Department's eligibility determination, finding that the EDI application "is practically identical to the later adopted" DRF, and, therefore, qualifies as a DRF for purposes of section 376.3071(13)(a), Florida Statutes. D'Alto, 860 So. 2d at 1005. Importantly, the EDI application was for the particular discharge that the landowner sought coverage under the PCPP. Id. (noting that the application identified the source of the contamination). In contrast, 3250 seeks to use the 1991 DRF reporting contamination at the Original Site (which was covered under the ATRP) to also provide PCPP eligibility for a completely different discharge at a separate location subsequently discovered years later.

CONCLUSION

75. 3250 has not demonstrated entitlement to either ATRP eligibility or PCPP eligibility for the petroleum contamination at the Second Site.

76. The petroleum contamination at the Second Site is not eligible for either the ATRP or the PCPP.

For the foregoing reasons,

It is therefore ORDERED:

A. The discharge from the second UST system and any associated contamination is ineligible for participation in either the ATRP or PCPP.

B. 3250's 2010 applications for participation in the ATRP and PCPP are denied.

Notice of Right to Judicial Review

Any party to this proceeding has the right to seek judicial review of this final order under Section 120.68, Florida Statutes, by filing a notice of appeal under Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the Department of Environmental Protection in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 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 thirty (30) days after the date this order is filed with the clerk of the Department of Environmental Protection.

DONE AND ORDERED this 6th day of August, 2015, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

s/ Kenneth B. Hayman
KENNETH B. HAYMAN, PRESIDING OFFICER
Senior Assistant General Counsel
3900 Commonwealth Blvd. – MS 35
Tallahassee, FL 32399-3000

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

/s/ _____ 8/6/2015
(DEPUTY) CLERK DATE

CERTIFICATE OF SERVICE

I HERE BY CERTIFY that a true and correct copy of the foregoing has been furnished this 6th day of August, 2015, via electronic mail to:

Robert D. Fingar, Esq.
Guilday, Schwartz, Simpson, West, Hatch & Lowe, P.A. bob@guildaylaw.com
1983 Centre Pointe Boulevard, Suite 200
Tallahassee, Florida 32308

Sarah M. Doar, Esq.
Senior Assistant General Counsel
State of Florida Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, Florida 32399-3000

s/ Kenneth B. Hayman
KENNETH B. HAYMAN, PRESIDING OFFICER