

**STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

<b>BMSTPETE, INC.,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>OGC CASE NO. 22-1938</b>
	)	<b>DOAH CASE NO. 22-1999</b>
<b>DEPARTMENT OF ENVIRONMENTAL PROTECTION,</b>	)	
	)	
<b>Respondent.</b>	)	
	/	

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**FINAL ORDER**

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on January 27, 2023, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. No party filed exceptions to the ALJ’s RO.

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

**BACKGROUND**

On or about February 25, 2022, BMSTPETE, Inc. (BMSTPETE or Petitioner) filed an application with DEP for inclusion of its commercial property located at 449 49th Steet South, St. Petersburg, Florida in the Abandoned Tank Restoration Program (ATRP). (RO p. 2). On or about May 19, 2022, DEP informed the Petitioner in writing that its application was denied. (RO p. 2). The Petitioner timely filed a petition for administrative hearing (Petition), and DEP referred the Petition to DOAH on July 8, 2022. (RO p. 2).

The DOAH final hearing was conducted on November 8, 2022. (RO p. 1). BMSTPETE presented the testimony of John McKeague, president of BMSTPETE. (RO p. 2). BMSTPETE Exhibit Nos. 1 through 6, 8, and 9 were admitted into evidence. (RO p. 2). DEP presented the testimony of Blake Miller. (RO p. 2). DEP Exhibit Nos. 1 through 13 were admitted into evidence. (RO p. 2).

A one-volume transcript of the final hearing was filed with DOAH on December 1, 2022. (RO p. 2). On December 9, 2022, the ALJ entered an order granting an extension of time until January 4, 2023, for the parties to file their proposed recommended orders. (RO p. 2). Both parties timely filed their proposed recommended orders on January 4, 2023.

### **SUMMARY OF THE RECOMMENDED ORDER**

In the RO, the ALJ recommended that the Department enter a final order denying Petitioner BMSTPETE's application for inclusion in the Abandoned Tank Restoration Program. In doing so, the ALJ concluded that the "[P]etitioner failed to present sufficient credible evidence establishing that on or before March 1, 1990, Bob & Mike's Automotive[, the previous property owner,] ceased conducting business involving consumption, use, or sale of petroleum products at the location in question," thus disqualifying the site for the Abandoned Tank Restoration Program. (RO ¶ 19).

### **STANDARD OF REVIEW FOR DOAH RECOMMENDED ORDERS**

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker*, 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing*, 954

So. 2d 77, 81 (Fla. 5th DCA 2007); *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to any findings of fact the parties “[have] thereby expressed [their] agreement with, or at least waived any objection to, those findings of fact.” *Env't Coal. of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2022); *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

In this case, no party filed any exceptions to the RO objecting to the ALJ's findings, conclusions of law, recommendations, or to the DOAH hearing procedures. The Department concurs with the ALJ's legal conclusions and recommendations.

### **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 in its entirety, and incorporated by reference herein.

B. BMSTPETE, Inc.'s application for inclusion of its commercial property in St. Petersburg, Florida in the Abandoned Tank Restoration Program is DENIED.

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 3rd day of April 2023, 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.

  
Deputy CLERK      4/3/23  
DATE


**CERTIFICATE OF SERVICE**

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

John McKeague, President BMSTPETE, Inc. PO Box 1639 Land O' Lakes, FL 34639 <a href="mailto:marcegroup@verizon.net">marcegroup@verizon.net</a>	John Ryen Morgan-Ring, Esquire Department of Environmental Protection 3900 Commonwealth Blvd., M.S. 35 Tallahassee, FL 32399-3000 <a href="mailto:Ryen.MorganRing@FloridaDEP.gov">Ryen.MorganRing@FloridaDEP.gov</a>
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this 3rd day of April 2023.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

  
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STACEY D. COWLEY  
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**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

BMSTPETE, INC.,

Petitioner,

vs.

Case No. 22-1999

DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, via Zoom video conference on November 8, 2022, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: John McKeague, President  
BMSTPETE, Inc.  
21126 Lake Patience Road  
Land O' Lakes, Florida 34638

For Respondent: John Ryen Morgan-Ring, Esquire  
Department of Environmental Protection  
3500 Commonwealth Boulevard, Mail Station 35  
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

Whether Petitioner is eligible to receive financial assistance for cleanup of a petroleum storage system pursuant to the Abandoned Tank Restoration Program, as set forth in section 376.305, Florida Statutes (2022).<sup>1</sup>

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<sup>1</sup> All references to Florida Statutes will be to the 2022 version, unless otherwise indicated.

### PRELIMINARY STATEMENT

On or about February 25, 2022, BMSTPETE, Inc. (Petitioner), submitted to the Florida Department of Environment Protection (Department/ Respondent) an application for inclusion in the Abandoned Tank Restoration Program (ATRP). On or about May 19, 2022, the Department informed Petitioner that its application was denied. Petitioner timely filed a request for administrative hearing, and on July 8, 2022, the Department referred the matter to DOAH for a disputed fact hearing.

At the hearing, John McKeague represented and testified on behalf of Petitioner. Respondent presented testimony from its employee, Blake Miller. Petitioner's Exhibits 1 through 6, 8, and 9 were admitted into evidence. Respondent's Exhibits 1 through 13 were admitted into evidence.

The one-volume Transcript from the disputed fact hearing was filed with DOAH on December 1, 2022. On December 9, 2022, an Order Granting Extension of Time was entered, and each party was given until January 4, 2023, to submit a proposed recommended order. Each party timely submitted a Proposed Recommended Order and they were considered in the preparation of this Recommended Order.

### FINDINGS OF FACT

1. Pursuant to section 376.305, Respondent is responsible for determining eligibility to receive State-sponsored financial assistance for the cleanup of sites that contain abandoned petroleum storage systems. Specifically, section 376.305(6) provides, in part, that "[t]he department shall establish the Abandoned Tank Restoration Program to facilitate the restoration of sites contaminated by abandoned petroleum storage systems [and] [f]or purposes of this subsection, the term [']abandoned petroleum storage system['] means a

petroleum storage system that has not stored petroleum products for consumption, use, or sale since March 1, 1990.”<sup>2</sup>

2. Petitioner is a Florida corporation and is the current owner of commercial property located at 449 49th Street South, St. Petersburg, Florida. Petitioner applied for inclusion in the ATRP, and the Department denied the application due to Petitioner’s failure to present sufficient evidence demonstrating that the company met statutory eligibility requirements.

3. It is undisputed that in March 1987, Bob & Mike’s Automotive, a previous owner of the subject property, installed a 1,000-gallon petroleum storage tank (Tank) at the location in question. It is also undisputed that when the Tank was installed, the property had a primary zoning designation of “gas station,” a secondary designation of “auto repair,” and that Bob & Mike’s Automotive conducted business on the site. According to a letter dated February 28, 1992, which was authored by the owners of Bob & Mike’s Automotive, the Tank “was installed after we were informed that our auto repair business could not be in operation unless linked with a filling station occupational license.”

4. On or about November 7, 1990, the Department performed an initial inspection of the Tank and memorialized its findings on a form designated as a “Pollutant Storage Tank System Inspection Report (Inspection Report).”<sup>3</sup>

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<sup>2</sup> Section 90.802, Florida Statutes, states that “[e]xcept as provided by statute, hearsay evidence is inadmissible.” Section 90.803(16) provides that “[s]tatements in a document in existence 20 years or more, the authenticity of which is established,” are an exception to the hearsay exclusionary rule even though the declarant is available as a witness. As previously noted, the final hearing took place on November 8, 2022, and therefore, documents with a date prior to November 8, 2002, are admitted into evidence pursuant to section 90.803(16). As for relevant statements contained in documents with a date after November 8, 2022, section 120.57(1)(c), Florida Statutes, provides that “[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.”

<sup>3</sup> The comments section of the Inspection Report states, in part, that “[t]his is a small user facility not currently regulated under 17-61 F.A.C. but will be regulated by the new 17-761 F.A.C. in 30-60 days.”



The Inspection Report has a box for “tank status,” and the inspector wrote in the box that the Tank was “IN USE.” The Inspection Report makes no reference to what, if any, substance was in the tank, but based on other evidence, as explained below, it is clear that at some point subsequent to November 7, 1990, petroleum product was in the Tank.

5. Section II of the Inspection Report is labeled “TANK STATUS” and contains six questions that require a “yes, no, unknown, or not applicable” notation by the inspector. The questions are as follows: “10. Tank Designated Out of Service: 17-61.050(3)(b)1.[;] 11. inventory + monitoring records kept or[;] 12. secured against tampering[;] 13. Tanks properly abandoned? 17.61.050(3)(c)[;] 14. in place or[;] 15. removed.” For each question, the inspector checked the box for “not applicable.” It stands to reason that a petroleum storage tank that is “in use” would not have been designated as either “out of service” or “properly abandoned.”

6. The Inspection Report was signed by both the inspector and the “facility contact” person. Neither the inspector nor the facility contact person testified at the final hearing, and there is no evidence that the findings noted by the inspector were disputed by Bob & Mike’s Automotive at or near the time of issuance of the Inspection Report.

7. In support of its claim for eligibility, Petitioner relies on correspondence dated February 28, 1992, that the owners of Bob & Mike’s Automotive submitted to the Pinellas County Public Health Unit. In the letter, the owners state that “[t]he 1000 gallon tank in question was installed in March, 1987 and has not been in service.” While the letter confirms when the Tank was installed, it lacks sufficient specificity as to when the Tank was removed from service.

8. Petitioner also relies on a “Petroleum Cleanup Participation Program Affidavit” that Bob & Mike’s Automotive submitted to the Department on or about September 18, 2001. One of the questions on the affidavit states that “if petroleum is no longer stored at the above referenced site, [what is] the date

that petroleum or petroleum product was last stored[?]" The year "1988" was the answer given.

9. As an initial matter, the Petroleum Cleanup Participation Program (PCPP) is different from the ATRP,<sup>4</sup> and Petitioner failed to provide any evidence demonstrating that "stored petroleum" under PCPP is definitionally the statutory equivalent of "a petroleum storage system that has not stored petroleum products for consumption, use, or sale" under the ATRP.

10. Furthermore, the veracity of the declaration that "1988" was the year when petroleum or petroleum product was last "stored" in the Tank is called into question by a 2010 Consent Order involving the Tank which notes therein that "[o]n or about September 3, 1999, all gasoline and residues were removed from the System and the System was filled with water."

11. Petitioner's Exhibit 4 is a written statement purportedly from Michael Prell. The statement reads as follows:

This is to acknowledge that as the business partner to Mike Broesler and longtime tenant of Bob and Mike's Auto Repair, the facility never sold or stored fuel at any time (gasoline or diesel) at the facility located at 449 49th Street South, St. Petersburg, Florida, and that the only purpose for the current underground tank was for a zoning dispute. Bob and Mike's never intended to operate as a gas station.

Mr. Prell did not testify at the final hearing.

12. On November 23, 1998, the Department met with representatives of Bob & Mike's Automotive to discuss matters related to the Tank. According to the list of attendees, Mr. Prell was present at the meeting.

13. Notes from the meeting indicate that the Tank "has [less than] 1 [inch] of product on [the] bottom [and the owner] plans to clean out rest of tank over Thanksgiving weekend." The prepared agenda for the meeting reflected that

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<sup>4</sup> Section 376.305(6)(a)4. states that in order to be included in ATRP, the site must not otherwise be "eligible for the Petroleum Cleanup Participation Program under s. 376.3071(13). ..."

the Tank “has been out-of-service and inactive since at least 3/26/91.” The fact that the Tank, as of November 23, 1998, had less than one inch of petroleum product in it undermines Mr. Prell’s written statement that there was never gasoline or diesel fuel stored in the Tank.

14. The evidence is inconclusive regarding whether Bob & Mike’s Automotive, on or before March 1, 1990, ceased conducting business operations involving consumption, use, or sale of petroleum product at the location is question.

#### CONCLUSIONS OF LAW

15. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1).

16. As the applicant for inclusion in the ATRP, Petitioner is asserting the affirmative, and therefore bears the ultimate burden of proving entitlement to enrollment in the program. *Fla. Dep’t of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

17. The standard of proof that Petitioner must meet is by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat. The preponderance of the evidence standard requires proof by “the greater weight of the evidence” or evidence that “more likely than not” tends to prove a certain proposition. *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000).

18. Section 376.305(6) provides as follows:

The Legislature created the Abandoned Tank Restoration Program in response to the need to provide financial assistance for cleanup of sites that have abandoned petroleum storage systems. For purposes of this subsection, the term “abandoned petroleum storage system” means a petroleum storage system that has not stored petroleum products for consumption, use, or sale since March 1, 1990. The department shall establish the Abandoned Tank Restoration Program to facilitate the restoration of sites

contaminated by abandoned petroleum storage systems.

(a) To be included in the program:

1. An application must be submitted to the department certifying that the system has not stored petroleum products for consumption, use, or sale at the facility since March 1, 1990.

2. The owner or operator of the petroleum storage system when it was in service must have ceased conducting business involving consumption, use, or sale of petroleum products at that facility on or before March 1, 1990.

3. The site is not otherwise eligible for the cleanup programs pursuant to s. 376.3072.

4. The site is not otherwise eligible for the Petroleum Cleanup Participation Program under s. 376.3071(13) based on any discharge reporting form received by the department before January 1, 1995, or a written report of contamination submitted to the department on or before December 31, 1998.

(b) In order to be eligible for the program, petroleum storage systems from which a discharge occurred must be closed pursuant to department rules before an eligibility determination. However, if the department determines that the owner of the facility cannot financially comply with the department's petroleum storage system closure requirements and all other eligibility requirements are met, the petroleum storage system closure requirements shall be waived. The department shall take into consideration the owner's net worth and the economic impact on the owner in making the determination of the owner's financial ability.

(c) Sites accepted in the program are eligible for site rehabilitation funding as provided in s. 376.3071.

(d) The following sites are excluded from eligibility:

1. Sites on property of the Federal Government;
2. Sites contaminated by pollutants that are not petroleum products; or
3. Sites where the department has been denied site access.

(e) Participating sites are subject to a deductible as determined by rule, not to exceed \$10,000.

19. Petitioner failed to present sufficient credible evidence establishing that on or before March 1, 1990, Bob & Mike's Automotive ceased conducting business involving consumption, use, or sale of petroleum products at the location in question. Therefore, in considering the evidence as set forth in the Findings of Fact above, it is concluded that Petitioner did not meet its burden of proof and its application for inclusion in the ATRP should be denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Department of Environmental Protection enter a final order denying Petitioner BMSTPETE, Inc.'s application for inclusion in the Abandoned Tank Restoration Program.

DONE AND ENTERED this 27th day of January, 2023, in Tallahassee, Leon County, Florida.



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LINZIE F. BOGAN  
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 27th day of January, 2023.

COPIES FURNISHED:

John McKeague  
(eServed)

John Ryen Morgan-Ring, Esquire  
(eServed)

Lea Crandall, Agency Clerk  
(eServed)

Justin G. Wolfe, General Counsel  
(eServed)

Shawn Hamilton, Secretary  
(eServed)

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.