

**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.

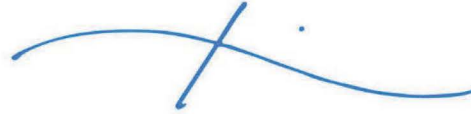
JUDICIAL REVIEW

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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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACQUELINE LANE,

Petitioner,

vs.

Case No. 20-3305

INTERNATIONAL PAPER COMPANY AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

RECOMMENDED ORDER

This case was heard on November 9, 2020, by Zoom Conference before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Jacqueline M. Lane, pro se
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Pensacola, Florida 32506

For Respondent International Paper Company:

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For Respondent Department of Environmental Protection:

Kirk S. White, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the Consent Order issued by Respondent, Department of Environmental Protection (“Department”) on April 28, 2020, OGC File No. 19-1453 (“Consent Order”), is a reasonable exercise of its enforcement authority.

PRELIMINARY STATEMENT

On April 20, 2020, the Department entered the Consent Order that requires Respondent, International Paper Company (“International”) (collectively “Respondents”) to undertake a series of studies to establish the cause of 19 documented occasions from 2015 to 2020 in which International failed to meet its wastewater treatment plant permit limits for chronic whole effluent toxicity (“WET”) for the *Ceriodaphnia dubia* species.

Petitioner timely filed a challenge to the Consent Order, which was dismissed by the Department. Thereafter, on June 25, 2020, Petitioner filed her First Amended Petition of Jacqueline Lane Challenging Consent Order 19-1453, by which she requested a formal hearing.

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

On July 30, 2020, upon Motion, Petitioner filed her Second Amended Petition.

On August 6, 2020, International filed a Motion to Dismiss Second Amended Petition. On August 14, 2020, that Motion was denied.

On August 18, 2020, Petitioner filed a Motion for Summary Judgment to Dismiss Consent Order 19-1453. On August 24, 2020, that Motion was denied.

On August 21, 2020, the Department filed its 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 back into compliance, should not be considered in this proceeding.

On August 25, 2020, the undersigned entered an Order denying the Motion to Relinquish Jurisdiction, and granting the Motion in Limine and/or Strike, which established the issues for disposition in this case as follows:

The underlying dispute concerns a Consent Order entered into by DEP and International for the specific purpose of resolving 19 occasions over the period from 2015 to 2020, for which International reported effluent quality monitoring results that failed to meet its wastewater treatment plant permit limits for chronic whole effluent toxicity for the *Ceriodaphnia dubia* species. The Consent Order establishes a series of measures designed to establish the reason(s) for the exceedances and resolve them if shown to be caused by International's operation of its wastewater treatment facility.

Petitioner has alleged injury to her property which is based on the effect of the exceedances, and whether the exceedances will be resolved by the measures proposed. However, the Second Amended Petition goes well beyond the issues in the Consent Order alleging, among other things, that in its Class 3 freshwater experimental wetlands, International is not meeting standards for specific conductance, dissolved oxygen, pH, biochemical oxygen demand, biological health, transparency, and turbidity, and that International's effluent contains sludges which contain toxic materials, resulting in a number of alleged adverse effects and unresolved non-compliance with a previous Consent Order. However, the narrow issue in the case is whether the Consent Order is a reasonable exercise of DEP's enforcement discretion as to the specific violations over which DEP has elected to exercise its enforcement discretion.

* * *

In a Consent Order proceeding to resolve a specific enforcement matter, evidence related to other matters, including other alleged violations not addressed by the Consent Order, is not relevant.

Therefore, it is

ORDERED that:

* * *

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.

On September 22, 2020, the parties jointly moved for the hearing dates to be modified, and that the final hearing proceed on November 9 and 10, 2020. The motion was granted.

On September 29, 2020, Petitioner filed a Motion to Amend Her Second Amended Petition to Maintain Standing in This Case. On September 30, 2020, that motion was denied, based on the ground that the bases for Petitioner's standing set forth in the motion had been previously pled. Thus, no supplemental pleading was necessary.

On November 4, 2020, the parties filed their Joint Prehearing Stipulation ("JPS"). The JPS contained five stipulations of fact, and six stipulations of law, each of which are adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition.

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). Petitioner filed a response. On November 9, 2020, prior to the commencement of the hearing, Petitioner filed a Motion to Dismiss.

The final hearing was convened on November 9, 2020, as scheduled, and was completed on that date.

At the commencement of the hearing, the outstanding motions were taken up. For reasons set forth on the record, the Motion to Dismiss was denied; the Motion in Limine was granted as to Petitioner's Exhibits 27 through 29; and ruling was reserved on the Motion in Limine regarding Petitioner's Exhibits `6 through 9 and 18 through 21.

By stipulation of the parties, the order of presentation was established, starting with the Department's case-in-chief, followed by International, and concluding with Petitioner. Witnesses were allowed to be fully questioned while on the stand, without "scope" objections.

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. Department Exhibits 1 through 7 were received in evidence. International 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. International's Exhibits 8, 11, 13, 16, 18, 24, 26, 27, 29, and 30 were received in evidence. Petitioner testified on her own behalf, and recalled Ms. Ross. Petitioner's Exhibits 1, 6, 13, 14, 20, and 21 were received in evidence. In addition, Petitioner's Exhibits 7, 8, 10 through 12, and 15 through 19 were not received in evidence, but were proffered. Those proffered exhibits accompany the record of this proceeding, but have not been reviewed or considered in the development of this Recommended Order.

A one-volume Transcript of the proceedings was filed on November 30, 2020. All parties timely filed proposed recommended orders, which have been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, International, operates a paper mill in Cantonment, Florida, near Pensacola (the "Mill"). The Mill produces unbleached linerboard

for cardboard boxes, and global cellulose fiber, used in the production of baby diapers, feminine hygiene products, and the like.

2. Petitioner owns a home that fronts Perdido Bay in Escambia County, Florida. She has lived in that home for more than 40 years.

Stipulated Facts

3. The Department is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapter 403, Florida Statutes, and the rules promulgated thereunder.

4. On April 28, 2020, the Department and International executed the Consent Order to resolve 19 exceedances of its limits in Department Wastewater Permit No. FL000256-008-IW1S ("Permit") from 2015 to 2019 for chronic WET for the *Ceriodaphnia dubia* species ("Exceedances").

5. Petitioner timely filed a petition challenging the Consent Order.

6. Petitioner is substantially affected by the Consent Order and, thus, only for the purposes of this proceeding, has standing to challenge the Consent Order.

International's Mill

7. Water used in International's linerboard and cellulose fiber production is drawn from two primary sources. Most, and previously all, of the process water is from on-site wells. However, since late 2011 or early 2012, up to 20 percent (5 million gallons per day ("MGD")) of International's total process input water (approximately 24 MGD) has consisted of reclaimed water from Emerald Coast Utility Authority ("ECUA").

8. Effluent from International's process areas is received at its wastewater treatment plant ("WWTP") through a mix box. The effluent is then transmitted to two primary clarifiers, which allow solids to settle out of the effluent. Those solids are periodically removed, dewatered, and taken to a landfill.

9. From the primary clarifiers, the effluent is transmitted to Pond 1, which is an aerated basin, and then through Pond 3 and Pond 4, which provide secondary clarification. Solids that settle in those ponds are dredged and removed.¹

10. From Pond 4, the effluent is discharged to another mix box, at which compliance samples are collected prior to discharge of the effluent via the transmission pipeline to the wetlands that constitute the freshwater effluent distribution system.²

11. International holds a variety of environmental permits for the operation of the Mill. The National Pollutant Discharge Elimination System (“NPDES”) permit for its WWTP requires monitoring, reporting, and compliance for roughly 70 regulated parameters. The state is delegated the authority to perform many of the permitting and enforcement duties required by the NPDES program. Under that authority, the Department issued the Permit, which authorizes International to release treated effluent from the Mill process that, after traveling through a number of marshes of varying salinity, discharges to the salt waters of Perdido Bay.

Whole Effluent Toxicity Testing

12. The Consent Order is designed to address a situation in which International discovered that split compliance samples of its effluent submitted to two independent laboratories were resulting in different results in chronic WET.

13. Toxicity is measured by exposing fish and invertebrate test species to effluent collected after it has passed through a process or treatment facility.

¹ Prior to the end of 2019, activated sludge was removed from Pond 3 and returned to Pond 1. That practice has ceased. The end of that practice had no effect on the toxicity of the Mill effluent at the compliance point.

² ECUA also disposes of three MGD of reclaimed water to International’s effluent discharge pipeline at a point after the compliance point. That disposal does not affect the issues in this proceeding.

The test species and methods are established by rule to ensure consistency in measurement and analysis of the effluent.

14. Unlike testing for known chemical parameters in a wastestream, where the chemicals are sampled for set concentrations, WET testing is performed when different parameters in the effluent that could result in toxicity to specific organisms are unknown, or the effluent is very complex. The WET testing strategy is designed to evaluate constituents of the wastestream that could be detected analytically, as well as those that are not individually sampled, or that affect toxicity in unanticipated combinations.

15. WET testing is reported at the method detection limit at which toxicity impacts an organism. It takes into consideration the test organism's ability to functionally deal with conditions on a metabolism basis, and is a more sensitive test procedure than traditional chemical analytical parameters.

16. A facility that discharges to a freshwater system is required to use freshwater organisms as its testing target species. If a facility's effluent is freshwater, and its direct receiving waters are freshwater, the testing target species will be freshwater organisms, even if the ultimate receiving water body is saltwater. Fla. Admin. Code R. 62-620.620(3)(g).

17. Since the Mill effluent is considered to be freshwater, and is initially discharged to a series of artificially created freshwater treatment marshes before it reaches the tidally influenced marshes and waters of Perdido Bay, freshwater species are used to measure chronic toxicity. For such species, salt ions can be toxic.³

18. Chronic toxicity is measured by its effect on the reproduction or growth of the target species. Unlike acute toxicity, in which individual

³ Sodium, potassium, magnesium, and calcium ions, all considered to be "salts," are present in freshwater, and are essential chemicals required by aquatic organisms. Nonetheless, increases or imbalances in these ions can result in acute or chronic toxic effects to sensitive organisms.

organisms die from the toxic effects of the target constituent, chronic toxicity is measured by its sub-lethal effect on the test species.

19. The WET test for the International effluent uses a freshwater species of water flea, *Ceriodaphnia dubia*, as the test target species. *Ceriodaphnia dubia* is very sensitive to salt ions.

20. WET testing is performed at the Instream Waste Concentration (“IWC”). For International’s Permit, the effluent is collected at the end of the WWTP, before ECUA’s three MGD reclaimed water disposal point and before discharge to receiving waters. Thus, the International IWC is 100 percent, which means organisms have to be able to live and reproduce in the undiluted effluent just as they would in laboratory culture water. According to Mr. Goodfellow, an IWC of 100 percent is “one of the more tough challenging yardsticks to measure effluent compliance.”⁴

21. The Inhibition Concentration (“IC”) is a linear regression analysis with the goal of determining the concentration of effluent that results in a reduction of the reproduction or growth rate in the test organisms. As applied to the issues in this case, IC₂₅ is the concentration of toxic constituents in the WWTP wastewater stream that results in a 25 percent reduction in the reproduction rate of *Ceriodaphnia dubia* compared to control water.⁵ Since test concentrations can be varied by dilution, IC₂₅ allows one to analyze an entire data set of concentrations against the control into the overall assessment.

22. The Permit requires that the IC₂₅ be measured at a concentration of 100 percent effluent, meaning that the *Ceriodaphnia dubia* test organisms

⁴ At many facilities, the IWC is established where the effluent would be fully mixed in the receiving water. Thus, the discharged effluent will have been diluted by the receiving waters or subject to natural bio- or photo-degradation that occurs in the receiving water. Mr. Goodfellow testified that, prior to this case, 90 to 95 percent was the highest IWC he had seen, with many facilities at 70 to 50 percent or lower.

⁵ Similarly, IC₅₀ is the concentration of toxic constituents in a wastewater stream that results in a 50 percent reduction in reproduction compared to control water. IC₂₅ is more stringent than IC₅₀, and is the standard required by the Permit.

can experience no more than a 25 percent reduction in their rate of reproduction when in 100 percent effluent than their rate of reproduction in control laboratory culture water, i.e., a difference of 15 young produced in the effluent versus 20 young produced in the laboratory culture water.⁶

23. WET testing is inexpensive and quick. Since *Ceriodaphnia dubia* can go through three generations in the course of seven days, one can change individual concentrations and measure the effect of the change in reproduction over a relatively short period.

24. In this case, WET test samples collected by International were split, with the samples sent to separate independent certified laboratories for analysis. Though the split samples were identical in their constituent makeup, the results produced differing toxicity results between the laboratories.

25. The Consent Order was designed to test the hypothesis that the sensitivity of laboratory-specific test cultures of *Ceriodaphnia dubia* to inorganic salt or ion composition in the Mill effluent could produce the mixed results being reported by the different laboratories.

Salt Ion Composition Work Plan

26. The Consent Order requires the implementation of a Salt Ion Composition Work Plan (“Plan”) to analyze the impact of the salt ion composition of the treated effluent on the toxicity results, and to evaluate whether the salt ion composition of the Mill effluent is causing or contributing to violations.

27. Salt ions in the Mill effluent result from the paper making process or the neutralization process as part of wastewater treatment. Although very minor levels of salt ions could be present in the ECUA contribution to the

⁶ Likewise, an IC₂₅ of 50 percent effluent means that test organisms would produce 25 percent fewer young in an effluent test concentration of 50 percent effluent and 50 percent laboratory control water.

Mill process water, and even in the well water, they are inconsequential in the effluent salt ion concentration.

28. Although all test cultures of *Ceriodaphnia dubia* are clones, the species can rapidly reproduce. Thus, variations in the sensitivity of laboratory strains over time may have led to the variation in results.

29. The Plan involves a comparison of the Mill effluent with a mock effluent that contains only salt ions in solution with dilution water, without any other constituents of the Mill effluent. Those two effluents are then to be independently evaluated for toxicity, and mixed together in specified concentrations to determine if consistent toxicity results are achieved.

30. The Plan uses a series of serial dilutions of the Mill effluent, and measures the effect of the effluent on the test species against a control solution, which can either be laboratory water or the facility's receiving waters. In this case, International's effluent will be compared to the mock effluent to determine its toxic effect.

31. The serial dilutions of the effluent start at 100 percent effluent, and are then to be halved and mixed with the mock effluent resulting in five concentrations, i.e., 100 percent (whole) effluent, 50 percent effluent; 25 percent effluent, 12.5 percent effluent, and 6.25 percent effluent. For each concentration, the test species organisms are evaluated for the impact from exposure to the effluent mixtures on their survival and reproduction over a seven-day period.⁷ By performing toxicity tests on each one of those samples, it is possible to factor the impact of the mock effluent versus the International effluent, and identify the contribution of the various salt ions in the solutions.

32. If the chronic toxicity violations are due to salt ions, then the mock effluent, the Mill effluent, and any combination of the two, would continue to exhibit toxicity. However, if the mock effluent does not impair the

⁷ For the other freshwater test species, the fathead minnow, survival and growth of the larvae are measured over the same seven-day period.

reproduction of *Ceriodaphnia dubia*, then a conclusion can be drawn that the violations of the Permit toxicity standard are the result of other pollutants in the Mill effluent. In that case, toxicity would be expected to decrease as the ratio of mock effluent to Mill effluent increases, because the other non-salt ion pollutants in the Mill effluent would be diluted by the mock effluent.

33. It would be preferable for the mock effluent and the Mill effluent to have the same concentration of the ions at issue. However, the Plan proposes to make the mock effluent at 150 percent of the Mill effluent salt ion concentration. The Department explained that International has a limited period in which to conduct the salt ion study. Not all of its samples exhibit chronic toxicity. The increase to 150 percent of the Mill effluent would ensure that the mock effluent is at chronically toxic levels. Having a different concentration is “messy” in that there is not a one-to-one comparison, but it remains possible to review the data and to get results from it.

34. International’s response to the Department’s concern explained that since the tests will be performed as serial dilutions, the mock effluent and Mill effluents will be assessed at different dilutions, and will allow toxicological responses at levels above typical Mill effluent. International was confident that its proposal would allow for the characterization of the relationship between Mill effluent and *Ceriodaphnia dubia* survival and reproduction at high and low concentrations.

35. Ms. Ross opined that it was acceptable to allow for the study to proceed as proposed. The Department approved the implementation of the Plan. The evidence was persuasive that the Plan is a reasonable and effective measure to assess the contribution of salt ions in the Mill effluent on chronic toxicity as measured by its effect on *Ceriodaphnia dubia* reproduction.

ECUA Contribution Study

36. If the Plan proves inconclusive that the exceedances of the chronic toxicity standard were due to a salt ion imbalance, then the contribution of ECUA’s reclaimed water as process source water to the chronic toxicity

standard violations is to be evaluated. International began to have more frequent intermittent failures of the WET standard at roughly the same time as International began to accept ECUA reclaimed water as a component of its process input water, which was in late 2011 or early 2012.

37. Implementation of the Plan with the normal ECUA influent load was determined to be sequentially important because discontinuing ECUA reclaimed water as source water before the implementation of the Plan would introduce additional variability into the verification of the salt ion composition hypothesis.

38. ECUA reclaimed water makes up as much as 20 percent of International's source process water. ECUA has, among its customers, a number of industrial users. Even in advanced wastewater treatment systems, as are the ECUA wastewater facilities, industrial toxins are not effectively treated and removed. Thus, it is likely that ECUA reclaimed water has toxic constituents of unknown concentration. If the salt ion Plan does not resolve the toxicity issue, adjusting the amount of ECUA reclaimed water as source process water may result in incremental improvement in the toxicity levels of International's effluent, such that International can consistently pass the permit limitation for chronic WET.

39. The effect of the ECUA reclaimed water on toxicity of International's WWTP effluent will be assessed by first eliminating the ECUA contribution to International's source process water, and allowing the WWTP system to reach equilibrium, a process that can take up to from 30 to 45 days for the ECUA constituents to clear the WWTP system. Samples of the effluent will then be collected and WET tested to determine the toxicity of the International effluent in isolation. ECUA reclaimed water will then be added back into International's process water in slow increments, with samples of the resulting effluent being regularly tested.

40. The evidence was persuasive that the ECUA contribution study is a reasonable and effective measure to assess the contribution of ECUA's reclaimed water on chronic toxicity.

Toxicity Identification Evaluation

41. If both the salt ion Plan and the elimination of the ECUA source water fail to identify the cause of the chronic toxicity failure, then International will implement a Toxicity Identification Evaluation ("TIE"), the "third leg"⁸ of the Consent Order, by which specific constituents of the Mill effluent are removed, one-by-one, with an assessment of each on *Ceriodaphnia dubia*.

42. During regular monthly compliance during the process of scheduled WET testing or during the ECUA evaluation, any toxic samples that are identified will be further evaluated using the TIE testing procedures to help inform as to the principal toxicant.

43. The TIE takes a complex effluent through a series of chemical and physical treatments, called fractionations, that either removes or complexes potential toxins, with a comparison of the reaction of the test organisms to the effluent with and without various constituents in the effluent. The manipulations include pH adjustment, aeration, filtration, extraction, chelation, oxidant reduction, and other means of adjusting the effluent. In some instances, the process removes a constituent from the effluent, and in some instances, e.g., with chelation of metals, it renders the constituent biologically unavailable, meaning that the chemical may still be in the effluent, but can no longer be toxic because it is bound in a form that cannot be taken in by the test organism.

44. Every time a TIE manipulation is complete, the resulting effluent is exposed to the test organisms for an evaluation of the effect of the modification on toxicity, and comparing it against the baseline effluent. The

⁸ Mr. Goodfellow likened the process established by the Consent Order as a three-legged stool, with the first leg being the salt ion Plan, the second being the elimination of ECUA source water, and the third being the TIE's methodical elimination of effluent constituents, and measuring the effect of each on the reproductive rate of the *Ceriodaphnia dubia* species.

TIE allows for the individual study of each potentially toxic constituent of the effluent.

45. A challenge for doing a TIE is that if a compliance test shows an effluent is toxic, it can take several days to a week before the effluent can be evaluated, because its toxicity is not known until the end of the test. When evaluating a subtle toxicity, such as reproduction, a compliance test must be run through the entire seven-day test period. Toxicity of effluent can vary and even go away through natural processes. Thus, especially with subtle toxicities, it may be difficult to determine the toxicity of a particular sample of effluent the second time it is subject to evaluation through the TIE. Nonetheless, the evidence was persuasive that the TIE is a reasonable and effective measure to evaluate the effect of individual constituents in the Mill effluent on chronic toxicity.

Other Consent Order Provisions

46. The scheduled date on which the studies contemplated and approved in the Consent Order are to be completed is January 1, 2022. How this litigation over the terms of the Consent Order might affect its endpoint is unknown, and is not an issue in this proceeding.

47. Pursuant to a previous 2010 Consent Order, International undertook a program of long-term monitoring in the receiving waters for the Mill effluent. The results of that monitoring demonstrated that the freshwater surface waters within the wetlands that constitute the receiving effluent distribution system do not meet Class III water quality criteria for dissolved oxygen, specific conductance, and pH. On February 24, 2020, International submitted a petition for rulemaking pursuant to Florida Administrative Code Rule 62-302.800(2), to establish Site Specific Alternative Criteria (“SSAC”) for those parameters in the freshwater receiving waters. Those water quality standards, and potential violations thereof, though referenced as “Moderating Conditions” in the Consent Order, are not the subject of the corrective actions required by the Consent Order. Any agency action with respect to the

adoption of the SSAC rule will be subject to separate notice and an opportunity for a hearing in a separate proceeding.

48. If the Plan demonstrates that the salt ions in the effluent account for the chronic toxicity violations, International proposes to petition for a variance from the chronic toxicity standard. It is difficult to correct an ion imbalance within the effluent itself. Such violations are commonly addressed through a variance or mixing zone. International does not have mixing capability. Thus, if the chronic toxicity violations are the result of an ion imbalance, the evidence supports that a variance is a reasonable approach towards achieving compliance. There is no evidence to the contrary. Furthermore, any agency action with respect to the petition for variance will be subject to separate notice and an opportunity for a hearing in a separate proceeding.

49. While the proposed investigative and corrective measures are being implemented, the Consent Order provides for stipulated monetary penalties. Those penalties were not challenged, and are not at issue.

Conclusion

50. The preponderance of the evidence established that the sequential investigative measures required by the Consent Order -- the Salt Ion Composition Work Plan, the ECUA Contribution Study, and the Toxicity Identification Evaluation -- are reasonable and effective measures to establish the reason for the 19 instances in which International reported effluent quality monitoring results that failed to meet its WWTP Permit limits for chronic WET for the *Ceriodaphnia dubia* species.

CONCLUSIONS OF LAW

A. Jurisdiction.

51. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto. §§ 120.569 and 120.57(1), Fla. Stat.

B. Burden of Proof and Analysis

52. The Department has the authority to resolve violations of environmental standards by entry of a settlement with the violator. § 403.121(2)(g), Fla. Stat. That authority has been exercised in this case through entry of the Consent Order.

53. Petitioner's concerns with the Consent Order are, essentially, that it does not go far enough to address what she believes to be potential causes of toxicity related to the Mill that are not addressed by the studies required by the Consent Order, and that investigatory measures to determine the cause of the 19 violations of the chronic toxicity standard failed to accept what she alleged to be the "known" causes of the violations. Those include long-chain fatty acids, dissolved copper, constituents in the solids contained in the WWTP treatment pond sludges, and the total solids discharged to the effluent distribution system marshes. Petitioner's concerns may or may not have merit. Regardless, as explained herein, whether the Consent Order addresses all existing or potential violations at the Mill is not subject to review in this proceeding.

54. For a consent order that is a resolution of environmental violations designed to bring a violator back into compliance with the law, as opposed to being a substitute for a permit, the appropriate standard of review is whether the Department abused its enforcement discretion in agreeing to the consent order. *M.A.B.E Properties, Inc. v. Dep't of Env'tl. 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). The Consent Order in this case is one designed to identify the cause of the 19 exceedances of International's chronic toxicity limits.

55. The Department has the burden of proving the Consent Order is a reasonable exercise of its enforcement discretion. *Id.* "The 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. It merely needs to be appropriate given all of the factors that must be considered by the agency in reaching an agreement.” *Id.*

56. Allegations that a consent order fails to address all existing or potential violations are not subject to administrative review. *Arlington Ridge Cmty. Ass’n, v. GI Shavings, LLC*, Case No. 18-5297, FO at 47 (Fla. DOAH June 19, 2019; Fla. DEP Sept. 13, 2019).

57. A Consent Order can only be approved or disapproved. It cannot be approved with modifications. *M.A.B.E. Properties, Inc.*, Case No. 10-2334, Order on Motions at 2; citing *Lambou v. Dep’t of Env’tl. Prot.*, Case No. 02-4601 (Fla. DOAH June 24, 2003; Fla. DEP Sept. 22, 2003).

C. Conclusion

58. The preponderance of the evidence established that the sequential investigative measures required by the Consent Order were reasonable under the circumstances and appropriate given all of the factors related to the 19 exceedances of International’s WWTP Permit limits for chronic WET for the *Ceriodaphnia dubia* species. Thus, the Department met its burden of proving that the Consent Order is a reasonable exercise of its enforcement discretion.

59. As to alleged violations not encompassed by the Consent Order, Ms. Lane has a remedy under the citizen suit provisions in section 403.412(2), Florida Statutes, which authorizes any citizen of the state to maintain an action for injunctive relief for a violation of the state's environmental laws. *Arlington Ridge Cmty. Ass’n*, Case No. 18-5297, FO at 47; *M.A.B.E. Properties, Inc.*, Case No. 10-2334, FO at 2.

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 approving the Consent Order, OGC File No. 19-1453.

DONE AND ENTERED this 16th day of December, 2020, in Tallahassee, Leon County, Florida.



E. GARY EARLY
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this 16th day of December, 2020.

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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.