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Dept. of Environmental Protection
JUL 29 2011
Southwest District

July 27, 2011

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Ms Pamala Vazquez
Program Administrator
Florida Dept. of Environmental Protection
Southwest District
13051 North Telecom Parkway
Temple Terrace, FL 33637-0926

In Re: DRAFT CONSENT ORDER
OGC Case No.: 11-0878
January Environmental Services, Inc.
FLD 982 162 943
Polk County

Dear Ms Vazquez:

I am writing in my capacity as legal counsel to Mr. Cris A. January and January Environmental Services, Inc., in response to your letter Of June 23, 2011, and the draft Consent Order that accompanied that letter.

Mr. January appreciates the professionalism you and Ms Knauss have exercised in your dealings with him but feels that the proposed penalty in your draft Consent Order is spectacularly inconsistent with efforts by Governor Rick Scott to reduce unnecessary regulation and make Florida a more business-friendly state. More specifically, Mr. January directs the following additional comments

to your draft Consent Order:

The Florida Department of Environmental Protection ("FDEP") found [Consent Order at 4 a)]that January Environmental Services, Inc., ("Respondent") on or before December 20, 2010, was storing used oil for more than 35 days at its Bartow facility and did not have a used oil processor permit, in violation of s. 62-710.800(2), Florida Administrative Code ("F.A.C.") .

While the draft Consent Order does not specify a specific civil penalty for this alleged violation, your February 2, 2011, warning letter to Ms Loren January, Secretary of January Environmental Services, Inc., states that "In accordance with the United States Environmental Protection Agency's (EPA) RCRA Civil Penalty Policy of 2003, the penalties which would be assessed in this case are $40,500." The reference is clearly to the totality of civil penalties that the FDEP for all alleged violations at the Bartow facility, not just for the alleged s. 62-710.800(2), F.A.C. violation.

In a Penalty Computation Worksheet dated February 2, 2011, and signed by you, however, the alleged s. 62-710.800(2), F.A.C. violation is identified as having a major potential for harm and constituting a major deviation (presumably from a statutory or regulatory requirement), a combination which, with certain other factors, earned the Respondent a civil penalty of $39,000.00. It is with your categorization of this alleged violation as having a major potential for harm and constituting a major deviation that Mr. January takes issue.

The RCRA Civil Penalty Policy ("Policy") you cited in your February 2, 2011, letter to Ms January, provides significant guidance in determining gravity-based penalty amounts, which both I and Mr. January presume you have done in your draft Consent Order.

The Policy provides, at VI A., that gravity-based penalties should be determined by examining potential for harm and the extent of deviation from a statutory or regulatory requirement. It further provides that the factors to be considered in determining potential for harm are the risk of human or

environmental exposure to hazardous waste and/or hazardous constituents that may be posed by noncompliance, and the adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the RCRA program.

The Policy also provides, at VI A a, that where a violation involves the actual management of waste, a penalty should reflect the probability that the violation could have resulted in, or has resulted in a release of hazardous waste or constituents, or hazardous conditions posing a threat of exposure to hazardous waste or waste constituents.

In the Respondent's specific situation as to the alleged storage of used oil for more than 35 days without a permit, we are talking about used oil being stored in a stable vessel of unquestioned integrity. The likelihood of a release was extremely remote and, in fact, was at no time greater after 35 days of storage than it would have been after, say, three days of storage. There was no evidence of a release, there was no evidence of waste mismanagement, such as rusting drums or other vessels, and monitoring equipment and inspection procedures were never called into question.

Even if there was even a remote possibility of a release, which there was not, the quantity and toxicity of the waste at issue were minor, the likelihood of transport by way environmental media was de minimis and there were no substantial receptor populations in the area of the facility.

As to the adverse effect the Respondent's failure to have a used oil processor permit—or keeping the oil for more than 35 days-- might have on statutory or regulatory purposes of procedures for implementing RCRA programs, Mr. January's position is that the effect is also de minimis. He kept the used oil longer than 35 days because in the depressed, uncertain and volatile markets with which he had to deal in the days prior to the FDEP inspection, there was simply no place for him to ship it. He's going to get his permit, just as soon as the FDEP processes it. And he won't keep used oil longer than 35 days again.

Mr. January operates in several states one of the most heavily regulated environmental-related businesses extant. He is aware of the need for regulation and has consistently and to the best of his ability complied with such regulation. At the same time, he believes regulations and regulators need also to be sensitive to the exigencies and realities of the business world, much along the lines articulated—and being carried out—by the Executive Branch head of your agency, Governor Scott.

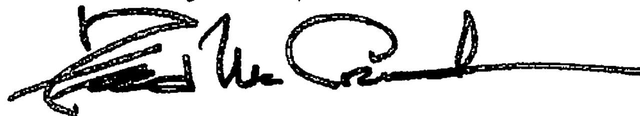
Specifically, Mr. January feels that both the Respondent's alleged s. 62-710.800(2) and s. 701.300(1)(a), F.A.C., violations posed or may have posed low or relatively low risks of exposure to humans or other environmental receptors to hazardous waste or constituents and that its action have or may have a small adverse effect on statutory or regulator purposes or procedures for implementing the RCRA program.

Accordingly, he requests that you redetermine the potential for harm and extent of deviation for both alleged violations to minor and recalculate the matrix ranges for both.

Mr. January also points out that the FDEP's Penalty Computation Worksheet of February 2, 2011, lists five alleged violations, the total penalty for which is $40,500.00. Your draft Consent Order lists only four alleged violations, yet the total penalty remains at $40,500.00.

Again, Mr. January appreciates your professionalism in meeting with him and discussing his issues at length. He wishes to comply with and carry out the corrective actions set forth in your draft Consent Order but requests that the penalty be set at $10,500, plus $300.000 in FDEP costs.

Sincerely,



Fred McCormack

cc: The Hon. Rick Scott
The Hon. Charles S. Dean, Sr.
The Hon. Trudi K. Williams
Herschel T. Vinyard, Jr.
Jeff Littlejohn
Gary Colecchio
Loren January
Cris January