STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Petitioner,	)	**OGC CASE NOS. 21-1178**
	)	**21-0881**
v.	)	**22-1934**
SCOTT THOMSON,	)	**DOAH CASE NOS. 22-0070**
	)	**22-0074**
Respondent.	)	**22-1620**
_____/		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on August 5, 2022, 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. DEP timely filed exceptions on August 22, 2022. Thomson did not file exceptions nor a response to DEP's exceptions.

This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On May 3, 2021, the Florida Department of Health (DOH) issued a citation[1] (Citation I), seeking to levy fines against the Respondent Thomson (Respondent or Thomson) for work performed on a septic system at 7629 Arlene Avenue (Arlene Avenue). "Citation I charged that

[1] As of July 1, 2021, DEP took over for DOH as the agency enforcing section 381.0065, Florida Statutes, including enforcement for violations of that statute, other provisions of chapter 381, Florida Statutes, and any rule adopted thereunder. Ch. 2020-150, § 7, Laws of Fla. Although the rules cited in the Citations and the Complaint are to DOH's rules in chapter 62E-6, Florida Administrative Code, these rules were transferred to DEP chapter 62-6, Florida Administrative Code, in 2021 based on the statutory authority in Chapter 2020-150, § 7, Laws of Florida.

Respondent violated several rules by improperly repairing a septic system, using spoils material to replace a drainfield, failing to contact DOH for a required inspection, and covering the drainfield without first obtaining such inspection." (RO p. 2). On the same day, DOH issued an identical Citation for the same alleged misconduct at Arlene Avenue against Jeffrey Mathis (Mathis Citation). (RO p. 3). On June 1, 2021, DOH issued a Complaint seeking to levy fines against Thomson for work performed on a septic system at 2566 Conway Gardens Road (Conway Gardens Road). (RO p. 3). The Complaint charged Thomson with initiating and completing a septic repair at 2566 Conway Gardens Road, Orlando, Florida without a permit in violation of section 381.0065(4), Florida Statutes, and rules 64E-6.003(1) and 64E-6.022(1) and (2), Florida Administrative Code. [2]

On January 7, 2022, DEP transmitted Citation I, the Mathis Citation, and the Complaint to DOAH upon the Respondents' request. DOAH assigned Case No. 22-0070 to Citation I, Case No. 22-0071 to the Mathis Citation, and Case No. 22-0074 to the Complaint. *Id*. On January 18, 2022, DEP filed a Notice of Voluntary Dismissal in Case No. 22-0071, and a Notice of Dropping a Party and Voluntary Dismissal as to Jeffrey Mathis in Case No. 22-0074. On January 19, 2022, the ALJ issued an Order Closing File and Relinquishing Jurisdiction in Case No. 22-0071, and an Order Dismissing Jeffrey Mathis and Amending Case Style in Case No. 22-0074. On the same day, the ALJ issued an Order consolidating Case Nos. 22-0070 and 22-0074. (RO p. 3).

On April 29, 2022, DOH issued Citation II against Thomson charging him with engaging in gross negligence, incompetence, or misconduct by certifying that the existing septic tank at Arlene Avenue was free of observable defects even though the tank defectively had two inlet

[2] At the hearing DEP withdrew the allegation about improperly completing the septic repair without a permit. DEP seeks to impose a $250 fine for the remaining violation at Conway Garden Road.

pipes installed. (RO p. 4). On June 1, 2022, DEP transmitted Citation II to DOAH, which was assigned Case No. 22-1620. Based on agreement of the parties, the ALJ issued a Second Order of Consolidation on June 6, 2022, consolidating Case Nos. 22-0070, 22-0074, and 22-1620.

The ALJ held the final hearing on June 21, 2022, in Orlando Florida. (RO p. 1). DEP presented the testimony of Lindsay Hockreiter, Alexis Negron, Brendan Brock, and Bark Harriss. The Respondent Thomson testified on his own behalf. DEP's Corrected Exhibits 1 through 28 were admitted in evidence without objection. Thomson's Composite Exhibits 1 through 3 were admitted in evidence over DEP's relevancy objections. (RO p. 5).

Thomson and DEP timely filed proposed recommended orders (PROs), which were considered by the ALJ in preparing his RO.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department of Environmental Protection "issue a final order imposing administrative fines against Respondent in the amount of $1,750, comprised of $250 for the violations in the Complaint, $1,000 for the violations in Citation I, and $500 for the violations in Citation II." In doing so, the ALJ found that DEP proved by clear and convincing evidence that Thomson violated rule 62-6.022(1)(d), Florida Administrative Code, at Arlene Avenue by failing to call for a reinspection after failing an initial inspection. (RO ¶ 63). The ALJ also found that DEP proved by clear and convincing evidence that Thomson violated rule 62-6.003(2), Florida Administrative Code, at Arlene Avenue by covering up the drainfield without a final approval from DOH. (RO ¶ 65). Moreover, the ALJ found that DEP proved by clear and convincing evidence that Thomson violated rule 62-6.015(6), Florida Administrative Code, at Arlene Avenue by using spoil material, instead of new fill, when installing the drainfield. (RO ¶ 67). However, the ALJ concluded that it was not proven by clear and

convincing evidence that Thomson committed gross negligence, incompetence, or misconduct at Arlene Avenue in violation of rule 62-6.022(1)(l), Florida Administrative Code. Specifically, the ALJ found that "[t]he weight of the credible evidence did not establish that the second inlet pipe was an observable defect that Respondent was required to discover when signing the certification on Form 4015 for installation of a new drainfield." (RO ¶ 71).

Regarding the Complaint at Conway Gardens Road, the ALJ found that DEP proved by clear and convincing evidence that Thomson violated section 381.0065(4), Florida Statutes, and rule 62-6.003(1), Florida Administrative Code, by starting the repair of a septic system without a permit.

STANDARDS OF REVIEW FOR DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2021); *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g.*, *Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g.*, *Rogers v.*

Dep't of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Env't. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. School Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g.*, *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g.*, *North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994*); Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cnty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). An agency has the primary responsibility to interpret statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Emp. Relations Comm'n v. Dade Cnty. Police Benevolent Ass'n*, 467

So. 2d 987, 989 (Fla. 1985); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were actually a conclusion of law. *See, e.g.*, *Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Pro. Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g.*, *Suddath Van Lines, Inc. v. Dep't of Env't. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). The Department is charged with enforcing and interpreting portions of chapter 381 of the Florida Statutes pertaining to onsite sewage treatment and disposal systems and chapter 403 of the Florida Statutes. As a result, DEP has substantive jurisdiction over interpretation of these statutory provisions and the Department's rules adopted to implement these statutes.

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Pro. Regul.*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regul.*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Evidentiary rulings are matters

within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* 120.57(1)(k), Fla. Stat. (2021). The agency, however, need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

A party that files no exceptions to certain findings of fact "has thereby expressed its 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, 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, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2021); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels,* 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON DEP'S EXCEPTIONS

DEP's Exception to Paragraph No. 37

DEP takes exception to a portion of the ALJ's findings in paragraph no. 37 of the RO, alleging that the RO "implies that Respondent Thomson visually inspected the septic tank at issue." DEP's Exceptions, pp. 3-4. DEP notes that the person who inspected the septic tank did not testify at the hearing, and that Thomson implies he personally inspected the septic tank. DEP

contends that because Thomson did not inspect the septic tanks himself, the findings in paragraph no. 37 of the RO could not be based on competent, substantial evidence.

However, DOH, the predecessor agency to DEP that previously implemented the septic tank program, issued Citation II against Thomson charging him with engaging in gross negligence, incompetence, or misconduct by certifying that the existing septic tank at Arlene Avenue was free of observable defects even though the tank inappropriately had two inlet pipes installed. (RO p. 4). Accordingly, DEP's exception to paragraph no. 37 is not material to Citation II under dispute. DEP's exception contends that Thomson engaged in gross negligence, incompetence, or misconduct because his employee or agent and not Thomson conducted the visual inspection of the septic tank. However, Citation II does not cite Thomson for unlawfully having his employee or agent visually inspect the septic tank, instead of himself; rather, it cites him for failing to detect an observable defect. Accordingly, DEP had the burden to prove by clear and convincing evidence that the Respondent committed gross negligence, incompetence, or misconduct when he did not detect the defect, i.e., the second inlet pipe. Whether Thomson or one of his employees or agents conducted the visual inspection was not material. Instead, the material facts are set forth by the ALJ in paragraph 37 of the RO where he found that Thomson "credibly explained that the rules [requiring a visual inspection of the septic tank] do not require a contractor to stick their heads inside of an existing tank or use a mirror as doing so is a health hazard given the sewage and bacteria contained inside." (RO ¶ 37).

Contrary to DEP's exception to paragraph no. 37, the ALJ's findings of fact in paragraph no. 37 of the RO are supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence presented at the final hearing. (Thomson, T. Vol. 2, pp. 224, 232; Harriss, T. Vol. 1, pp. 117, 119-20; DEP Exhibit 10, p. 46 -- Thomson deposition).

Based on the foregoing reasons, DEP's exception to paragraph no. 37 is denied.

DEP's Exception to Paragraph No. 38

DEP takes exception to *the ALJ's finding in the last sentence of RO paragraph no. 38* that Thomson did not commit "gross negligence, incompetence, or misconduct that should subject him to discipline." (RO ¶ 38).

Paragraph no. 38 of the RO provides in its entirety:

> 38. Based on the weight of the credible evidence, the undersigned finds that the existence of the second inlet pipe was not an observable defect, much less one that could support a finding that Respondent committed gross negligence, incompetence, or misconduct for failing to discover it when making his certification. *Neither the rules nor Form 4015 define what constitutes an observable defect or otherwise specify what contractors must do when certifying that a tank is free of observable defects, which alone undermines a finding that Respondent committed gross negligence, incompetence, or misconduct that should subject him to discipline.*

RO ¶ 38 (emphasis added).

DEP's exception contends that Thomson engaged in gross negligence, incompetence, or misconduct because his employee or agent and not Thomson conducted the visual inspection of the septic tank. However, Citation II does not cite Thomson for unlawfully having his employee or agent visually inspect the septic tank; rather, it cites him for failing to detect an observable defect.

Contrary to DEP's exception, the ALJ's findings of fact in paragraph no. 38 of the RO are supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence presented at the final hearing. (Thomson, T. Vol. 2, pp. 224, 232; Harriss, T. Vol. 1, pp. 117, 119-20).

DEP takes exception to paragraph no. 38 of the RO for essentially the same reasons articulated in its exception no. 37. Based on the Department's analysis and ruling on DEP's

exception to paragraph no. 37 above, which is incorporated herein, the Petitioners' Exception No. 38 is denied.

DEP's Exception to Paragraph No. 48

DEP takes exception to the ALJ's conclusion of law in the last sentence of paragraph no. 48 of the RO, which provides that "[i]mportantly, neither the rules nor Form 4015 define 'observable defects' or otherwise explain what a contractor is expected to do in order to observe defects with the tank." (RO ¶ 48). DEP contends that the "rule clearly identifies the type of inspection required, i.e., a visual inspection. . . . [and] provides that the only person who may submit the results to the Department is the person who performed the visual inspection." DEP's Exceptions, p. 5.

DEP is correct that rule 62-6.001(4)(b), Florida Administrative Code, requires a septic tank contractor to perform a visual inspection of the empty septic tank to detect any observable defects and for the inspector to submit the results to the Department; however, neither chapter 381, Florida Statutes, chapter 62-6, Florida Administrative Code, nor Form 4015 define or identify what constitutes an "observable defect" to a septic tank. The Department concurs with the ALJ's legal conclusion that neither the septic tank rules nor Form 4015 define what constitutes an "observable defect" to a septic tank.

Based on the foregoing reasons, DEP's exception to paragraph no. 48 is denied.

DEP's Exception to Paragraph No. 71

DEP takes exception to the ALJ's mixed findings of fact and conclusions of law in paragraph no. 71 of the RO. Paragraph no. 71 provides in its entirety:

> 71. Based on the Findings of Fact above, DEP failed to prove by clear and convincing evidence that Respondent committed gross negligence, incompetence, or misconduct in violation of rule 62-6.022(1)(l). The weight of the credible evidence did not establish that the second inlet pipe was an observable

defect that Respondent was required to discover when signing the certification on Form 4015 for installation of a new drainfield.

RO ¶ 71.

DEP's exception contends that Thomson engaged in gross negligence, incompetence, or misconduct because his employee or agent and not Thomson conducted the visual inspection of the septic tank. However, Citation II cites Thomson for not detecting an observable defect, not for having his employee or agent visually inspect the septic tank. Whether Thomson or one of his employees or agents conducted the visual inspection was not material to paragraph no. 71 of the RO. Moreover, the ALJ found that the "weight of the credible evidence did not establish that the second inlet pipe was an observable defect that Respondent was required to discover. . . ." (RO ¶ 71).

Contrary to DEP's exception, the ALJ's mixed findings of fact and conclusions of law in paragraph no. 71 are supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence presented at the final hearing. (Thomson, T. Vol. 2, pp. 224, 232; Harriss, T. Vol. 1, pp. 117, 119-20).

DEP takes exception to paragraph no. 71 of the RO for essentially the same reasons articulated in its exception nos. 37 and 38. Based on the Department's analysis and rulings on DEP's exceptions to paragraph nos. 37 and 38 above, which are incorporated herein, the Petitioners' Exception No. 71 is denied.

DEP's Exception to Paragraph No. 72

DEP takes exception to the ALJ's conclusions of law in paragraph no. 72 of the RO, which interpret rules 62-6.015(1) and 62-6.001(4), Florida Administrative Code. DEP's Exceptions, pp. 7-8.

Paragraph no. 72 of the RO provides in pertinent part that:

> [R]ules 62-6.015(1) and 62-6.001(4), and Form 4015 neither define the term "observable defect" nor specify what contractors must do other than "perform a visual inspection of the tank when the tank is empty to detect any observable defects or leaks in the tank." Fla. Admin. Code R. 62-6.001(4). Thus, disciplining Respondent for failing to inspect the inside of the tank with a flashlight or mirror to discover the second inlet pipe and identify it as a defect on Form 4015 would be improper. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441, 444 (Fla. 5th DCA 2013) ("Where a statute imposes sanctions and penalties in the nature of denial or revocation of a license to practice for violating its proscriptions, such a statute 'must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it.'") (quoting *Lester v. Dep't of Pro. & Occ. Regul.*, 348 So. 2d 923, 925 (Fla. 1st DCA 1997)). . . .

RO ¶ 72.

DEP contends "it is clear that the rule" requires a septic tank contractor to conduct a visual inspection of the empty septic tank to determine "if there are any faults, flaws, imperfections, or weaknesses." DEP's Exceptions, p. 8. The Department acknowledges that rule 62-6, Florida Administrative Code, requires a septic tank contractor to inspect the tank for an "observable defect"; nevertheless, neither chapter 62-6 nor Form 4015 define what is meant by an "observable defect." This is a question of fact. The Department concurs with the ALJ that he is "preclude[ed] [from] finding that Respondent committed gross negligence, incompetence, or misconduct," because DEP did not prove by clear and convincing evidence that the septic tank contained an "observable defect" that Thomson should have found by a visual inspection of the tank. RO ¶ 72.

Based on the foregoing reasons, DEP's exception to paragraph no. 72 is denied.

Correction to RO's Scrivener's Error to Recommendation Paragraph

The ALJ recommended that the "Department of Environmental Protection issue a final order imposing administrative fines against Respondent [Thomson] in the amount of $1,750.00, comprised of $250 for the violations in the Complaint, $1,000 for the violations in Citation I, and

$500 for the violations in Citation II." (RO p. 31). Citation II alleged only that Thomson violated rule 62-6.022(1)(l), Florida Administrative Code, by engaging in gross negligence, incompetence, or misconduct. However, paragraph nos. 70 through 73 of the RO unambiguously concluded that it was not proven by clear and convincing evidence that Thomson committed gross negligence, incompetence, or misconduct in violation of rule 62-6.022(1)(l), Florida Administrative Code. Based on the ALJ's findings of fact, conclusions of law, and the totality of the evidence presented at the final hearing, the Department concludes that the ALJ's recommendation that the Department impose administrative fines against Thomson in the amount of $500 for the violations in Citation II is a scrivener's error that must be rejected. This scrivener's error does not affect the ALJ's findings of fact or conclusions of law in his RO attached hereto.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the Recommended Order, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted and incorporated by reference, except as modified by the above rulings on Exceptions and Correction to RO's Scrivener's Error.

B. Citation I and the Complaint issued to Scott Thomson are hereby APPROVED.

C. Citation II issued to Scott Thomson is hereby DENIED.

D. Within 60 days of the effective date of this Final Order, the Respondent Scott Thomson shall pay the Department the sum of $1,250.00, comprised of $1,000 for the violations in Citation I at Arlene Avenue, and $250 for the violations in the Complaint at Conway Gardens

Road. Payment shall be made in the form of a cashier's check, certified check, or money order made payable to the Florida Department of Environmental Protection, and reference thereon OGC No. 21-1178. The check or money order shall be sent to the following address: Florida Department of Environmental Protection, Onsite Sewage Program, Attention: Eb Roeder, 2600 Blair Stone Road, M.S. 3596, Tallahassee, Florida 32399-2400

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 1st day of November 2022 in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

SHAWN HAMILTON
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.

Syndie Kinsey
Digitally signed by Syndie Kinsey
Date: 2022.11.01 14:53:31 -04'00'

CLERK DATE

CERTIFICATE OF SERVICE

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

Scott Thomson Mathis and Sons Septic, L.L.C. 4947 South Orange Avenue Orlando, FL 32806 scott.mathisandsonsspetic@gmail.com mathisandsonsseptic@gmail.com	Jay Patrick Reynolds, Esquire John Ryen Morgan-Ring, Esquire Department of Environmental Protection 3900 Commonwealth Blvd., M.S. 35 Tallahassee, FL 32399-3000 Patrick.Reynolds@FloridaDEP.gov Ryen.MorganRing@FloridaDEP.gov

this 1st day of November 2022.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

STACEY D. COWLEY
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242
email Stacey.Cowley@FloridaDEP.gov

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

vs.

SCOTT THOMSON,

Respondent.
_____/

Case Nos. 22-0070
22-0074
22-1620

RECOMMENDED ORDER

Administrative Law Judge Andrew D. Manko of the Division of Administrative Hearings ("DOAH") presided over the final hearing in these consolidated cases, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2022), on June 21, 2022, in Orlando, Florida.

APPEARANCES

For Petitioner: Jay Patrick Reynolds, Esquire
John Ryen Morgan-Ring, Esquire
Department of Environmental Protection
Office of General Counsel
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

For Respondent: Scott Thomson, pro se
Mathis and Sons Septic, LLC
4947 South Orange Avenue
Orlando, Florida 32806

STATEMENT OF THE ISSUES

(1) Case No. 22-0070 – whether Petitioner, Department of Environmental Protection ("DEP"), may impose fines against Respondent, Scott Thomson

("Respondent"), for violating Florida Administrative Code Rules 62-6.003(2), 62-6.015(6), and 62-6.022(1)(d) and (1)(p), as alleged in the Citation dated May 3, 2021 ("Citation I"); (2) Case No. 22-1620 – whether DEP may impose fines against Respondent for violating rule 62-6.022(1)(*l*), as alleged in the Citation dated April 29, 2022 ("Citation II"); and (3) Case No. 22-0074 – whether DEP may impose fines against Respondent for violating section 381.0065(4), Florida Statutes, and rules 62-6.003(1) and 62-6.022(1)(b)1., as alleged in the Administrative Complaint ("Complaint").

PRELIMINARY STATEMENT

On May 3, 2021, the Florida Department of Health ("DOH") issued Citation I, seeking to levy fines against Respondent for work performed on a septic system at 7629 Arlene Avenue ("Arlene Avenue").[1] Citation I alleged that Respondent violated several rules by improperly repairing a septic system, using spoils material to replace a drainfield, failing to contact DOH for a required inspection, and covering the drainfield without first obtaining such inspection. On the same day, DOH issued an identical Citation for the same alleged misconduct against Jeffrey Mathis ("Mathis Citation"), the owner of Mathis and Sons for whom Respondent works. Respondent and Mr. Mathis disputed the material allegations and timely requested an administrative hearing.

[1] As of July 1, 2021, DEP took over for DOH as the agency enforcing section 381.0065, including imposing discipline for violations of that section, other provisions of chapter 381, and any rules adopted thereunder. Ch. 2020-150, § 7, *Laws of Fla.* In these consolidated cases, DOH investigated the allegations, issued the citations and the Complaint, and sought to impose fines against Respondent; DEP is prosecuting these cases to enforce the requested fines against Respondent. Although the rules cited in the citations and the Complaint are to DOH's rule set (Florida Administrative Code Chapter 64E-6), those rules were transferred to DEP's rule set (chapter 62-6) in 2021 based on the statutory changes noted above; thus, DEP now seeks to levy fines against Respondent based on violations of chapter 62-6. Even if Respondent had argued that DEP cannot seek to levy fines under chapter 62-6 given that the citations and the Complaint cited to provisions of chapter 64E (he did not), Respondent was put on adequate notice of the factual allegations against him and the substance of the specific violations on which DEP seeks to levy fines.

On June 1, 2021, DOH issued a Complaint seeking to levy fines against Respondent and Mr. Mathis for work performed on a septic system at 2566 Conway Gardens Road ("Conway Gardens Road"). The Complaint alleged that they both violated a statute and two rules by starting the repair of a septic system and completing it without a permit.[2] Respondent and Mr. Mathis denied the allegations and requested an administrative hearing.

On January 7, 2022, DEP transmitted Citation I, the Mathis Citation, and the Complaint to DOAH. DOAH assigned Case No. 22-0070 to Citation I, Case No. 22-0071 to the Mathis Citation, and Case No. 22-0074 to the Complaint.

In the Response to Initial Order in case number 22-0070 and the Joint Response to Initial Order in Case No. 22-0074, DEP acknowledged that it would be dismissing Case No. 22-0071 against Mr. Mathis and requested that Case Nos. 22-0070 and 22-0074 against Respondent be consolidated for all purposes. On January 18, 2022, DEP filed a Notice of Voluntary Dismissal and Motion to Relinquish Jurisdiction in Case No. 22-0071 and a Notice of Dropping a Party and Voluntary Dismissal as to Jeffrey N. Mathis in Case No. 22-0074. On January 19, 2022, the undersigned issued an Order Closing File and Relinquishing Jurisdiction in Case No. 22-0071 and an Order Dismissing Jeffrey N. Mathis and Amending Case Style in Case No. 22-0074. On the same date, the undersigned issued an Order consolidating Case Nos. 22-0070 and 22-0074 for all purposes.

On January 20, 2022, the undersigned issued a Notice of Hearing and scheduled a live hearing in Orlando for March 16 and 17, 2022. On March 4, 2022, the parties filed an Agreed Motion for Continuance based on the need

[2] At the hearing, DEP dropped the allegation about improperly completing the repair without a permit. DEP now seeks to impose a $250 fine for the remaining violation.

for more time to conduct a site assessment. On March 7, 2022, the undersigned granted the request and reset the hearing for May 4 and 5, 2022.

On April 20, 2022, DEP filed a Motion to Relinquish Jurisdiction as to Case No. 22-0074. DEP argued that Respondent had admitted to the alleged violations in the Complaint and that relinquishment was appropriate because there no longer were any disputed issues of fact. On April 26, 2022, Respondent filed a response in opposition based on several attached exhibits, including several statutes and rules. On April 28, 2022, after holding a telephonic motion hearing, the undersigned issued an Order Denying Motion to Relinquish Jurisdiction as to Case No. 22-0074. The undersigned found that disputed issues of fact remained as to the propriety of the fine sought to be levied by DEP, including consideration of aggravation and mitigation factors as required by section 381.0061(2).

On April 29, 2022, DOH issued Citation II, levying another fine against Respondent for work performed at Arlene Avenue. Citation II alleged that Respondent engaged in gross negligence, incompetence, or misconduct by falsely certifying that the existing septic tank was free of observable defects even though it defectively had two inlet pipes installed.

On April 29, 2022, DEP filed a Motion for Continuance of the final hearing based on the issuance of Citation II. DEP acknowledged that Respondent had 21 days to take corrective action and that, if he failed to do so, judicial economy would be served by resolving Citation II at the final hearing with the other two consolidated matters. Respondent agreed with a continuance in Case No. 22-0070 but objected to a continuance in Case No. 22-0074. Agreeing with DEP that a continuance would serve the interests of judicial economy and efficiency, the undersigned issued an Order Granting

Continuance and Rescheduling Hearing on May 2, 2022, which rescheduled the final hearing for June 21, 2022.

On June 1, 2022, DEP transmitted Citation II to DOAH, which was assigned Case No. 22-1620. On June 3, 2022, the undersigned held a pre-hearing conference. Based on the agreement of the parties, the undersigned issued a Second Order of Consolidation on June 6, 2022, which consolidated Case Nos. 22-0070, 22-0074, and 22-1620 for all purposes and confirmed that the final hearing remained as scheduled.

At the final hearing, DEP presented the testimony of four witnesses: (1) Lindsey Hochreiter, the owner of 7629 Arlene Avenue; (2) Alexis Negron, a sanitary nuisance investigation coordinator with DOH; (3) Brendan Brock, an environmental specialist with DOH; and (4) Bart Harriss, an environmental manager with DOH. Respondent testified on his own behalf.

DEP's Corrected Exhibits 1 through 28 were admitted in evidence without objection. Respondent's Composite Exhibits 1 through 3 were admitted in evidence over DEP's relevancy objections.

The two-volume Transcript of the hearing was filed on July 6, 2022. Prior to the filing of the Transcript, Respondent filed his Proposed Recommended Order ("PRO") on June 24, 2022. DEP timely filed its PRO on July 18, 2022. Both PROs were duly considered in preparing this Recommended Order.

For ease of reference, all citations are to the 2022 versions of the Florida Statutes, which have not changed in any material way to the issues herein. In making the findings below, the undersigned only considered hearsay evidence that supplemented or explained other evidence or would be admissible over objection in civil actions. § 120.57(1)(c), Fla. Stat.

FINDINGS OF FACT

1. DEP is the state agency charged with regulating onsite sewage treatment and disposal systems, including enforcement activities against septic tank contractors for violations of part I of chapter 381 and any rules adopted thereunder. As part of this regulatory authority, DEP may issue citations, enforce citations issued by other regulatory agencies, such as DOH in Orange County, and impose fines against septic tank contractors.

2. Respondent is a registered septic tank contractor in Florida (SR0161774).[3] He serves as the qualifying contractor for Mathis and Sons Septic, LLC ("Mathis and Sons"), which is a Florida-certified septic tank contractor (SA0141851). Respondent is the vice president of employees, licenses, and permits for Mathis and Sons. Respondent previously served as the environmental manager for DOH in Orange County for 19 years.

3. In these consolidated cases, DEP seeks to impose administrative fines against Respondent for alleged violations concerning repairs made at two different properties—Conway Gardens Road and Arlene Avenue.

Conway Gardens Road

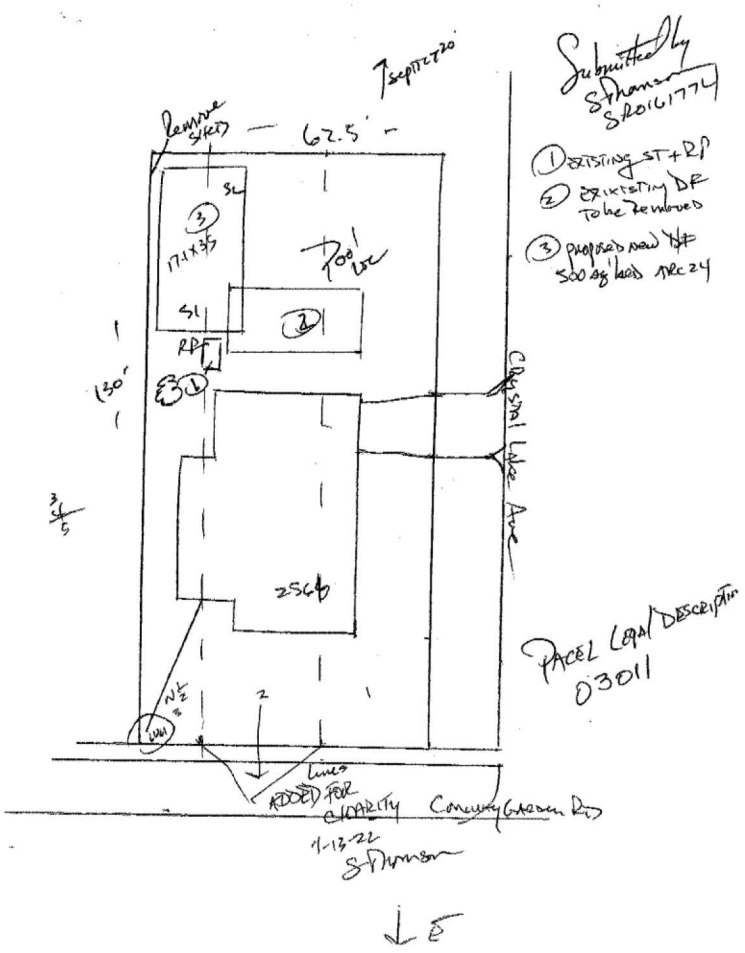
4. The Conway Gardens Road property is in the Rest Haven subdivision in Orange County. As originally platted in 1926, the subdivision's lots are 25 feet wide. The property contains a single-family house on one parcel that is 62.5 feet wide, consisting of Lot 1 (25 feet wide), Lot 2 (25 feet wide), and half of Lot 3 (12.5 feet wide). The house sits on all three lots.

5. In or around August 2020, Respondent visited the property and evaluated the existing septic system. At the time, the drainfield was located behind the house on Lots 1 and 2; it was not within close proximity to the property line as it was fairly centered behind the house.

---

[3] Respondent was the registered contractor who signed the permit application to authorize Mathis and Sons to conduct the repair at issue. Thus, he had to ensure that all contracted work—performed by him or others under his supervision—complied with the requirements of Florida law. Fla. Admin. Code R. 62-6.022(1). Thus, "Respondent" is used herein to refer to actions taken directly by him and by Mathis and Sons' employees under his supervision.

6. On August 28, 2020, at approximately 12:19 p.m., Respondent submitted a permit application to DOH to repair the system and install a new drainfield. The application was completed on Form 4015, as required.[4] Respondent attached a diagram to scale, replicated below, showing the lot lines (vertical dashes), the house, the location of the old drainfield (#2), and the location of the new drainfield (#3) to be installed on Lots 2 and 3.



7. Two business days later, on September 1, 2020, at about 4:30 p.m., DOH notified Respondent that a binding utility easement ("BUE") would be required before a permit could be approved. A BUE is a notarized document

[4] In April 2020, DOH served as the agency regulating septic systems and its rules required the use of Form DH 4015. DEP now serves as the agency regulating such systems and its rules require the use of Form DEP 4015. The forms are substantively identical and will be referred to herein as "Form 4015."

recorded in the official county records that provides notice to subsequent owners that a septic system or part thereof is located on the property. Although Lots 2 and 3 were owned by the same person, DOH required the BUE because one of those lots could be sold to a different owner in the future.

8. On September 2, 2020, Respondent emailed DOH an unsigned and incomplete BUE. He indicated that it would be signed that day and would take the comptroller three to five days to record. He requested that the permit be issued and held for final system approval once the recorded BUE was filed. DOH replied that day and confirmed that the permit could not be issued until the BUE was received.

9. On September 10, 2020, Respondent emailed DOH to inform it that the drainfield installation was scheduled for September 14, 2020, and that a BUE would be recorded. He requested that the permit be issued and held for final system approval. DOH replied several minutes later to confirm again that the system could not be installed without a permit.

10. On September 14, 2020, the installation of the new drainfield began without a permit. This fact was confirmed by Mr. Brock, the DOH inspector who visited the property around 12:00 p.m. He directed the workers to stop because they could not be working without a permit.

11. At some point around 1:00 p.m., Respondent physically brought a copy of the recorded BUE to DOH. The BUE was signed, notarized, and filed in the official records that same day. Respondent demanded issuance of the permit, which DOH did not do immediately. Instead, at around 3:00 p.m., the inspector went back to the property only to discover—contrary to the directive to stop work immediately—that the drainfield installation was even further along than when he had visited the property earlier that day.

12. On September 15, 2020, the next business day, DOH issued the permit. Respondent conceded under oath that the repair work began before the permit was issued and that doing so was a technical violation.

13. Notwithstanding Respondent's concession, he justified his decision to start without a permit because he believed the system was a sanitary nuisance and the property owner wanted it repaired. In his mind, he knew the permit would be granted because the sole hold-up concerned the BUE, which the owner of all three lots would unquestionably sign; as such, the violation did not adversely affect public health. Respondent also believed that DOH was simply taking too long because a BUE should not have been required and, regardless, it routinely issues permits with a hold for final approval pending receipt of a BUE.

14. Respondent is correct that the violation neither resulted in monetary or other harm to the customer nor did it adversely affect or endanger public health. Indeed, this was not a situation where the permit was withheld because the design of the system was faulty or there was some other issue that could affect public health, which certainly would be a far more severe offense. Respondent also began the work because he believed that the owner's inability to use the system served as a nuisance.

15. That said, the weight of the credible evidence established that Respondent started the repair without a permit and knowingly decided to violate Florida law by doing so. Although he may have believed he was doing the right thing, he knew—especially given his 19-year stint at DOH and his extensive experience in the private sector since leaving DOH—that the law did not authorize him to unilaterally decide that he could start the repair without a permit. Respondent also acknowledged under oath that DOH had the authority to wait to issue the permit pending the recorded BUE. And, although he testified that DOH's practice is to issue permits with a hold for final approval, the weight of the credible evidence confirmed that DOH only issues conditional approvals where the septic system is contained entirely within one lot and a BUE is only precautionary because the system is within close proximity to an adjacent lot. That exception did not apply here because the new drainfield was unquestionably on more than one lot.

Arlene Avenue – Citation I

16. The Arlene Avenue residential property is located in Orlando and utilizes a septic tank system and drainfield. Ms. Hochreiter, the property owner, had issues with the septic system when she purchased the property and contacted Mathis and Sons to diagnose the issue.

17. On March 30, 2020, Ms. Hochreiter hired Mathis and Sons to install a new drainfield for $5,117.00. The contract did not include pricing for sand or clean fill for the drainfield, as those were to-be-decided.

18. On April 7, 2020, Respondent completed the required application on Form 4015 for a repair permit to install the new drainfield. Form 4015 is comprised of several individuals forms, including a site evaluation and system specifications form and an existing system and system repair evaluation form.

19. Respondent completed Form 4015 and signed it. As required on the form, Respondent certified that the existing tank was pumped by Mathis and Sons on April 5, 2020, that he determined the volumes specified based on the tank's dimensions, that the tank was "free of observable defects or leaks," and that it had a solids deflection device installed.

20. On April 15, 2020, DOH issued a repair permit to install the new drainfield (#48-SX-2053996). The permit acknowledged that no fill was required, but mandated the removal of spoil prior to inspection. The permit stated that "spoil material cannot be used in system repair." The permit also provided that, "[i]f any spoils are left onsite at the time of inspection[,] a re-inspection must be conducted."

21. In the days thereafter, the installation of the new drainfield began. The existing drainfield was dug up and the removed dirt was placed in piles along the fence of the property. This dirt contained spoil material that could not be used for the new drainfield. The new drainfield was installed and DOH was contacted for an inspection.

22. On April 20, 2020, DOH sent Mr. Brock to inspect the repair work. The existing tank remained buried underground, though it had a lid that could be accessed to see inside the tank. The newly-installed drainfield was uncovered. Mr. Brock verified that that the soil underneath the drainfield was acceptable and also noted that there were large piles of leftover soil and dirt around the drainfield. Because the owner reported that the system was backing up into the house, Mr. Brock believed there was an issue with the outlet device. He testified that he could not verify the outlet device because the tank was full, so he disapproved the repair work. He conceded, however, that he did not check the volume and instead assumed at the time that the tank had to be full because the system was backing up into the house.

23. On April 21, 2020, Mr. Brock sent written confirmation to Mathis and Sons that he disapproved the repair work because he could not verify the outlet device. The letter confirmed that corrective action needed to be taken before a final inspection could be done, that a reinspection fee would apply, and that DOH should be contacted once the items had been completed to schedule a final inspection.

24. Even though DOH disapproved of the repair work, Respondent never called for a reinspection as required. Instead, he covered the drainfield without final approval from DOH.

25. In September 2020, Ms. Hochreiter submitted a complaint to DOH because sewage continued to back up into the house. On September 14, 2020, Mr. Negron, an environmental specialist, inspected the system and took soil samples from several places around the new drainfield. The samples contained spoil material, including pieces of clay pipe.

26. In October 2020, Mr. Brock and Mr. Harriss, the environmental manager for DOH in Orlando, visited the property and took additional soil samples from in and around the drainfield. Those samples also contained a substantial amount of spoil material, including pieces of clay pipe and lime/white rock. Because these materials had not been used in septic systems

for 20-30 years, DOH believed that Respondent improperly reused the soil and dirt from the old drainfield to cover the new drainfield.

27. In May 2021, DOH issued Citation I against Respondent. Citation I alleged that Respondent violated several rules by improperly repairing a septic system, using spoil material to replace a drainfield, failing to contact DOH for a required reinspection, and covering the drainfield without obtaining such a reinspection.

28. Based on the weight of the credible evidence, the undersigned finds that Respondent failed to contact DOH to conduct a reinspection after Mr. Brock failed the inspection and thereafter covered the drainfield without obtaining a final approval after such a reinspection.

29. Based on the weight of the credible evidence, the undersigned finds that spoil material was used when Respondent installed the new drainfield. Although Mr. Brock confirmed that there was no issue with the soil underneath the drainfield, a substantial amount of old clay pipe and lime rock was later found in the soil above the new drainfield. Because those materials have not been used in drainfields for many years, spoil material from the old drainfield must have been used for the new drainfield. Indeed, Ms. Hochreiter testified credibly that the same dirt that had been placed against the fence when the old drainfield was excavated was used to fill in the new drainfield. She also was never charged for removing spoil material from the old drainfield or for clean soil or fill for the new drainfield.

30. Respondent's testimony on this issue was not credible. He testified that no spoil material was reused. He admitted that he had no idea what happened to the spoil material. He was only able to speculate that it could have been hauled off or buried elsewhere on the property.

31. Respondent generally testified that the allegations in Citation I were not violations at all, or, at most, they were technical violations that should have subjected him to a mere warning letter rather than a fine. Respondent is correct that the violations neither resulted in monetary or other harm to

the customer. Indeed, DOH witnesses generally agreed that the work performed by Respondent to install the new drainfield is not the likely cause of the sewage backing up into the house. Respondent also explained that the fines impacted his livelihood because they were preventing him from becoming a master septic tank contractor.

32. Importantly, however, Respondent has extensive experience in this industry and should have known that his actions violated several provisions of chapter 62-6. The weight of the credible evidence also did not support his contention that DOH's customary practice was to issue warnings for these violations.

Arlene Avenue – Citation II

33. On April 25, 2022, Mr. Harriss returned to the property at the request of Ms. Hochreiter because the system continued to back up into her house. She informed Mr. Harriss for the first time that a plumber had installed a second inlet pipe into the tank when the prior owners added a new bathroom at some point before she purchased the property in 2020. DOH dug down to expose the sides of the tank and discovered the two inlet pipes, which it believed was a defect in the tank that Respondent should have observed when he completed Form 4015 in April 2020.

34. On April 29, 2022, DOH issued Citation II against Respondent. Citation II alleged that Respondent engaged in gross negligence, incompetence, or misconduct under rule 62-6.022(1)(*l*) by falsely certifying that the existing septic tank was free of observable defects even though it defectively had two inlet pipes installed.

35. At the final hearing, Mr. Harriss testified that the tank was defective because it had a second inlet pipe. Rather than install a second inlet pipe directly into the tank, which compromises its structural integrity, the plumber should have connected the new and existing pipes closer to the house so that the tank continued to have only one inlet pipe as originally manufactured. He supported this position by pointing to the use of the phrase

"inlet and outlet devices" in rule 62-6.013(2)(f) to suggest that tanks can only have one inlet device. Mr. Harriss believed that Respondent was required to visually inspect the inside of the tank for observable cracks or leaks after it had been pumped out. By using a flashlight or mirror during that process, Respondent should have observed the second inlet pipe and indicated that the tank could not be certified on Form 4015.

36. That said, Mr. Harriss confirmed that both inlet pipes were high enough to allow for proper flow to the outlet device, that the second inlet would likely not contribute to the back-up that the owner was experiencing in the house, and that the new drainfield appeared to be functioning properly. In short, he did not believe that the system failure was the result of an issue with the tank or the new drainfield installed by Respondent.

37. Respondent acknowledged that he signed the certification form based on the information provided to him by the worker who pumped the tank. He also conceded that a plumber installing a second inlet pipe into a tank is improper. However, he testified that the second inlet pipe in this tank was not a defect he could observe while conducting the evaluation required to complete Form 4015. He credibly explained that the rules do not require a contactor to stick their heads inside of an existing tank or use a mirror, as doing so is a health hazard given the sewage and bacteria contained inside. He also explained that, unlike the outlet device, the inlet pipe is not located directly below the lid that would make it easy to inspect. To observe defects with the inlet device, the tank would have to be dug up, which is not required when completing Form 4015 to install a new drainfield.

38. Based on the weight of the credible evidence, the undersigned finds that the existence of the second inlet pipe was not an observable defect, much less one that could support a finding that Respondent committed gross negligence, incompetence, or misconduct for failing to discover it when making his certification. Neither the rules nor Form 4015 define what constitutes an observable defect or otherwise specify what contractors must

do when certifying that a tank is free of observable defects, which alone undermines a finding that Respondent committed gross negligence, incompetence, or misconduct that should subject him to discipline.

39. Further, the owner never informed Respondent about the second inlet pipe prior to making his certification, which could have put him on notice that he needed to look for such a defect. DOH staff also inspected the system several times based on the owner's repeated complaints about the system backing up and never discovered this as a possible defect. For instance, although Mr. Brock knew that the system was not functioning properly when he initially inspected the drainfield, he assumed the tank was full and never tried to look inside to verify the outlet device with a mirror or flashlight, which undermines the claim that this is what Respondent was required to do when completing the certification on Form 4015. Indeed, DOH did not discover the second inlet pipe until it dug down to expose the area around the tank, which no witness suggested was an action Respondent had to take.

CONCLUSIONS OF LAW

40. DOAH has jurisdiction over the subject matter in these consolidated cases and the parties thereto. §§ 120.569 and 120.57(1), Fla. Stat.

41. DEP is the state agency charged with regulating onsite sewage treatment and disposal systems. § 381.0065(2)(*l*) and (3), Fla. Stat. DEP is authorized to adopt rules to administer this authority that, among other things, sets forth the application and permit requirements for maintaining such systems. *Id.* § 381.0065(3)(a). DEP also enforces septic tank contractor requirements in part I of chapter 381 and any rules adopted thereunder, including the imposition of fines for violations. *Id.* § 381.0065(3)(h).

42. DEP seeks to impose fines against Respondent and, thus, bears the burden of proving the allegations by clear and convincing evidence. *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

43. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997) (quoting *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994)). As stated by the Florida Supreme Court:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting *Slomowitz v. Walker*, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)). "[E]ven when the evidence is in conflict, the proof may be more than sufficient to meet the standard of clear and convincing evidence." *In re Henson*, 913 So. 2d at 592 (quoting *In re Bryan*, 550 So. 2d 447, 448 n.* (Fla. 1989)).

44. Florida law provides a detailed process for making repairs to an existing septic tank system, which is defined as the:

> replacement of or modifications or additions to a failing system which are necessary to allow the system to function in accordance with its design or must be made to eliminate a public health or pollution hazard. Servicing or replacing with like kind mechanical or electrical parts of an approved onsite sewage treatment and disposal system; or making minor structural corrections to a tank, or distribution box, does not constitute a repair. The use of any treatment method that is intended to improve the functioning of any part of the system, or to prolong or sustain the length of time the system functions, shall be considered a repair. The use of any non-prohibited additive by the system owner, through the building plumbing, shall not be

> considered a repair. Removal of the contents of any tank or the installation of an approved outlet filter device, where the drainfield is not disturbed, shall not be considered a repair. Replacement of a broken lid to any tank shall not be considered a repair. Splicing a drip emitter line where no emitter is eliminated shall not be considered a repair.

Fla. Admin. Code R. 62-6.002(47). Importantly, the law is clear that "[a] person may not … repair … an onsite sewage treatment and disposal system without first obtaining a permit approved by the department." § 381.0065(4), Fla. Stat.; *accord* Fla. Admin. Code R. 62-6.003(1) ("No portion of an onsite sewage treatment and disposal system shall be … repaired … or replaced until a construction permit has been issued on Form DEP 4016, 08/09, Construction Permit, herein incorporated by reference.").

45. DEP rules set forth the application and permitting requirements that must be met before making a repair to an existing septic system. Rule 62-6.015, entitled Permitting and Construction of Repairs, provides as follows:

> All repairs made to a failing onsite sewage treatment and disposal system shall be made only with prior knowledge and written approval from the Department having jurisdiction over the system. Approval shall be granted only if all of the following conditions are met:
>
> (1) Any property owner or lessee who has an onsite sewage treatment and disposal system which is improperly constructed or maintained, or which fails to function in a safe or sanitary manner shall request from the Department, either directly or through their agent, a permit to repair the system prior to initiating repair of the system. A permit shall be issued on Form DEP 4016 only after the submission of an application accompanied by the necessary exhibits and fees. Form DEP 4015 shall be used for this purpose, and can be obtained from the Department. Applications shall contain the following information:

(a) A site plan showing property dimensions, the existing and proposed system configuration and location on the property, the building location, potable and non-potable water lines, within the existing and proposed drainfield repair area, the general slope of the property, property lines and easements, any obstructed areas, any private or public wells, or any surface water bodies and stormwater systems in proximity to the onsite sewage system which restricts replacement or relocation of the drainfield system. The existing drainfield type shall be described. For example, mineral aggregate, non-mineral aggregate, chambers, or other.

(b) The size of the septic tank or other treatment tank currently in use and the approximate square footage and elevation of the drainfield existing on the site.

(c) The quantity and type of waste being discharged to the system. Where water use records cannot be obtained, estimates shall be made from values found in Rule 62-6.008, Table I, F.A.C.

(d) The soil textures encountered within the existing and proposed drainfield areas, and the estimated water table during the wettest season of the year.

(e) Any unusual site conditions which may influence the system design or function such as sloping property, drainage structures such as roof drains or curtain drains, and any obstructions such as patios, decks, swimming pools or parking areas.

(f) The person performing the site evaluation shall provide a brief description of the nature of the failure which is occurring.

46. Rule 62-6.001(4) provides additional details about the permit application, which must be submitted on Form 4015:

Except as provided for in Section 381.00655, F.S., any existing and prior approved system which has been placed into use and which remains in satisfactory operating condition shall remain valid for use under the terms of the rule and permit under which it was approved. Alterations that change the conditions under which the system was permitted and approved, sewage characteristics or increase sewage flow will require that the owner, or their authorized representative, apply for and receive reapproval of the system by the Department, prior to any alteration of the structure, or system. If an applicant requests that the Department consider the previous structure's or establishment's most recent approved occupancy, the applicant must provide written documentation that the onsite sewage treatment and disposal system was approved by the Department for that previous occupancy.

(a) An applicant will be required to complete Form DEP 4015, 08/09, Application for Construction Permit, herein incorporated by reference, and provide a site plan in accordance with paragraph 62-6.004(3)(a), F.A.C., to provide information of the site conditions under which the system is currently in use and conditions under which it will be used.

(b) The applicant shall have all system tanks pumped by a permitted septage disposal service. A registered septic tank contractor, state-licensed plumber, person certified under Section 381.0101, F.S., or master septic tank contractor shall determine the tank volume and shall perform a visual inspection of the tank when the tank is empty to detect any observable defects or leaks in the tank. The tank volume shall be obtained from the tank legend or shall be calculated from measured internal tank dimensions for length, width and depth to the liquid level line or from the measured outside dimensions for length and width minus the wall thickness and depth to the liquid level line. For odd shaped tanks and tanks without a legend, metered water flows from the refilling of

> the tank may be used in lieu of measured inside or outside tank dimensions. The person performing the inspection shall submit the results to the Department as part of the application using of Form DEP 4015.

47. Form 4015 is the application that septic contractors must submit to obtain a permit to conduct a repair on an existing septic system. Form 4015 is incorporated by reference in rules 62-6.001(4), 62-6.015(1), and 62-6.004(1).

48. Consistent with the dictates in rules 62-6.001(4) and 62-6.015(1), Form 4015 requires contractors to certify the following details about the existing tank: (1) it was pumped and by whom; (2) it has the volume specified and the manner in which that was determined; (3) it is free of observable defects or leaks; and (4) whether it has a solids deflection device or outlet filter device installed. If the tank cannot be certified, Form 4015 requires the contractor to explain why. Importantly, neither the rules nor Form 4015 define "observable defects" or otherwise explain what a contractor is expected to do in order to observe defects with the tank.

49. Along with Form 4015, contractors must submit all other required documentation. Of particular importance here, a recorded BUE is required for a residential parcel consisting of multiple lots if the septic system operates on more than one lot. Rule 62-6.004(7)(a) provides as follows:

> Where a property owner proposes to build or has built a single residence or a single business or multiple residences or businesses on multiple lots, and the residence's or business's authorized sewage flow requires the use of multiple lots, or parts thereof, for the onsite sewage treatment and disposal system, the property owner must submit, prior to issuance of a permit, a written utility easement executed and recorded in the public property records at the county courthouse. The utility easement must bind the required property together so that the original lots and their collective size, or part thereof, is retained for purposes of the onsite sewage treatment and

> disposal system, and must include provisions for maintaining the onsite sewage treatment and disposal system. For example, a residence or business built on three lots with a sewage flow which is large enough to require the land from all three lots must have a written utility easement executed and recorded in the public property records before an onsite sewage treatment and disposal system construction permit may be issued. In order to obtain a repair permit, the property owner must submit a copy of the recorded utility easement demonstrating the retention of the original lots and their collective size for purposes of the onsite sewage treatment and disposal system and a method for maintaining the system.

See also § 381.0065(2)(j), Fla. Stat. (defining lot as "a parcel or tract of land described by reference to recorded plats or by metes and bounds, or the least fractional part of subdivided lands having limited fixed boundaries or an assigned number, letter, or any other legal description by which it can be identified").

50. Upon receipt of Form 4015, DEP or the local regulatory agency (*e.g.*, DOH in Orlando) "shall make every effort to issue a permit within 2 working days after receiving the application for system repair." Fla. Admin. Code R. 62-6.015(5). If an application is deficient or additional information is needed, the deficiencies must be corrected before the permit can be issued.

51. Once the permit is issued, the contractor shall conduct the repairs in accordance with the requirements of chapter 381 and rule chapter 62-6. One such requirement prohibits making a repair to a drainfield using spoil material, which is defined as:

> any part of the existing drainfield, any adjacent soil material within 24 inches vertically and 12 inches horizontally of the drainfield, and any soil that has visible signs of effluent that has been removed as part of a repair, modification or abandonment of an onsite sewage treatment and disposal system.

Fla. Admin. Code R. 62-6.002(50). This prohibition is set forth in rule 62-6.015(6) as follows:

> Construction materials used in system repairs shall be of the same quality as those required for new system construction. Aggregate and soil in spoil material from drainfield repairs shall not be used in system repair in any manner. Undamaged infiltration units, pipes and mechanical components may be reused on the original site. Any spoil material taken off site shall be disposed of in a permitted landfill or shall be limed and stockpiled for at least 30 days to prevent a sanitary nuisance. Offsite spoil material stockpile areas shall meet the prohibition requirements of subsection 62-701.300(2), F.A.C. The resulting lime-treated material shall not be used for drainfield repair, or construction of any onsite sewage treatment and disposal system. Any use of the lime treated material shall not cause a violation of chapter 386 F.S., and shall not impair groundwater or surface water. Mineral aggregate and soil in spoil material may, at the option of the septic tank contractor and the property owner, be buried on site if limed before burial. Lime amount must be sufficient to preclude a sanitary nuisance. Depth of seasonal high water table to the spoil material must be at least six inches. Setbacks for buried spoil material shall be the same as for onsite sewage treatment and disposal system drainfields. A minimum of six inches of slightly or moderately limited soil shall cover the spoil material and shall extend to at least five feet around the perimeter of the burial site. …

52. After completing the repairs, a contractor must notify the agency and have the system inspected before placing it back into service. As to the required inspection, rule 62-6.003 provides as follows:

> (2) System Inspection -- Before covering with earth and before placing a system into service, a person installing or constructing any portion of an onsite sewage treatment and disposal system shall notify the Department of the completion of the

> construction activities and shall have the system inspected by the Department for compliance with the requirements of this chapter, except as noted in subsection 62-6.003(3), F.A.C., for repair installations.
>
> (a) If the system construction is approved after an inspection by the Department, the Department shall issue a "Construction Approval" notice to the installer.
>
> (b) If the system installation does not pass the construction inspection on any type of system installation, the installer shall make all required corrections and notify the Department of the completion of the work prior to reinspection of the system. A reinspection fee shall be charged to the installer for each additional inspection leading up to construction approval.
>
> (c) Final installation approval shall not be granted until the Department has confirmed that all requirements of this chapter, including building construction and lot grading are in compliance with plans and specifications submitted with the permit application.
>
> * * *
>
> (3) Repair Inspections -- A system repair shall be inspected by the Department or a master septic tank contractor to determine compliance with construction permit standards prior to final covering of the system. Inspections shall comply with subsection 62-6.003(2) … .

53. Registered contractors must ensure "that work for which they have contracted and which has been performed by them or under their supervision is carried out in conformance with the requirements of all applicable Florida Statutes and Chapter 62-6, F.A.C." Fla. Admin. Code R. 62-6.022(1). If they fail to do so, DEP may impose discipline based on the penalty guidelines.

54. Section 381.0065(5)(b)3. provides that "[t]he fines imposed by a citation issued by the department may not exceed $500 for each violation." Similarly, section 381.0061(1) provides that, "[i]n addition to any administrative action authorized by chapter 120 or by other law, the department may impose a fine, which may not exceed $500 for each violation, for a violation of s. 381.006(15), s. 381.0065, s. 381.0066, s. 381.0072, or … for a violation of any rule adopted under this chapter."

55. Rule 62-6.022(1) also sets forth disciplinary guidelines for specific violations and provides as follows:

> The following actions by a person included under this rule shall be deemed unethical and subject to penalties as set forth in this section. The penalties listed shall be used as guidelines in disciplinary cases, absent aggravating or mitigating circumstances and subject to other provisions of this section.
>
> * * *
>
> (b) Permit violations.
>
> 1. Contractor initiates work to install, modify, or repair a system when no permit has been issued by the Department. A permit is issued after construction is started but prior to completion of the contracted work. No inspections are missed. First violation, letter of warning or fine up to $500.00; repeat violation, $500.00 fine and 90 day suspension or revocation.
>
> * * *
>
> (d) Failure to call for required inspections. First violation, letter of warning or fine up to $500.00; repeat violation, letter of warning or fine up to $500.00 and 90 day suspension or revocation.
>
> * * *

> (l) Gross negligence, incompetence, or misconduct which:
>
> 1. Causes no monetary or other harm to a customer, or physical harm to any person. First violation, letter of warning or fine up to $500.00; repeat violation, $500.00 fine and 90 day suspension or revocation.
>
> 2. Causes monetary or other harm to a customer, or physical harm to any person. First violation, letter of warning or fine up to $500.00 and 90 day suspension; repeat violation, $500.00 fine and revocation.
>
> * * *
>
> (p) Installation, modification, or repair of an onsite sewage treatment and disposal system in violation of the standards of Section 381.0065 or 381.00655, F.S., or Chapter 62-6, F.A.C. First violation, letter of warning or fine up to $500.00 per specific standard violated; repeat violation, 90 day suspension or revocation.

56. In applying the penalty guidelines and determining the appropriate penalty, if any, DEP is required to consider aggravating and mitigating factors. Section 381.0065(5)(b)5. authorizes DEP to "reduce or waive the fine imposed," upon consideration of "the gravity of the violation, the person's attempts at correcting the violation, and the person's history of previous violations including violations for which enforcement actions were taken." Section 381.0061(2) is largely in accord and requires DEP to consider the following factors in determining the amount of a fine:

> (a) The gravity of the violation, including the probability that death or serious physical or emotional harm to any person will result or has resulted, the severity of the actual or potential harm, and the extent to which the provisions of the applicable statutes or rules were violated.

(b) Actions taken by the owner or operator to correct violations.

(c) Any previous violations.

57. Pursuant to rule 62-6.022(2), DEP also must consider the following circumstances for purposes of mitigation or aggravation of the penalty:

(a) Monetary or other damage to the registrant's customer, in any way associated with the violation, which damage the registrant has not relieved, as of the time the penalty is to be assessed.

(b) Actual job-site violations of this rule or conditions exhibiting gross negligence, incompetence or misconduct by the contractor, which have not been corrected as of the time the penalty is being assessed.

(c) The severity of the offense.

(d) The danger to the public.

(e) The number of repetitions of the offense.

(f) The number of complaints filed against the contractor.

(g) The length of time the contractor has practiced and registration category.

(h) The actual damage, physical or otherwise, to the customer.

(i) The effect of the penalty upon the contractor's livelihood.

(j) Any efforts at rehabilitation.

(k) Any other mitigating or aggravating circumstances.

Conway Gardens Road

58. The Complaint alleged that Respondent violated section 381.0065(4) and rule 62-6.003(1) by starting the repair of a septic system without a permit. DEP seeks to impose a $250 fine for this violation.

59. Based on the Findings of Fact above, DEP proved by clear and convincing evidence that Respondent violated section 381.0065(4) and rule 62-6.003(1) by starting to install a new drainfield without a permit.

60. Respondent's arguments to the contrary must be rejected. Respondent primarily argued that a BUE should not have been required because the lots were platted before the 1970s and, regardless, DOH should have issued the permit and held it for final approval upon receipt of the BUE consistent with its usual practice. However, a BUE is required even where a parcel consisting of several lots is owned by the same person, so long as the septic system requires the use of more than one of those lots to operate. § 381.0065(2)(j), Fla. Stat.; Fla. Admin. Code R. 62-6.004(7)(a). The fact that the lots were platted before the 1970s only exempts the property from the lot size requirements relating to minimum surface water setbacks and limits on projected daily flows; it does not exempt the property from the requirement to submit a BUE when the septic system is installed on more than one lot. § 381.0065(4)(g), Fla. Stat. Indeed, the purpose of the BUE is to ensure that subsequent owners are on notice that a system is being utilized by all of the lots. Further, the weight of the credible evidence did not support Respondent's argument that DOH contravened its customary practice by refusing to conditionally issue a permit in these circumstances.

61. DEP seeks to impose a $250 fine against Respondent for this violation. Pursuant to rule 62-6.022(1)(b)1., DEP has discretion to impose discipline for this violation ranging from a letter of warning up to a maximum fine of $500. Based on the Findings of Fact above, DEP's requested fine of $250 is appropriate considering the balance of all applicable mitigation and

aggravation factors set forth in sections 381.0065(5)(b)5. and 381.0061(2), and in rule 62-6.022(2).

Arlene Avenue – Citations I and II

62. Citation I alleged that Respondent committed the following violations: (1) failing to contact DOH for a required reinspection prior to covering the drainfield, in violation of rule 62-6.022(1)(d); (2) covering the drainfield before obtaining a reinspection and final approval, in violation of rule 62-6.003(2); and (3) improperly repairing a septic tank system by using spoil material to replace the drainfield, in violation of rules 62-6.015(6) and 62-6.022(1)(p).

63. Based on the Findings of Fact above, DEP proved by clear and convincing evidence that Respondent violated rule 62-6.022(1)(d) by failing to call for a reinspection after failing an initial inspection. The weight of the credible evidence confirmed that Respondent knew that DOH disapproved of the repair work after the inspection, that corrective action had to be taken, and that he had to call for a reinspection before closing the drainfield.

64. DEP seeks to impose a $500 fine against Respondent for this violation. Pursuant to rule 62-6.022(1)(d), DEP has discretion to impose discipline for this violation ranging from a letter of warning up to a maximum fine of $500. Based on the Findings of Fact above, DEP's requested fine of $500 is appropriate considering the balance of all applicable mitigation and aggravation factors set forth in sections 381.0065(5)(b)5. and 381.0061(2), and in rule 62-6.022(2).

65. Based on the Findings of Fact above, DEP proved by clear and convincing evidence that Respondent violated rule 62-6.003(2) by covering up the drainfield without a final approval being issued by DOH. The weight of the credible evidence confirmed that Respondent covered the drainfield without obtaining final approval from DOH after a reinspection.

66. DEP seeks to impose a $500 fine against Respondent for this violation. Pursuant to rule 62-6.022(1)(d), DEP has discretion to impose discipline for this violation ranging from a letter of warning up to a maximum fine of $500.

Based on the Findings of Fact above, DEP's requested fine of $500 is appropriate considering the balance of all applicable mitigation and aggravation factors set forth in sections 381.0065(5)(b)5. and 381.0061(2), and in rule 62-6.022(2).

67. Based on the Findings of Fact above, DEP proved by clear and convincing evidence that Respondent violated rule 62-6.015(6), which prohibits the use of spoil material when installing a drainfield. The weight of the credible evidence established that Respondent dug up the dirt containing spoil material from the old drainfield, piled it along the fence on the property, and then used the same dirt with the spoil material to fill the new drainfield.

68. In both Citation I and in its PRO, DEP requests imposition of a $500 fine against Respondent for violating rule 62-6.015(6) and a separate $500 fine for violating rule 62-6.022(1)(p). However, the two violations are not independent bases for imposing separate fines. That is because the factual allegation is the same—*i.e.*, that Respondent improperly used spoil material in the drainfield—and the basis for DEP's authority to impose up to a $500 fine for such conduct is through rule 62-6.022(1)(p). In other words, rule 62-6.015(6) makes Respondent's conduct improper and rule 62-6.022(1)(p) authorizes DEP to impose a $500 fine for that improper conduct.

69. Based on the Findings of Fact above, DEP's requested fine of $500 for the violation of rule 62-6.015(6), as authorized in rule 62-6.022(1)(p), is appropriate considering the balance of all applicable mitigation and aggravation factors set forth in sections 381.0065(5)(b)5. and 381.0061(2), and in rule 62-6.022(2).

70. Citation II alleged that Respondent violated rule 62-6.022(1)(*l*) by engaging in gross negligence, incompetence, or misconduct by falsely certifying that the existing septic tank was free of observable defects, even though it defectively had two inlet pipes installed.

71. Based on the Findings of Fact above, DEP failed to prove by clear and convincing evidence that Respondent committed gross negligence,

incompetence, or misconduct in violation of rule 62-6.022(1)(l). The weight of the credible evidence did not establish that the second inlet pipe was an observable defect that Respondent was required to discover when signing the certification on Form 4015 for installation of a new drainfield.

72. Further, rules 62-6.015(1) and 62-6.001(4), and Form 4015 neither define the term "observable defect" nor specify what contractors must do other than "perform a visual inspection of the tank when the tank is empty to detect any observable defects or leaks in the tank." Fla. Admin. Code R. 62-6.001(4). Thus, disciplining Respondent for failing to inspect the inside of the tank with a flashlight or mirror to discover the second inlet pipe and identify it as a defect on Form 4015 would be improper. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441, 444 (Fla. 5th DCA 2013) ("Where a statute imposes sanctions and penalties in the nature of denial or revocation of a license to practice for violating its proscriptions, such a statute 'must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it.'") (quoting *Lester v. Dep't of Pro. & Occ. Regul.*, 348 So. 2d 923, 925 (Fla. 1st DCA 1977)); *Elmariah v. Dep't of Pro. Regul.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990) (holding that a statute imposing "sanctions or penalties" is "penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee"); *cf. Breesmen v. Dep't of Pro. Regul.*, 567 So. 2d 469, 471 (Fla. 1st DCA 1990) ("Basic due process requires that a professional or business license not be suspended or revoked without adequate notice to the licensee of the standard of conduct to which he or she must adhere."). The lack of any specificity at to what defects are observable and what contractors are expected to do when conducting a visual inspection of a tank for such defects also precludes a finding that Respondent committed gross negligence, incompetence, or misconduct.

73. The undersigned rejects DEP's argument that rule 62-6.013(2)(f), which uses "inlet" in singular form as part of the phrase "inlet and outlet devices," sufficiently put Respondent on notice that tanks should only have

one inlet and that a tank with two is an observable defect. However, the last sentence of the same subdivision refers to "[i]nlets and outlets" in plural form, undermining the suggestion that this rule makes clear that tanks can only have one inlet. DEP's argument is also undermined by rule 62-6.013(4)(h)4., which provides a list of "unacceptable defects" that must be reported when conducting an annual inspection of a septic tank manufacturer's inventory. That rule uses the terms "inlets and outlets" in plural form when discussing the type of defects that must be reported and, importantly, does not identify multiple inlets as a defect. Even assuming the tank was defective for this reason, DEP failed to prove by clear and convincing evidence that it was observable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection issue a final order imposing administrative fines against Respondent in the amount of $1,750.00, comprised of $250 for the violations in the Complaint, $1,000 for the violations in Citation I, and $500 for the violations in Citation II.

DONE AND ENTERED this 5th day of August, 2022, in Tallahassee, Leon County, Florida.

ANDREW D. MANKO
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of August, 2022.

COPIES FURNISHED:

Jay Patrick Reynolds, Esquire
Department of Environmental Protection
Doulgas Building, Mail Stop 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

John Ryen Morgan-Ring, Esquire
Department of Environmental Protection
Office of General Counsel
Douglas Building, Mail Station 35
3500 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Justin G. Wolfe, General Counsel
Department of Environmental Protection
Legal Department, Suite 1051-J
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Scott M. Thomson
Mathis and Sons Septic LLC
4947 South Orange Avenue
Orlando, Florida 32806

Lea Crandall, Agency Clerk
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Shawn Hamilton, Secretary
Department of Environmental Protection
Douglas Building
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3000

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.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

vs. **DOAH CASE NOs. 22-0070**
22-0074

SCOTT THOMSON,

Respondent.
_____/

SCOTT THOMSON,

Petitioner,

vs. **DOAH CASE No. 22-1620**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.
_____/

DEPARTMENT OF ENVIRONMENTAL PROTECTION'S EXCEPTIONS TO RECOMMENDED ORDER

Department of Environmental Protection ("DEP"), pursuant to Florida Administrative Code Rule 28-106.217(1), Florida Administrative Code, takes exception to paragraphs 37, 38, 48, 71, and 72 of the Recommended Order entered by the Administrative Law Judge (ALJ) on August 5, 2022, as follows:

STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an administrative law judge, unless the agency "states with particularity in its final order that the findings were not based upon competent

substantial evidence or that the proceedings on which the findings are based did not comply with the essential requirements of law." *Gross v. Dep't of Health*, 819 So. 2d 997, 1001 (Fla. 5th DCA 2002). The agency may not "weigh the evidence, judge the credibility of the witnesses, or interpret the evidence to fit its ultimate conclusions" when determining whether to reject or modify a finding of fact. *Gross*, 819 So. 2d at 1001*; see also Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277 (Fla. 1st DCA 1985).

The agency's responsibility to determine if a finding of fact is supported by substantial evidence may not be avoided by "merely labeling, either by the administrative law judge or the agency, contrary findings as conclusions of law." *Gross*, 819 So. 2d at 1001. However, if a finding of fact in a recommended order is improperly labeled the label should be disregarded, and the item treated as though it were properly labeled as a conclusion of law. *Battaglia Properties v. Fla. Land and Adjudicatory Commission*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994).

It is the role of the Administrative Law Judge to make a determination on the *relevant* factual issues. Reviewing agencies may not reject or modify such findings unless they determine on the basis of a review of the complete record, that there is no competent substantial evidence from which findings could be inferred. *Goin v. Comm'n on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995); *Heifetz*, at 1281. The Florida Supreme Court defined substantial evidence "to be such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. Such 'substantial evidence' must be 'competent', and it is [competent], if it is relevant and material to the issue or issues presented for determination." *Gainesville Bonded Warehouse, Inc. v. Carter*, 123 So. 2d 336, at 338 (Fla. 1960) (citing *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)). The Administrative Law Judge's findings of fact must also be "based upon a preponderance of the evidence" and "exclusively on the evidence of record and on matters

officially recognized." § 120.57(1)(j), Fla. Stat. (2017). When fulfilling the role described above, the Administrative Law Judge must apply the correct legal standards applicable to the administrative proceeding.

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an Administrative Law Judge's conclusion of law and interpretation of administrative rules "over which it has substantive jurisdiction." An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *Pub. Emps. Relations Comm'n v. Dade Cnty. Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *Florida Pub. Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

EXCEPTIONS TO FINDINGS OF FACT

Paragraph 37

Paragraph 37 of the Recommended Order incorrectly implies that Respondent Thompson visually inspected the septic tank at issue. Paragraph 37 provides, in its entirety:

> 37. Respondent acknowledged that he signed the certification form based on the information provided to him by the worker who pumped the tank. He also conceded that a plumber installing a second inlet pipe into a tank is improper. However, he testified that the second inlet pipe in this tank was not a defect he could observe while conducting the evaluation required to complete Form 4015. He credibly explained that the rules do not require a contactor to stick their heads inside of an existing tank or use a mirror, as doing so is a health hazard given the sewage and bacteria contained inside. He also explained that, unlike the outlet device, the inlet pipe is not located directly below the lid that would make it easy to inspect. To observe defects with the inlet device, the tank would have to be dug up, which is not required when completing Form 4015 to install a new drainfield.

The first sentence acknowledges that Respondent signed the certification required by Form 4015 based on information provided by another person, specifically "the worker who pumped the tank." That person did not testify at the final hearing. The rest of paragraph 37, and the third sentence in

particular, implies that Respondent personally visually inspected the septic tank. However, the competent, substantial evidence demonstrates that Respondent did not personally visually inspect the septic tank. [Tr. Vol. 2, p. 251: 8-20]. Respondent's testimony about what could or could not be observed is not based on competent, substantial evidence and should be excluded from the Department's Final Order.

Paragraph 38

Paragraph 38 of the Recommended Order contains mixed findings of fact with an incorrect conclusion of law. The paragraph states in its entirety:

> 38. Based on the weight of the credible evidence, the undersigned finds that the existence of the second inlet pipe was not an observable defect, much less one that could support a finding that Respondent committed gross negligence, incompetence, or misconduct for failing to discover it when making his certification. **Neither the rules nor Form 4015 define what constitutes an observable defect or otherwise specify what contractors must do when certifying that a tank is free of observable defects, which alone undermines a finding that Respondent committed gross negligence, incompetence, or misconduct that should subject him to discipline.**

However, as noted by the ALJ in paragraph 46 of the Recommended Order, Florida Administrative Code Rule 62-6.001(4)(b) provides that "[a] registered septic tank contractor, state-licensed plumber, person certified under Section 381.0101, F.S., or master septic tank contractor shall determine the tank volume and **shall perform a visual inspection of the tank when the tank is empty to detect any observable defects or leaks in the tank**. . . . **The person performing the inspection shall submit the results to the Department as part of the application using of Form DEP 4015." [Emphasis added].** The rule clearly identifies the type of inspection, i.e., a visual inspection, that the registered tank contractor must perform. Moreover, the rule clearly provides that the only person who may submit the results to the Department using Form DEP 4015 is the

person who performed the visual inspection. The competent, substantial evidence demonstrates that Respondent did not perform a visual inspection of the septic tank. [Tr. Vol. 2, p. 251: 8-20]. Further, the competent, substantial evidence shows that Respondent submitted the results of an inspection that he never performed. [DEP Corrected Ex. 4; Tr. Vol. 2, p. 229-231]. Thus the competent, substantial evidence supports a finding of gross negligence, incompetence, or misconduct. Based on the foregoing, DEP takes exception to the last sentence of paragraph 38 of the Recommended Order and it should be rejected.

EXCEPTIONS TO CONCLUSIONS OF LAW

Paragraph 48

DEP takes exception to the last sentence of paragraph 48 which provides:

> Importantly, neither the rules nor Form 4015 define "observable defects" or otherwise explain what a contractor is expected to do in order to observe defects with the tank.

Florida Administrative Code Rule 62-6.001(4)(b) provides, in pertinent part, that **"[a] registered septic tank contractor**, state-licensed plumber, person certified under Section 381.0101, F.S., or master septic tank contractor shall determine the tank volume and **shall perform a visual inspection of the tank when the tank is empty to detect any observable defects or leaks in the tank**. . . . **The person performing the inspection shall submit the results to the Department as part of the application using of Form DEP 4015." [Emphasis added].** The rule clearly identifies the type of inspection required, i.e., a visual inspection. Moreover, the rule clearly provides that the only person who may submit the results to the Department is the person who performed the visual inspection. Based on the foregoing, DEP takes exception to the last sentence of paragraph 48 of the Recommended Order and it should be rejected.

Paragraph 71

Paragraph 71 of the Recommended Order contains mixed findings of fact with an incorrect conclusion of law. The paragraph states in its entirety:

> 71. Based on the Findings of Fact above, DEP failed to prove by clear and convincing evidence that Respondent committed gross negligence, 30 incompetence, or misconduct in violation of rule 62-6.022(1)(l). The weight of the credible evidence did not establish that the second inlet pipe was an observable defect that Respondent was required to discover when signing the certification on Form 4015 for installation of a new drainfield.

However, as noted by the ALJ in paragraph 46 of the Recommended Order, Florida Administrative Code Rule 62-6.001(4)(b) provides that **"[a] registered septic tank contractor**, state-licensed plumber, person certified under Section 381.0101, F.S., or master septic tank contractor shall determine the tank volume and **shall perform a visual inspection of the tank when the tank is empty to detect any observable defects or leaks in the tank. . . . The person performing the inspection shall submit the results to the Department as part of the application using of Form DEP 4015."** [Emphasis added]. The rule clearly identifies the type of inspection required, i.e., a visual inspection. Moreover, the rule clearly provides that the only person who may submit the results to the Department is the person who actually performed the visual inspection. The competent, substantial evidence demonstrates that Respondent did not perform a visual inspection of the septic tank. [Tr. Vol. 2, p. 251: 8-20]. Further, the competent, substantial evidence shows that Respondent submitted the results of an inspection that he never performed. Thus, the competent, substantial evidence supports a finding of gross negligence, incompetence, or misconduct. [DEP Corrected Ex. 4; Tr. Vol. 2, p. 229-231]. Based on the foregoing, DEP takes exception to paragraph 71 of the Recommended Order and it should be rejected.

Paragraph 72

DEP takes exception to the interpretation of its rules in paragraph 72 which states:

> 72. Further, rules 62-6.015(1) and 62-6.001(4), and Form 4015 neither define the term "observable defect" nor specify what contractors must do other than "perform a visual inspection of the tank when the tank is empty to detect any observable defects or leaks in the tank." Fla. Admin. Code R. 62- 6.001(4). Thus, disciplining Respondent for failing to inspect the inside of the tank with a flashlight or mirror to discover the second inlet pipe and identify it as a defect on Form 4015 would be improper. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441, 444 (Fla. 5th DCA 2013) ("Where a statute imposes sanctions and penalties in the nature of denial or revocation of a license to practice for violating its proscriptions, such a statute 'must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it.'") (quoting *Lester v. Dep't of Pro. & Occ. Regul.*, 348 So. 2d 923, 925 (Fla. 1st DCA 1977)); *Elmariah v. Dep't of Pro. Regul.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990) (holding that a statute imposing "sanctions or penalties" is "penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee"); *cf. Breesmen v. Dep't of Pro. Regul.*, 567 So. 2d 469, 471 (Fla. 1st DCA 1990) ("Basic due process requires that a professional or business license not be suspended or revoked without adequate notice to the licensee of the standard of conduct to which he or she must adhere."). The lack of any specificity at to what defects are observable and what contractors are expected to do when conducting a visual inspection of a tank for such defects also precludes a finding that Respondent committed gross negligence, incompetence, or misconduct.

"The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct." *Brown v. State,* 629 So.2d 841, 842 (Fla.1994). It is well settled that in the absence of statutory definition, words of common usage are construed in their plain and ordinary sense. *Southeastern Fisheries Ass'n, Inc. v. Department of Natural Resources,* 453 So.2d 1351 (Fla.1984); *State v. Hagan,* 387 So.2d 943 (Fla.1980). "If necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary." *Green v. State,* 604 So.2d 471, 473 (Fla.1992).

The dictionary defines "defect" as "an imperfection or weakness; fault; flaw; blemish." *Webster's New College Dictionary* 378 (2007). "Observable" means "that can be observed; visible; discernable; noticeable." *Id.* at 996. Read in connection with the 62-6.001(4)(b)'s requirement of performing a visual inspection of the empty tank, it is clear that the rule provides adequate notice of what is required by a registered septic tank contractor; namely a visual inspection of the empty tank to determine if there are any faults, flaws, imperfections, or weaknesses. A septic tank contractor of ordinary intelligence would be on fair notice of what the rule requires. Indeed in his testimony, Respondent identified a "crack" as an example of an observable defect. [Tr. Vol. 2, p249; 4-5]. Based on the foregoing, the Department takes exception to paragraph 72 of the Recommended Order and it should be rejected.

WHEREFORE, the Department requests that the exceptions to the Findings of Fact and Conclusions of Law discussed herein be granted.

DATED this 22nd day of August, 2022.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

/s/ Jay Patrick Reynolds
JAY PATRICK REYNOLDS
Senior Assistant General Counsel
Florida Bar Number: 95291
JOHN RYEN MORGAN-RING
Assistant General Counsel
Florida Bar No.: 1032356
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, FL 32399-3000
Telephone: (850) 245-2285/(850) 245-2295
Email: Patrick.Reynolds@FloridaDEP.gov
Ryen.MorganRing@FloridaDEP.gov
Lateshee.M.Daniels@FloridaDEP.gov
Michelle.M.Knight@FloridaDEP.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was e-mailed to Scott Thomson, 4947 South Orange Avenue, Orlando, Florida 32806 at scott.mathisandsonsseptic@gmail.com and mathisandsonsseptic@gmail.com on this 22nd day of August, 2022.

/s/ Jay Patrick Reynolds
JAY PATRICK REYNOLDS
Senior Assistant General Counsel