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IN THE DISTRICT COURT OF APPEALS
FIFTH DISTRICT
STATE OF FLORIDA

MARK F. GERMAIN, LEESBURG'S
OLDEST FILLING STATION, INC.,
AND JOHN DOE 1-5,

Respondents / Appellants,

vs.

DCA Case No. 5D14-0869
LT DOAH Case No. 12-4008EF

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Petitioner / Appellee.

_____ /

RESPONDENT'S REPLY BRIEF

Respectfully submitted by:

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This 30th day of April, 2015

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RECORD APPENDIX (Filed with Initial Brief)

A. FDEP Storage Tank/Contaminated Facility Latitude/Longitude Search Results

Griner's Station Facility Status: CLOSED

Cleanup Status: No Contamination

Storage Tank/Contaminated Facility Name & Address Search

Griner's Station Status: Closed

Tanks Closed In Place

F. Storage Tank Regulation / Form 17-61.090(5) August 1987

Number of Tanks Abandoned at This Time 4

(R: 1285, l. 18 - 1286, l. 14)

(R: 1292, l. 1 - 5)

X. 40 C.F.R. 280 and 281 dated September 28, 1988

Out-of-Service UST Systems and Closures

(R: 1281, l. 23 - 1282, l. 8)

(R: 1292, l. 1 - 5)

(R: 1296, l. 5 - 12)

Z. 40 CFR 312.20 "ALL APPROPRIATE INQUIRY"

"DATES: This final rule is effective November 1, 2006."

(R: 1292, l. 1 - 5)

(R: 1296, l. 5 - 12)

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STATEMENT OF THE CASE

1. DEP seeks to hold the Respondents liable for cleanup of alleged contamination despite the fact that the facility was “**CLOSED**” under DEP supervision 25 years ago. DEP published on its public access website, OCULUS, that the tanks were “**Closed In Place**” with concrete, that the facility status was “**CLOSED**” and that Cleanup Status according to DEP was “**No Contamination.**” **Record Appendix A, 1 - 4, R: 1377, l. 8 -15, Final Order para 32 and R: 327 - 330.**

2. The terms “**CLOSED**” and closure have specific legal definitions. When used by “environmental professionals,” such as those at the DEP, they mean that the facility complied with the technical requirements of **40 C.F.R. 280.71 et.seq., enacted Friday, Sept. 23, 1988**, which require assessment and remediation of contamination *before closure* of Underground Storage Tanks. Please see **40 C.F.R. 280.71 and 280.72** at **Record Appendix X.**

3. Respondents relied on these published finding by DEP in their “**All Appropriate Inquiry**” and claim an “Innocent Purchaser” or “Third Party” defense pursuant to section 376.308, Florida Statutes. They did not know the Property was contaminated prior to purchase, were not the owners of the facility when contamination occurred and did not cause or contribute to the contamination.

4. The evidence shows that Germain conducted an “**All Appropriate Inquiry**” *prior* to purchase in **May 2006**.

5. Respondents also maintain that DEP failed to prove with *admissible*, competent and substantial evidence that their Property is contaminated.

6. DEP argues that Respondents could NOT rely on the DEP declarations that the tanks were “**Closed In Place**” with concrete, that the facility status was “**CLOSED**” and that the Cleanup Status according to DEP was “**No Contamination**” in their “**All Appropriate Inquiry**” even though DEP published these declarations on its public access OCULUS website.

7. DEP also argues that the S&ME and ATC hearsay reports were admissible to supplement its SIS report.

STATEMENT OF THE FACTS

8. Charles Griner owned and operated as a petroleum filling station in the 1980s. The facility operated as a gas station since the 1920's. The Chevron facility had three underground storage tanks. **Final Order para 5 - 6 and R: 334.**

9. Sometime in late 1989 or early 1990, the tanks at the Property were “Closed in Place” with concrete under DER, now DEP, supervision. **R: 327 - 357.**

10. DEP listed, (and continues to list), the Property on its public access

website OCULUS as: **“Facility Status: CLOSED”**
 “Cleanup Status: No Contamination”
 “Tanks: Closed In Place”

Respondent’s Exhibit A, 1-4, R: 1377, I. 8 -15, and R: 327 - 330.

11. Historically, there have been four gas stations at the four corners of the Main Street intersection where the Property is located. **Final Order para 11.**

12. “Since 1990, one or more discharges of petroleum contaminants occurred on the (adjacent) Sunoco property.” **Final Order para 10.**

13. On August 22, 1988, Lake County officials in Tavares, (Please see Letterhead), acting as agents under contract with DEP, advised Mr. Griner they would be performing “compliance and installation inspections.” **R: 332 - 333.**

14. DEP inspectors visited the Property and issued reports on September 1, 1988, August 8, 1989 and March 7, 1990. **Resp’s Exs C - H and R: 332 - 357.**

15. On April 2, 1990, the STORAGE TANK REGULATION section of DER received a Closure Report signed by a Field Supervisor William Brewer indicating that the tanks at Griner’s Station were “abandoned.” It stated that,

“I, hereby certify and attest that I am familiar with the facility that is registered as No. _____ with the Florida Department of Environmental Regulation; that to the best of my knowledge and belief, the tank installation on this facility was conducted in accordance with Chapter 489 and Section 376.303, Florida Statutes and Chapter 17-61 Florida Administrative Code”

and that

“the operations on the checklist were performed accordingly.”

16. This is the DEP CLOSURE report for the facility. **R: 346 - 347.**

17. Mr. Griner testified that there were four monitoring wells on the Property and that the inspector used a “sensor” on the Property after closure of the tanks. DEP did not order Mr. Griner to monitor the tanks after closure. The inspector told him that the “property was closed.” **R: 1313, l. 17 - 1315, l. 22.**

18. In 1996, Griner sold the Property to Garcia. Griner told Garcia that the tanks were closed in place in accordance with DEP regulation and that the paperwork was at the DEP Lake County office in Tavares. **R: 1429, l. 18 -25.**

19. On June 10, 2005, DEP’s Bret LeRoux received a memo which indicated that the Property was the source of contamination and that he should contact the owner, Garcia. **Final Order para 22 - 24 and R: 360.**

20. **“The Department failed to notify Garcia of the contamination in 2005 as required by section 376.30702(3). If Garcia had been notified, Germain may not have purchased the property.” Final Order para 85.** The ALJ acknowledged the notification statute was “very relevant.” **R: 1295, l. 11-18.**

21. Garcia sold the property to Germain in May 2006. Garcia told Germain that the tanks were closed in place in accordance with DEP regulation and the

paperwork was at the DEP Lake County office in Tavares. **R: 1430, l. 7 - 16.**

22. Before purchasing the Property in 2006, Germain visited and reviewed files at the Lake County office of DEP in Tavares and the DEP public access OCULUS website. **Final Order para 32.** He also visited the Leesburg Historic Board. **Final Order para 30.** Germain spoke with local residents regarding the Property and was aware that the Property was an old gas station. **Final Order para 26-28.** Germain also did a physical inspection of the 80' X 80' Property and found no signs of contamination. **Final Order para 29.** He knew that DEP had published on the OCULUS website that the tanks were “**Closed in Place**” with concrete under DEP supervision in 1989 / 1990, that the facility was “**CLOSED**” and that the Cleanup Status according to DEP was “**No Contamination.**”

Final Order para 32. DEP personnel advised Germain that “it appeared to be an appropriate property that could be purchased.” **R: 1435, l. 1 - 3.**

23. The S&ME and ATC reports were NOT prepared by DEP employees. **Nobody from S&ME or ATC testified at the hearing. R: 1115, lines 11 - 25.**

24. In December 2010, George Wiegand, P.G. of the DEP issued a (SIS) report. **He did NOT testify at the hearing. R: 1115, l. 22 - 25.**

25. DEP witness Robert Cilek did not write the SIS but only “reviewed” it. **R: 1174, l. 11 - 24.** DEP witness Bret Leroux “didn’t have anything to do with

the analysis of the samples” and he “didn’t have anything to do with taking the samples out of the wells.” **R: 1298, l. 22 - 1299, l. 5.**

26. None of the DEP witnesses could swear to the accuracy of the reports. **R: 1115, l. 16 - 25** and **R: 1343, l. 14 - 20.**

27. The ALJ ruled, “No person that took the stand as a DEP employee could say I know that these are correct facts in here, I know from personal knowledge that these are accurate facts. They wouldn’t have personal knowledge. It would only be the person who actually did the work who knows that they’re accurate.... Evidence doesn’t come in that way.” **R: 1115, l. 16 - 25.**

28. The ALJ stated that the reports were filed with Seminole County, “**presumably**” with the Department of Public Safety. **Final Order para 21.**
The Property at issue is located in Lake County. **Final Order para 32.**

29. As of November 20, 2013, DEP continued to list the Property on its public access website as “**Facility Status: CLOSED**” and “**Cleanup Status: No Contamination.**” **R: 329.**

REPLY ARGUMENT

ISSUE 1. “INNOCENT PURCHASER” / “THIRD PARTY” DEFENSES.

30. The Department of Environmental Protection (DEP) does NOT answer Germain’s first and most important argument which is that ALJ erred in not

upholding the Respondents' "Innocent Purchaser" and "Third Party" defenses when DEP PUBLISHED ON ITS PUBLIC ACCESS WEBSITE THAT THE TANKS WERE "**Closed In Place**" (25 YEARS AGO), THAT THE FACILITY WAS "**CLOSED**" AND THAT CLEANUP STATUS ACCORDING TO DEP WAS "**No Contamination.**" **Respondent's Record Appendix A and R: 327 - 330.**

31. The DEP does NOT explain why it published these classifications in three (3) separate locations on its public access OCULUS website over many years.

32. Instead, the DEP couches the argument as only an estoppel defense. The argument is actually that Germain did conduct an "**all appropriate inquiry**" prior to purchase and therefore is an "**innocent purchaser**" pursuant to statute.

33. Germain clearly states in his first argument at paragraph 81 of the Initial Brief that "the Respondents did conduct an "all appropriate inquiry" by going directly to the environmental professionals at DEP, the agency in charge of overseeing the closure of facilities with underground storage tanks. They exercised a good commercial practice relying on Mr. Brewer's certified Closure Report of April 2, 1990." **Record Appendix F and R: 346 - 347.**

34. The word "**CLOSED**" has statutory meaning according to **40 C.F.R. 280.71 and 280.72.** "**No Contamination**" is plain English which means that the Property is clean of petroleum contaminants.

35. **40 C.F.R. 280.71 and 280.72**, (effective date September 23, **1988**), regulated out-of-service underground storage tank systems and closures during the permanent closing of the tanks at the Property in **1990**.

36. Section 280.71 states that

“The required assessment of the excavation zone under § 280.72 must be performed after notifying the implementing agency but before completion of the permanent closure.”

37. Section 280.72 states that

“Before permanent closure or a change-in-service is completed, owners and operators must measure for the presence of a release where contamination is most likely to be present at the UST site.”

If contamination is detected, owners and operators must begin corrective action.

38. The DEP’s own “Department of Environmental Services Underground Storage Tank Checklist” at the time of closure at the Property in 1990 stated

“CFR 280.72 requires that a closure assessment be performed when abandoning a storage system. A guidance memo is enclosed.”

DEP was citing federal regulation in its enforcement procedures. **R: 351 - 352.**

39. It was reasonable for Germain to rely on these findings by DEP in his **“all appropriate inquiry.”** The DEP is the state agency responsible for closing petroleum dispensing facilities and providing “early notification of the discovery of contamination to the affected public” pursuant to Florida Statute **376.30702**,

“Contamination Notification.” A reasonable person can trust the published finding of our State government.

40. The ALJ stated that “[W]hile at a Lake County office, Germain searched the DEP website and saw two documents that indicated the USTs on the Germain property had been Closed In Place. One of the documents indicated a cleanup status of “no contamination.” ” **Final Order para 32.**

41. Unfortunately, the ALJ missed the point of the “two documents.” The most important piece of information in those “two documents” was that DEP had declared the facility status “**CLOSED.**” **R: 327 - 330.**

42. As mentioned above, the word “**CLOSED**” has statutory meaning.

43. It would be unfair to subsequently hold an “innocent purchaser” liable for cleanup under such circumstances.

44. Florida Courts have not interpreted “**all appropriate inquiry.**” However, it’s clear that “inquiry” means to inquire, to ask, to request information. It does not mean spending tens of thousands of dollars to test, take samples or perform a Phase I examination when DEP has already “**CLOSED**” the site 25 years earlier.

45. Germain conducted an “All Appropriate Inquiry” pursuant to the law that was in place at the time he acquired the property. **He “inquired” of the environmental professionals at DEP who classified the property “CLOSED”**

with **“No Contamination.”** He went *directly* to the state agency responsible for ensuring tanks are properly **“CLOSED”** and notifying the public if there is contamination at a facility.

46. The ALJ ruled that the DEP had received information that the site was contaminated. Its explanation for publishing **“CLOSED”** and **“No Contamination”** on the website was “unsatisfactory.” **Final Order para 33.**

47. No other entity, public or private, could have declared the facility **“CLOSED”** with **“No Contamination”** and safe for purchase by a perspective investor. No private engineering firm could have declared the facility **“CLOSED.”**

48. Once DEP supervises the closure of underground storage tanks with four different inspectors, makes these designations and publishes on its public access website that the facility is **“CLOSED,”** the public can rely on the DEP published findings. DEP cannot mislead the public.

49. DEP employees are “environmental professionals” with “appropriate knowledge and experience,” (See testimony of Robert Cilek **R: 1147, l. 15 - 23** and Bret LeRoux **R: 1225, l. 13 - 25**). The first step of any “all appropriate inquiry” is to check with DEP. If DEP has **“CLOSED”** the site then the inquiry stops there. The **public can rely** on the **“Environmental Professionals” at DEP** and their determination that the facility complied with the requirements of State and

Federal law before closure.

50. With regard to estoppel, the Courts have specifically declined to impose an absolute rule against the assertion of estoppel against the government, See, **Office of Personnel Management v. Richmond**, 496 U.S. 414, 426 (1990). (“[W]e specifically decline today to accept the Solicitor General’s argument for an across-the-board no estoppel rule.”).

51. For example, in **Heckler v. Community Services of Crawford County, Inc.**, 467 U.S. 51 (1984), the Supreme Court made clear that equitable estoppel may be asserted against the government in circumstances where the private party has been misled by the government. *Id.* at **Foot Note 12**. (“In fact, at least two of our cases seem to rest on the premise that when Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of government deception”) [citing, **United States v. Pennsylvania Industrial Chemical Corp.**, 411 U.S. 655, 670-675, (1973)].

51. Finally, “To say to these appellants, ‘The joke is on you. You shouldn’t have trusted us,’ is hardly worthy of our great government.” **Brandt v. Hickel**, 427 F.2d 53, 57 (9th Cir. 1970).

53. The ALJ erred in not upholding the “innocent purchaser” defense.

2. S&ME, ATC and SIS REPORTS ARE INADMISSIBLE HEARSAY.

54. DEP did not comply with even the most fundamental rule of evidence. All of its documentary evidence was hearsay. DEP did not present any witness from S&ME or ATC to identify and authenticate their reports. DEP did not present George Wiegand, the author of the (SIS), to identify and authenticate his report.

55. The Respondents' inability to cross-examine Mr. Wiegand about his DEP (SIS) report, how he collected his data, the chain of custody of his samples or his credentials was a violation of their right to due process.

56. The ALJ stated, "– you can't pick up a report and say based on what they say in this report it all sounds good to me, and then I would accept it as a finding of fact. It doesn't work that way." **R: 1247, l. 7 - 10.**

57. DEP incorrectly states that Robert Cilek had personal knowledge. In fact, Mr. Cilek actually testified to the following:

Q. So you didn't write this report?

A. **I reviewed the report.**

Q. And none of the data is from the Griner station property?

A. No. We didn't collect any samples from the property.

Q. No samples from the property itself, correct?

A. Correct." **R: 1173, l. 20 - 1174, l. 24.**

58. DEP incorrectly argues that DEP witness Brett LeRoux had personal knowledge. In fact, Mr. LeRoux actually testified to the following:

“Q. I’m asking you can you swear to the accuracy of those reports?

A. I cannot.” **R: 1343, l. 14 - 20.**

59. DEP’s inability to present a witness with personal knowledge as to the identification or authentication of the S&ME, ATC and SIS reports rendered them inadmissible hearsay.

60. In this case DEP was relying on hearsay reports generated by someone contracted by Sunoco, a company seeking to avoid liability for contamination found on its own property after confirmed discharges. **Final Order 10.**

61. DEP experts testified that groundwater flow direction can change over time, **R: 1178, l. 19-21** and **R: 1331, l. 244, 1-4**, especially after nearly two decades. The **RCC Environmental Professionals report contained in the S&ME report indicated that groundwater flow was in a southeasterly direction from Sunoco toward the Property. R: 469.**

62. The SIS relies almost entirely on “Previous Environmental Studies” performed by S&ME and ATC approximately 6 - 7 years earlier. It is not a

“memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, ***made at or near the time*** by, or from information transmitted by, a *person with knowledge*”

as required by **Florida Statute 90.803(6)(a)**. **DEP Ex. 10, page 11 and R: 994.**

63. **THE ALJ’S FINDINGS ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.** Admitting contradictory and inconclusive hearsay evidence to supplement hearsay evidence was error.

3. FEDERAL “ALL APPROPRIATE INQUIRIES” INAPPLICABLE.

64. **40 CFR 312.20 / ALL APPROPRIATE INQUIRY** did not become effective as a final rule until November 1, 2006, six (6) months *after* Respondent Germain purchased the property in May 2006. The Federal Register Volume 70, Number 210 states, **“DATES: This final rule is effective November 1, 2006.”**
Respondents’ Record Appendix Z.

65. Of greater concern is that the cases upon which the ALJ relies. **Voggenthaler v. Md. Square LLC**, 724 F.3d 1050 (9th Cir. 2013) and **FT Investments, Inc. V. State Dep’t of Env’tl. Prot.**, 93 So.3d 369 (Fla. 1st DCA 2012), were decided years *after* Respondent Germain purchased the property in May 2006. **Voggenthaler** relied on **40 C.F.R. 312.20** which **did not even become effective until November 1, 2006**. The federal “all appropriate inquiries” standard requiring that “an environmental professional be employed” hadn’t even been established yet. The ALJ is applying federal regulation *ex post facto*.

4. REPORTS “PRESUMABLY” FILED WITH THE *DEPARTMENT OF PUBLIC SAFETY* IN A *DIFFERENT COUNTY* ARE NOT “reasonably ascertainable information.”

66. The best that the ALJ could say of the reports is that they were filed with Seminole County, “**presumably**” with the Department of Public Safety, (not in Lake County where the property at issue is located or with DEP), but in another county and with another Department. **Final Order para 21. “Presumably”** does not meet any standard of proof. It was error for the ALJ to place the burden on Respondent Germain to show that the site assessment reports were not “reasonably ascertainable information.” **Final Report para 43.**

67. The ALJ even ruled that the reports were not public records stating
“...they wouldn’t be public records and not business records. They're merely documents that the agency would have been seeing. That's all.”
Transcript p. 41, lines 1 - 5 and R: 1117, l. 1 - 5.

68. The S&ME, ATC and SIS were not public records in 2006 when Respondent Germain purchased the property. “**Presumably**” filed with the Department of Public Safety does not prove by a preponderance of the evidence that the reports were public record in Seminole County. A definitive finding that the records were at a specific location should be required. **Even so, reports “presumably” filed in a different county and with a different Department are NOT “reasonably ascertainable information.”**

CONCLUSION

69. In this case DEP did NOT properly “CLOSE” the facility in 1989 / 1990. It did NOT require Griner to test after it “**CLOSED**” the facility. It did NOT comply with the public notification statute when it learned of contamination.

70. DEP did, however, publish on its public access OCULUS website that the tanks were “**Closed In Place**” with concrete, that the facility status was “**CLOSED**” and that Cleanup Status according to DEP was “**No Contamination.**”

71. The Respondents relied on DEP in their “all appropriate inquiry.”

72. DEP did NOT present any witnesses who could identify and authenticate the S&ME or the ATC reports and the author of DEP’s SIS did NOT testify. No DEP witness had personal knowledge. The ALJ could not rely on these reports. It was error for the ALJ to use hearsay evidence to supplement and explain hearsay evidence. The SIS relied almost entirely on “Previous Environmental Studies” performed 6 - 7 years earlier. It was not reliable.

73. There was no legal definition of an All Appropriate Inquiry when Germain purchased the property. The federal “all appropriate inquiry” standard cited by the ALJ was not yet in force. Germain purchased the property in May 2006. The standard didn’t come into effect until November 1, 2006.

74. Moreover, it was not required in this case because DEP had already **permanently** designated on its public access website that the facility was

“**CLOSED**” with “**No Contamination.**” The first step of any “all appropriate inquiry” is to check with DEP. If DEP has permanently “**CLOSED**” the site then the inquiry stops there. The public can rely on the “Environmental Professionals” at DEP and their determination that the facility complied with the assessment and remediation requirements of State and Federal law *before* closure. **Heckler**, *ibid*. The terms “**CLOSED**” and “Closure” have specific legal meaning. **40 C.F.R. 280.**

75. With regard to S&ME and ATC, reports “**presumably**” filed in a different county and with a different Department are NOT “reasonably ascertainable information.”

76. If DEP still feels that the Property must be assessed and remediated it may go after the true persons responsible: **Chevron** and Griner.

77. The Florida Legislature provided two avenues for owners to avoid assessment and remediation liability of contaminated facilities: the innocent purchaser defense and the third party defense pursuant to Florida Statute 376.308. The Legislature does NOT pass meaningless laws.

78. The Respondents did not cause or contribute to the polluting condition at the Property, they did not know of the alleged contamination at the time they purchased the Property and they engaged in good commercial practice by relying on the environmental professionals at the DEP in their “all appropriate inquiry.” They should not be held liable for assessment or remediation. Thank you.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief was formatted in 14 point, Times New Roman font in compliance with Rule 9.210 Florida Rules of Appellate Procedure.

/s/ Mark F. Germain

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to:
Bonnie.Malloy@DEP.State.FL.US, this 30th day of April, 2015.

/s/ Mark F. Germain

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