STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

GLENDA Q. MAHANEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**DEP CASE NO.: 17-0119**
	)	**DOAH CASE NO.: 17-2518**
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
	)	
Respondent.	)	
_____/		

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on November 15, 2017, 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. Neither Petitioner nor the Department filed a proposed recommended order, or exceptions to the ALJ's RO. This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On March 10, 2017, the Department issued an access order (Access Order), which would require Petitioner to provide the Department access to her property located at 15751 Old US Highway 441, in Tavares, Florida, to install temporary groundwater monitoring wells, and collect groundwater samples from the temporary wells and from Petitioner's potable water well. On or about March 29, 2017, Petitioner filed a petition for hearing to challenge the Department's action.

At the final hearing, Petitioner testified on her own behalf and offered no exhibits into evidence. The Department presented the testimony of Department employees Tracy Jewsbury and David Phillips. Respondent's Exhibit 1 was admitted into evidence. Due to disruptions caused by Hurricane Irma, the final hearing transcript was not filed with DOAH until October 27, 2017.

SUMMARY OF THE RECOMMENDED ORDER

The groundwater beneath a parcel of land adjacent to Petitioner's property was contaminated with petroleum when the land was used previously for an auto salvage operation. (RO ¶ 3). Groundwater sampling near the border of Petitioner's property showed groundwater contamination by gasoline constituents which exceeded Groundwater Cleanup Target Levels (GCTLs), which would require cleanup. However, later sampling showed the concentration of contaminants had decreased below GCTLs, probably because of natural attenuation. (RO ¶ 4).

The existing data suggests that any groundwater contamination beneath Petitioner's property is probably now at a level that would not require cleanup. Because the Petitioner has continually requested further investigation, the Department issued the Access Order to examine the potential extent and concentration of any contaminants on Petitioner's property. (RO ¶¶ 5, 7). The Department wants to: (a) install up to five temporary groundwater monitoring wells, (b) collect groundwater samples from the wells, (c) collect a groundwater sample from Petitioner's potable water well, and (d) remove the monitoring wells after the sampling. (RO ¶ 8).

Liability

Although Petitioner believes petroleum contamination is present on her property and wants it cleaned up, she objects to the liability provision of the Access Order. Paragraph 9(e) of the Access Order states that the Petitioner "shall not be liable for any injury, damage or loss on

the property suffered by the Department, its agents, or employees which is not caused by the [sic] negligence or intentional acts." (RO ¶ 10). Petitioner insists she should not be liable for injuries or damages suffered by Department's agents or employees who come on her property for these purposes. She demands that the Department come onto her property "at their own risk." (RO ¶ 11).

At the final hearing, the Department stated that it did not intend to impose on Petitioner a level of liability different than the liability that would already apply under Florida law. The Department offered to amend Paragraph 9(e) of the Access Order to provide that Petitioner's "liability, if any, shall be determined in accordance with Florida law." (RO ¶ 12).

Scope of the Investigation

Petitioner furthermore objects that the proposed groundwater sampling is not extensive enough. Petitioner also believes the Department should test for soil contamination. (RO ¶ 13).

The Department's expert, David Phillips, testified that the proposed monitoring wells are located along the likely path of migration of any contaminated groundwater from the former auto salvage site. (RO ¶ 14). Another Department witness, Tracy Jewsbury, testified that no soil contamination was found on the auto salvage site, so the Department has no reason to expect there would be soil contamination on Petitioner's property that came from the auto salvage operation. (RO ¶ 15).

In the RO, the ALJ recommended that the Department withdraw the Access Order or, alternatively, that Paragraph 9 (e) of the Access Order be amended to provide that the Petitioner's potential liability, if any, shall be determined in accordance with Florida law. (RO at page 10).

CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrections. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact, the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical 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. (2017); *Barfield v. Dep't of Health,* 805 So. 2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

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

ORDERED:

A. The ALJ's Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference; and

B. The Access Order is amended to provide that the Petitioner Glenda Q. Mahaney's potential liability, if any, shall be determined in accordance with Florida law.

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 22ND day of January 2018, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

NOAH VALENSTEIN
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

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

Sindi Kinsey
Deputy CLERK

1-22-18
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by U.S. Mail to:

Glenda Q. Mahaney
Post Office Box 123
Mount Dora, FL 32756

by electronic mail to:

Bill Gwaltney, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Bill.Gwaltney@dep.state.fl.us

and by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

this 22ND day of January, 2018.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLENDA Q. MAHANEY,

Petitioner,

vs. Case No. 17-2518

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this case was held on July 28, 2017, by video teleconference at sites in Tallahassee and Orlando, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Glenda Q. Mahaney, pro se
Post Office Box 123
Mount Dora, Florida 32756

For Respondent: William W. Gwaltney, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the Notice of Intent to Issue Order Requiring Access to Property ("Access Order") issued by the Department of Environmental

Protection ("Department") and directed to Glenda Mahaney, as the property owner, is a valid exercise of the Department's authority.

PRELIMINARY STATEMENT

On March 10, 2017, Jeff Prather, Director of the Department's Central District Office in Orlando, issued the Access Order, which would require Petitioner to provide the Department access to her property located at 15751 Old US Highway 441, in Tavares, Florida, for the purpose of installing temporary groundwater monitoring wells and to collect groundwater samples from the temporary wells and from Petitioner's potable water well. On or about March 29, 2017, Petitioner filed a petition for hearing to challenge the Department's action.

At the final hearing, Petitioner testified on her own behalf. She offered no exhibits into evidence. The Department presented the testimony of Department employees Tracy Jewsbury and David Phillips. Respondent's Exhibit 1 was admitted into evidence.

Due to disruptions caused by Hurricane Irma, the one-volume Transcript of the final hearing was not filed with DOAH until October 27, 2017. Neither Petitioner nor the Department filed a proposed recommended order.

FINDINGS OF FACT

1. Petitioner Glenda Mahaney is a natural person and the owner of the property identified in the Access Order.

2. The Department is the state agency which has been granted powers and assigned duties under chapters 376 and 403, Florida Statutes, for the protection and restoration of air and water quality and to adopt rules and issue orders in furtherance of these powers and duties.

Background

3. The groundwater beneath a parcel of land adjacent to Petitioner's property was contaminated with petroleum when the land was used in the past for auto salvage operations.

4. Initial groundwater sampling near the border of Petitioner's property showed groundwater contamination by gasoline constituents which exceeded Groundwater Cleanup Target Levels ("GCTLs"). In other words, the contamination was at levels that required cleanup. However, later sampling showed the concentration of contaminants had decreased below GCTLs, probably as a result of natural attenuation.

5. The existing data suggests that any groundwater contamination beneath Petitioner's property is probably now at a level that would not require cleanup. However, the Department issued the Access Order because the Department is not certain

about the contamination beneath Petitioner's property and because Petitioner has continually requested further investigation.

6. Petitioner believes contamination from the auto salvage site has caused illness in a tenant and even contributed to other persons' deaths. However, no expert testimony was received on this subject and no finding is made about whether contamination exists on Petitioner's property which has caused illness or death.

7. The Department's Site Investigation Section wants access to Petitioner's property in order to determine whether contamination has migrated beneath Petitioner's property and, if it has, the extent and concentration of the contaminants.

8. The Department wants to: (a) install up to five temporary groundwater monitoring wells, (b) collect groundwater samples from the wells, (c) collect a groundwater sample from Petitioner's potable water well, and (d) remove the monitoring wells after the sampling.

9. The Access Order includes terms related to advance notice, scheduling, and related matters.

Liability

10. Although Petitioner believes petroleum contamination is present and wants it cleaned up, she objects to the provision of the Access Order related to liability. Paragraph 9(e) of the Access Order provides:

> Ms. Mahaney shall not be liable for any injury, damage or loss on the property suffered by the Department, its agents, or employees which is not caused by the [sic] negligence or intentional acts.

11. Petitioner insists that she should not be liable under any circumstances for injuries or damages suffered by Department's agents or employees who come on her property for these purposes. She demands that the Department come onto her property "at their own risk."

12. At the final hearing, the Department stated that it did not intend to impose on Petitioner a level of liability different than the liability that would already be applicable under Florida law. The Department offered to amend Paragraph 9(e) of the Access Order to indicate that Petitioner's "liability, if any, shall be determined in accordance with Florida law."

Scope of the Investigation

13. Petitioner objects to the proposed groundwater sampling because she does not believe it is extensive enough. Petitioner also believes the Department should test for soil contamination.

14. The Department's expert, David Phillips, testified that the proposed monitoring well locations were selected based on the direction of groundwater flow in the area and the wells are along the likely path of migration of any contaminated groundwater from the former auto salvage site.

15. Another Department witness, Tracy Jewsbury, testified that no soil contamination was found on the auto salvage site, so the Department has no reason to expect there would be soil contamination on Petitioner's property that came from the auto salvage operation.

16. The Department will use the data collected from the wells to determine if contamination is present and whether future contamination assessment and/or remediation activities are necessary.

CONCLUSIONS OF LAW

Jurisdiction

17. Petitioner contends that the Department lacks jurisdiction to order her to provide access, citing section 403.091(3), Florida Statutes. Section 403.091 is entitled "Inspections" and subsection (3) provides that the Department may make inspections of premises, equipment, and records, but only after obtaining consent of the owner or operator or by obtaining an "inspection warrant" from a county or circuit court judge. However, section 403.091 is not applicable here because it addresses the inspection of persons and facilities being regulated by the Department to determine compliance with regulations. Petitioner is not a person regulated by the Department. The Access Order is not for the

purposes of determining whether Petitioner is in compliance with regulations.

18. The Access Order cites section 403.061(8) and section 376.303(4), Florida Statutes, as the Department's authority to issue the order. Section 403.061(8) grants the Department authority to issue orders "to effectuate the control of air and water pollution and enforce the same by all appropriate administrative and judicial proceedings."

19. Section 376.303(4) states:

> The department may require a property owner to provide site access for activities associated with contamination assessment or remedial action. Nothing herein shall be construed to prohibit an action by the property owner to compel restoration of his or her property or to recover damages from the person responsible for the polluting condition requiring assessment or remedial action activities.

20. Section 376.303(4) imposes no condition that the Department obtain the property owner's consent or an inspection warrant from a court as required by section 403.091(3).

21. It is concluded that the Department has jurisdiction pursuant to section 376.303(4) to issue an administrative order to require access to property.

Liability

22. Most statutory statements about liability in chapters 376 and 403 are directed to persons who cause contamination or otherwise fail to comply with regulations; they are not directed to innocent, unregulated, adjacent property owners. However, Section 373.09(4) states:

> No person who, voluntarily or at the request of the department or its designee, renders assistance in containing or removing pollutants shall be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance, except for acts or omissions amounting to gross negligence or willful misconduct.

23. Petitioner, by being ordered to provide access, probably does not qualify as a person who is acting voluntarily or at the Department's request. Furthermore, it is not clear that providing access qualifies as rendering assistance in containing or removing pollutants.

24. Petitioner conceded at the final hearing that she would be liable for her intentional acts that caused injury or damages. However, she believes she should not be liable for any form of negligence, even gross negligence. She argues that her situation would be analogous to a fireman injured while fighting a fire in a burning house.

25. Because the Legislature was silent on the issue of liability in this particular situation, it must be presumed that

the Legislature did not intend to alter in any way a property owner's potential liability in tort, if any, for injuries or damages to the Department's agents or employees.

26. The Department does not have special expertise to know that Paragraph 9(e) is an accurate statement of Petitioner's potential liability in tort. Making tort liability determinations is not one of the Department's delegated powers or duties. The Department acted beyond the authority granted to it by the Legislature when it sought to establish in the Access Order the tort liability that Petitioner would be subject to for any injuries or damages arising from rehabilitation activities on Petitioner's property.

27. However, the Department's offer to amend Paragraph 9(e) to provide that Petitioner's "liability, if any, shall be determined in accordance with Florida law," would remedy this error. If this amendment is made, whatever protection Petitioner has under Florida law will not be diminished by the Access Order.

Scope of the Investigation

28. The Department demonstrated a reasonable basis for the scope of the investigation to be conducted pursuant to the Access Order. Petitioner was not competent by education, training, or experience to refute the Department's technical justification for the proposed activities.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Environmental Protection withdraw the Access Order or, alternatively, that Paragraph 9(e) of the Access Order be amended to provide that Ms. Mahaney's potential liability, if any, shall be determined in accordance with Florida law.

DONE AND ENTERED this 15th day of November, 2017, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of November, 2017.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.