STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NORTHWEST FLORIDA WATER MANAGEMENT DISTRICT,	)	
Petitioner,	)	
vs.	)	CASE NO. 94-4384
H. S. HARRELL, JR.,	)	
Respondent.	)	

RECOMMENDED ORDER

Notice was provided and on November 17, 1994, a formal hearing was held in this case. The hearing location was the Offices of the Division of Administrative Hearings in Tallahassee, Florida. Authority for conducting the hearing is set forth in Section 120.57(1), Florida Statutes. Charles C. Adams was the Hearing Officer.

APPEARANCES

For Petitioner: Gary J. Anton, Esquire
Stowell, Anton and Kraemer
Post Office Box 11059
Tallahassee, Florida 32302

For Respondent: No Appearance

STATEMENT OF ISSUES

Is Respondent responsible for alterations to a dam over which Petitioner has jurisdiction? Has Respondent performed these alterations without the benefit of a permit issued by Petitioner? Should Respondent be required to make changes to that structure?

PRELIMINARY STATEMENT

When the parties were unable to resolve their dispute concerning the administrative complaint/notice of violation and order issued by Petitioner against the Respondent, the case was referred to the Division of Administrative Hearings for formal hearing. That hearing was conducted on the aforementioned date.

Respondent did not attend the hearing and had communicated to counsel for the Petitioner on November 16, 1994, that he would not be attending the hearing. Nonetheless, given that the Petitioner was the burdened party as to proof of its case, it presented a case. In that presentation Petitioner called Richard Morgan, Jerry Sheppard, Lance Laird, and John Rittenour as witnesses, the latter as an interested party. Petitioner offered seven exhibits and they were admitted. Requests for admissions propounded from Petitioner to Respondent

which were not responded to were deemed admitted. Official recognition was made of Chapter 40A-4, Florida Administrative Code, as requested by Petitioner.

No transcript was ordered. Petitioner presented a proposed recommended order. Respondent did not. The fact finding proposed by Petitioner is commented on in an appendix to the recommended order.

FINDINGS OF FACT

1. One and one-half miles east of Crestview, Florida, which is in Okaloosa County, a dam has been constructed. The dam construction has formed an impoundment area thereby altering the course of a tributary to the Shoal River, an Outstanding Florida Water Body. Respondent contributed to the construction which formed the dam. He did so without benefit of a permit from Petitioner. No other person has obtained a permit from Petitioner for the dam construction.

2. Respondent is a resident of Crestview, Florida.

3. At present the impoundment of water created by the dam is more that 10 feet but less than 25 feet in height from the natural bed of the water course at the down stream tow of the barrier formed by the dam.

4. The work which has been done on the dam by the Respondent is based upon his belief that he is entitled to an easement at the stream crossing. The dam impoundment has no agricultural purpose.

5. John Rittenour claims ownership of the land at the stream crossing and takes issue with Respondent's belief that Respondent has an easement for that crossing. Mr. Rittenour did not authorize Respondent to do the work at the subject site nor was Mr. Rittenour responsible for performing work at the subject site independent of Respondent's activities.

6. There is no dispute concerning Respondent's ownership of property in the vicinity of the stream crossing.

7. Prior to March, 1990, Respondent had made certain changes at the subject site to maintain a vehicular crossing. The pre-March, 1990 changes were to a structure which used a culvert to allow the water in the stream to flow through the crossing. In addition Respondent was trying to create a water impoundment area behind that structure prior to March 1990. The nature of these activities was not such that the Petitioner had a basis for imposing the regulatory requirement that Respondent obtain a permit to conduct the alterations at the subject site.

8. In March, 1990, the dam at the subject site breached. As a consequence, other structures down stream also failed. Those structures belonged to Mr. Rittenour. The breach created conditions unsafe to the public.

9. In April, 1990, following the breach, Respondent reestablished the stream crossing. The work which he did created the present dam height which had been described.

10. The stream crossing provides local residents with access to their homes. There is another route to those homes, but its future availability is in question.

11. On July 30, 1993, Jerry Sheppard, Senior Field Representative for Petitioner, inspected the subject site. The findings that he made at that time are set forth in Petitioner's Exhibit No. 3. That Exhibit roughly describes the structure in question. In particular, it references the fact that the dam height is approximately 10.5 feet as observed through the form of measurement already described. The dam is 13 to 15 feet in depth. It's width is approximately 200 feet. It has horizontal culvert pipes to allow water flow through the dam. One pipe is 18 inches in circumference. The other pipe is 36 inches in circumference.

12. The inspection which Mr. Sheppard made on July 30, 1993, revealed that the changes to the structure following the breach in March, 1990, had increased the water impoundment area as to the landward extent of that water.

13. Mr. Sheppard was concerned with safety problems associated with the dam which he observed on July 30, 1993. He found the overall construction to be of poor quality. There were problems with vertical slopes on the dam faces, trees were observed to be on the slopes and the aggregate material used for construction was sandy in composition. All these conditions contributed to the substandard construction. Mr. Sheppard was also concerned about a change in the surface water volume that was created with the increase in the impoundment area. This could cause greater safety hazards in a future dam breach than had been occasioned by the March 1990 breach. The March experience released a lesser volume of water by comparison to the expected volume of water with a future breach.

14. Lance Laird, P.E., had accompanied Mr. Sheppard on the inspection at the subject site that was conducted on July 30, 1993. Mr. Laird is an expert in agricultural engineering and design of small dams. Mr. Laird is employed by Petitioner and was in its employ in 1993. Mr. Laird's observations concerning the dam that were made on July 30, 1993 are memorialized in a document which Mr. Laird prepared on August 2, 1993. That document is Petitioner's Exhibit No. 5. Pertinent to this case, Mr. Laird notes that the method of establishing the dam height was done by shooting the dam centerline at 50 foot intervals and the elevation of the tow by examining the elevation of the normal ground at station 1+75. Specifically, the dam crest was found to be at a height of 10.48 feet to 11.04 feet. Therefore, it was established that the maximum impounding capacity would be at 11.04 feet of dam height.

15. On September 7, 1993, Mr. Sheppard spoke with the Respondent. Respondent told Mr. Sheppard that the Respondent had an easement across the stream to allow access to property away from the stream. For that reason, Respondent told Mr. Sheppard that Respondent believed he could make alterations or repairs to the structure at the stream crossing that would be acceptable. Respondent also told Mr. Sheppard that the stream crossing structure was there before Respondent purchased property in the area and that Respondent had been responsible for making the repairs which are under consideration in this case. On this occasion Respondent told Mr. Sheppard that there were three or four mobile homes further down the lane from the stream crossing, in addition to one house site located in the area of the stream crossing. Respondent's Exhibit No. 4 is a memorandum concerning the telephone conversation which was conducted between Mr. Sheppard and the Respondent on September 7, 1993.

16. As described in the August 2, 1993 memorandum which reflected the findings on July 30, 1993, the road crossing was over a dam found at the perennial stream which goes under the roadway formed by the dam. As Mr. Laird observed, the effect of the two culverts is to back the water up to within 3

feet of the dam crest. A plywood stop-log is placed over the entrance of the 36 inch pipe that serves as a principal spillway. There is a plywood plug for the 18 inch pipe; however, it was not installed on July 30, 1993. On that date Messrs. Sheppard and Laird noted a washed out area that serves as the emergency spillway that was approximately 20 inches wide. When Mr. Laird made his inspection on July 30, 1993, he was of the opinion that the dam would not meet current engineering standards for construction of an earthen impoundment dam. In particular, he believed that the utilization of horizontal pipes and the history of failure of the structure were indications that the dam did not have the hydraulic capacity to meet the design storms that are anticipated for this area. The location of the 36 inch pipe was such that it was canterlevered out from the road fill by about 5 feet. The side slopes were from steep to vertical on the back slope. The upstream slopes were not found to be as steep.

17. In the August 2, 1993 report Mr. Laird expressed the opinion that the facility/dam needed to be modified to meet hydrological/hydraulic requirements and other construction standards for dams used as access roads. Mr. Laird specifically noted that a further dam breach would have adverse affect on Mr. Rittenour's property, and ponds which were down stream and possibly cause the failure of structures that Mr. Rittenour had put in place, all leading to the possibility of the release of sediments into the Shoal River.

18. On November 3, 1994, Mr. Laird returned to the subject site for further inspection. He rendered a report of that inspection on November 4, 1994. That report is found as Petitioner's Exhibit No. 7. In the course of the November 3, 1994 inspection Mr. Laird observed that the appearance of the dam was similar to that on July 30, 1993. The principal difference was that logs and debris were now present in the inlet and outlet ends of both of the culverts/pipes. Some of the logs were fairly large. One log was estimated to be 12 to 14 inches in diameter and 20 to 25 feet long. This log was at the outfall of the 36 inch pipe. The consequence of this debris in the areas of the two pipes was to restrict the hydraulic capacity of the system. This was made more significant because the horizontal pipes had inherent limitations on their hydraulic capacity. Under the circumstances it was imperative that the debris be removed. On this visit Mr. Laird also noted that the pipes were uncoated and rusting, thus limiting their life span. On this visit Mr. Laird noted that the emergency spillway had now become filled with sediments that had eroded from the road leading down the hillside to the dam site. Mr. Laird expressed a concern about the method of construction and the material used in that construction and the susceptibility of those fill materials to erode. In particular, Mr. Laird observed that the material was sandy and for that reason susceptible to erosion. Finally, Mr. Laird noted upon this visit that the sizing of the culverts had not been proven to be adequate when considering their intended function in the dam.

19. On November 15, 1993, Messrs. Morgan, Laird, Sheppard and Mitchell May met with the Respondent and his attorney at the subject site. The outcome of that meeting is memorialized in the memorandum from Mr. Morgan dated November 16, 1993, a copy of which is Petitioner's Exhibit No. 2 admitted into evidence. In the November 15, 1993 meeting, Respondent and his attorney were told about the various concerns which the Petitioner had about this dam consistent with the prior observations made by Petitioner's staff as described in this recommended order. Discussions were held concerning the means of correcting the problems. At this time Respondent indicated that he had been informed, by someone who was not identified, that the alternate route for residents in the area to gain access to their homes was being closed and that the stream crossing would then form the only means of ingress and egress to those properties. Respondent explained that he had spent $3,000 in improving the dam. Further he made

mention that he had originally sold 12.5 acres of property around the impoundment created by the dam and no longer had any interest in the property. Although no resolution was reached concerning the proper disposition of the problem created by the dam, Mr. Morgan noted in his November 16, 1993 memorandum that this safety hazard that had resulted from the impoundment of water at the dam site by virtue of the deficiencies in the dam construction must be corrected if the crossing was to be used as the sole access route into the residences which have been described.

20. On November 19, 1993, Mr. Laird prepared a memorandum in response to the request by Respondent's counsel through correspondence dated November 8, 1993, concerning the method of establishing Petitioner's jurisdiction over the dam pursuant to the dam height. The November 19, 1993 memorandum coincides with prior observations about the method to be employed in establishing that jurisdiction which are set forth in this recommended order. A copy of the memorandum is Petitioner's Exhibit No. 6. Petitioner's Exhibit No. 6 has a rough sketch and other calculations in support of the determination of the dam height.

21. Concerning Mr. Laird's testimony at hearing, he reiterated that the establishment of the dam height was through a measurement of the down stream site in which the elevation difference between the impounded water and down stream elevation at the stream bed were critical factors in determining the potential hazard should there be a further breach of the dam.

22. As established by Mr. Laird, proper methods of dam construction must be carried out in accordance with accepted engineering practices. In trying to determine acceptable engineering practices Mr. Laird relies on his experience as a professional engineer and expert in the design of small dams together a number of publications, to include publications from the Soil Conservation Services on design of dams, the U.S. Corps of Engineers and the Bureau of Land Reclamation.

23. As Mr. Laird described at hearing, the dam design is deficient in that it is not made of suitable materials. Those materials are sandy. This allows water to migrate through the dam and to saturate the dam, thereby making the dam more prone to failure. The slopes on the back side of the dame are so steep that they cannot be maintained. The dam is eroding and two gullies have formed extending up to the crest of the dam. There is a third pipe in the dam face which is 18 inches in diameter and it is rusting. This pipe was there before the dam breach in March, 1990. It was left in place when repairs were made following that breach. Its existence could increase the flow of water in the event of a failure of the dam or if this third pipe collapsed it could form a void in the dam face. The principal spillway for the present dam is created by the use of the newer pipes that were placed horizontally. The placement of those two pipes creates limited capacity for flow-through and their rusty condition creates limitations on the effective life of those pipes. Those pipes could not be relied upon to handle storm events. In anticipation of a storm event, the pipes are placed so high on the dam face that they could not be used to evacuate water to meet the contingency of an upcoming storm or flood event. This arrangement unlike a head gate or control device below the water surface, which would allow the evacuation of water to meet the upcoming contingency of a storm or flood event, is without utility. The placement of the present pipes at the dam site is so high that they cannot be relied upon to dewater in anticipation of such a contingency. As has been verified by observations of these pipes, horizontal pipes are prone to be clogged by debris. An appropriate spillway would have a means of protecting the spillway against clogging. The emergency spillway is inadequate in that it continues to be filled in from

erosion of the hill above the emergency spillway. On the dam surface, trees, weeds and other debris make it difficult for someone to perform an inspection of the dam condition, which is a necessary activity. Those same materials can penetrate the dam surface and cause erosion or in some instances if a tree were to fall and break the surface of the dam could cause further erosion. In summary, the dam does not meet generally accepted engineering standards for design nor comply with the requirements of safety for small dams as established by the opinion of Mr. Laird. The dam poses a safety hazard to people using the dam to cross the stream and for the down stream landowners should the dam breach as it did in March 1990.

24. Mr. Rittenour would not be opposed to having a stream crossing at the subject site to allow access to nearby properties. He is opposed to a dam at the site with its associated impoundment.

25. Under the circumstances the appropriate means of addressing the problem of the dam would be to remove the dam and its associated impoundment of water and replace that structure with a crossing which would allow vehicular traffic. This disposition is consistent with the order for corrective action. This would involve the safe removal of water behind the present dam structure and reduce the risk of sudden release of an increased volume of water from a future breach when contrasted to the 1990 breach. In this solution the spillway pipes would be lowered to an elevation at the natural level of the stream, thus the impoundment would be ended with the new structure which would allow vehicular traffic to cross the stream. A one to two foot fill would need to be placed over the pipes to maintain the crossing as a roadway. This would lower the crest of the structure to an elevation just above the stream bed. During the course of any construction, sediment barriers would need to be placed downstream and in areas where the construction was ongoing to prevent problems with sedimentation. Grass would need to be placed on any disturbed areas and on the slopes of the new structure. Alternatively, the entire structure could be removed with proper controls being placed to protect against sedimentation and erosion in the area in question.

26. Maintenance of the structure as a dam with its associated impoundment is not contemplated by this administrative action and would only be appropriate in the event that the dispute over the ownership of this site is resolved by informal settlement between Respondent and Mr. Rittenour or through litigation.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to Section 120.57(1), Florida Statutes.

28. Petitioner must prove the allegations set forth in the administrative complaint/notice of violation and order and provide proper legal support for its intended corrective action.

29. Section 373.119, Florida Statutes, grants authority to Petitioner to seek this administrative enforcement of the substantive provisions in that chapter and pursuant to regulations promulgated pursuant to that chapter.

30. Consistent with Section 373.171, Florida Statutes, Petitioner has established Chapter 40A-4, Florida Administrative Code, to effect the purposes of its jurisdiction over waters of the State of Florida, to include those waters at the subject site described in the fact finding.

31. The structure in question is a dam within the definitions set forth in Section 373.403(1), Florida Statutes. The water behind that structure is an impoundment as defined in Section 373.403(3), Florida Statutes.

32. Section 373.413, Florida Statutes, allows the Petitioner to require a permit or impose reasonable conditions deemed to be necessary to ensure that the construction or alteration of a dam or impoundment complies with Chapter 373, Part IV and any applicable rules promulgated pursuant to that part, and that the dam or impoundment will not harm the water resources of Petitioner beyond the point of construction or alteration of a dam or impoundment.

33. Petitioner is empowered to permit and impose reasonable conditions necessary to ensure the operation or maintenance of those areas in accordance with Section 373.416, Florida Statutes, and other provisions within Chapter 373, Part IV and rules promulgated pursuant to that part. The requirement for operation and maintenance permits is in the interest of the overall objectives of the Petitioner and protection against harm to the water resources of the Petitioner.

34. Section 373.423, Florida Statutes, empowers the Petitioner to inspect the site of any construction or alteration of a dam or impoundment to insure conformity with approved plans and specifications included in a permit.

35. Section 373.433, Florida Statutes, grants Petitioner the authority to declare a dam or impoundment which violates laws of the state or the standards of the Petitioner to be a public nuisance and to sue to enjoin the operation of the dam or impoundment.

36. When the Petitioner has completed an inspection of permitted dam or impoundment, as performed on a periodic basis, determinations may be made as to alternations or repairs necessary and the timing of those alterations and repairs, as needed.

37. Rule 40A-4.011, Florida Administrative Code, is designed to effect the water policies of the Petitioner, to include the requirement that permits be obtained to construct, alter, or abandon dams and impoundments. According to that rule Petitioner has the overall objective of insuring that dams and impoundments, as permitted, do not create hazardous conditions which might threaten lives or property and that the waters of the state are not depleted, restricted or otherwise impaired by artificial means without the benefit of a permit. The rule contemplates the correction of problems with unsafe dams or other works.

38. More specifically, Rule 40A-4.041, Florida Administrative Code, describes the need for permits related to the construction, alternation, abandonment or removal of a dam or impoundment. The dam in question and impoundment are contemplated by Rule 40A-4.041, Florida Administrative Code. To construct, alter, abandon or remove the dam or impoundment here, a permit would be necessary.

39. Rule 40A-4.461, Florida Administrative Code, creates the opportunity for the Petitioner to inspect the construction or alternation of a dam or impoundment promoted in accordance with a permit issued by Petitioner.

40. Rule 40A-4.471, Florida Administrative Code, allows the Petitioner to declare any dam or impoundment violative of standards, regulations, or orders of Petitioner or conditions of a permit, a public nuisance.

41. Rule 40A-4.481, Florida Administrative Code, allows the Petitioner to require alterations or repairs to be made within a time certain in association with permits issued for dams or impoundments and to employ remedial measures and at times emergency measures when the permittee fails to respond to the Petitioner's instructions concerning alternations or repairs to the dam or impoundment.

42. The dam and impoundment that Respondent created constitutes a public nuisance. The conditions at present present a threat to public safety and property. To alleviate the circumstances Respondent may apply for a permit which would allow the removal of the dam and impoundment and substitution of a roadway at the level of the stream bed.

RECOMMENDATION

Based upon consideration of the facts found and the conclusions of law reached, it is,

RECOMMENDED:

That a final order be entered which declares the dam and impoundment to be a public nuisance created by Respondent and informs the Respondent of the necessity to obtain a permit before removing the dam and impoundment and reestablishing the roadway at stream bed level.

DONE and ENTERED this 12th day of December, 1994, in Tallahassee, Florida.

CHARLES C. ADAMS
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of December, 1994.

APPENDIX

Petitioner's proposed facts are subordinate to the facts found in the recommended order.

COPIES FURNISHED:

Gary J. Anton, Esquire
Stowell, Anton and Kraemer
Post Office Box 11059
Tallahassee, FL 32302

H. S. Harrell
3153 Alpin Road
Crestview, FL 32536

Douglas Barr, Executive Director
Northwest Water Management District
Route One, Box 3100
Havana, FL 32333

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NORTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,

Petitioner,

vs. CASE NO. 94-4384

H. S. HARRELL, JR.,

Respondent.
_____/

FINAL ORDER

On December 12, 1994, Hearing Officer Charles C. Adams from the Division of Administrative Hearings submitted to Petitioner, the Northwest Florida Water Management District ("the District"), and to Respondent, H. S. Harrell, Jr. ("Mr. Harrell"), a Recommended Order, a copy of which is attached hereto as

"Exhibit A". The District filed an exception to the Recommended Order. The District's Governing Board also received comments from Mr. Harrell which, to the extent they disagreed with findings of the hearing officer, the Board treated as exceptions to the Recommended Order. All of the pleadings were timely filed and are a part of the record. This matter thereafter came before the District's Governing Board on January 26, 1995, for final agency action.

BACKGROUND

This matter arises out of a challenge by Respondent ("Mr. Harrell") to an Administrative complaint/Notice of Violation and Order issued by the District. Pursuant to that complaint, the District directed Mr. Harrell to take certain corrective action with respect to a dam and impoundment, also serving as an access road (hereinafter, "the project"), to which Mr. Harrell had made unpermitted improvements. A formal administrative hearing took place in Tallahassee on November 17, 1994. Mr. Harrell failed to appear at the hearing. The District proceeded to put on its case. Pursuant to a Recommended Order, the hearing officer recommended the District declare the project a nuisance and order Mr. Harrell to obtain a permit, remove the project, and reestablish the roadway at stream bed level.

RULING ON RESPONDENT'S EXCEPTIONS

By letter dated December 22, 1994, Mr. Harrell contradicted certain factual findings made by the hearing officer in the Recommended Order. Pursuant to Rule 40A-l.564, Florida Administrative Code, exceptions to findings of fact must make specific reference to those portions of the transcript which support the exception in order to be considered. Moreover, exceptions to findings of fact which are based upon facts not found by the hearing officer must be accompanied by nine copies of the complete transcript provided at the expense of the party filing the exceptions, or some lesser portion of the transcript if the parties so agree. Mr. Harrell's December 22, 1994 correspondence makes no reference to the transcript, nor has Mr. Harrell provided the District with any copies of the transcript. In addition, Section 120.57(1)(b)8, Florida Statutes, requires all findings of fact be based exclusively on the evidence of record and on matters officially recognized. Mr. Harrell's letter cited no evidence of record to support of his comments. Accordingly, the District cannot consider his "exceptions".

RULING ON PETITIONER'S EXCEPTIONS

A hearing officer's factual determinations cannot be overruled by an agency unless it can show that those determinations are not supported by competent substantial evidence. As explained by the court in Goss v. District School Board of St. John's county, 601 So.2d 1232 (Fla. 5th DCA 1992), the hearing officer's function is to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. Thus, the hearing officer is primarily responsible for purely factual determinations. An agency has principal responsibility, however, for the interpretation and application of statutes dealing with matters within the agency's regulatory jurisdiction. Florida Public Employees Council, v. Daniels, 19 Fla. L. Weekly D 2589 (1st DCA December 8, 1994). See also, University Community Hospital v. Department of Health and Rehabilitative Services, 610 So.2d 1342 (Fla. 1st DCA 1992).

The District filed an exception to the hearing officer's recommended application of Chapter 373, Florida statutes, and rules promulgated thereunder, as described above. Instead of the action recommended by the hearing officer, the District proposes to order Mr. Harrell to undertake specific corrective action, as forth in its proposed recommended order and its exception to the recommended order. Such corrective action would cure the project's current deficiencies. (paragraphs 23 and 25 of the Recommended Order.)

The Recommended Order does not include any findings or conclusions as to what benefit, if any, would result from the District's declaration of the project as a public nuisance. similarly, the Recommended Order includes no findings or conclusions as to what benefit, if any, would result from the District's requiring Mr. Harrell to obtain a permit before taking corrective measure as ordered by the District. The Recommended Order notes that the District has the authority to take such action, yet it provides no rationale for doing so. Because the regulation of dams and impoundments falls within the regulatory jurisdiction of the District, the District maintains primary responsibility for the application and interpretation of Chapter 373 and related rules. The District's exception is, therefore, granted.

ORDER

WHEREFORE, having considered the Recommended Order, the Exception thereto filed by the District, and having further reviewed the record of this proceeding and being otherwise fully advised in the premises:

NOW, THEREFORE, IT IS ORDERED that:

(1) The District's Exception to the Recommended Order is accepted, and accordingly, the Hearing Officer's recommended action is rejected.

(2) The Hearing Officer's Findings of Fact and Conclusions of Law as set forth in the Recommended Order, attached hereto as Exhibit A, are adopted.

(3) Within 30 days from the effective date of this order, Respondent must:

(i) lower the dam's two main pipes to stream level and place two feet of cover over the pipes;

(ii) remove the rusting pipe from the back of the dam;

(iii) lower the dam crest to two feet above the pipe;

(iv) remove trees and other debris from the dam;

(v) establish side slopes no steeper than three feet horizontal to one foot vertical.

Respondent shall notify the District 10 days prior to undertaking any work and shall obtain District approval of the methods to be used in completing the work. Before, during, and after performing any further work on the dam, Respondent must stabilize the area by using hay bales and filtration fences to prevent sedimentation from flowing downstream, and by seeding and mulching the dam slopes to prevent erosion.

(4) Respondent must adhere and abide to all the terms and conditions set forth herein.

(5) This Final Order shall become effective upon filing with the agency clerk.

DONE AND SO ORDERED this 26th day of January, 1995.

_____
Executive Director

Copies furnished by postage-paid, United States mail to:

Gary J. Anton, Esquire
Stowell, Anton & Kraemer
201 S. Monroe St., Suite 200
P.O. Box 11059
Tallahassee, Florida 32302

H.S. Harrell
3153 Alpin Road
Crestview, Florida 32536

Filed this 27th day of January, 1995.

NOTICE OF RIGHT TO APPEAL

This order constitutes final agency action You are notified that under the provisions of Section 120.68, Florida Statutes, a party adversely affected by final agency action may seek judicial review. In order to institute a proceeding for review, a Notice of Appeal pursuant to Rule 9.1110, Florida Rules of Appellate Procedure, must be filed with the Agency Clerk of the District, and a copy of the Notice of Appeal, together with the appeal filing fee, must be filed in the District Court of Appeal in the Appellate District where the agency maintains its headquarters or where a party resides. The Notice of Appeal must be filed within 30 days of the date this Final Order is filed with the Clerk of the District.

CERTIFICATE OF SERVICE
CASE NO. 94-001
FINAL ORDER

I HEREBY CERTIFY that a true and correct COPY of the foregoing Final Order and Exhibit A has been furnished to Mr. H. S. Harrell, Jr., 3153 Aplin Road, Crestview, Florida 32536 and Gary J. Anton, Esquire, Attorney for the Northwest Florida Water Management District, Stowell, Anton & Kraemer, P.O. Box 11059, Tallahassee, Florida 32302 by United States Mail, this 27th day of January, 1995.

Filed this 27th day of
January, 1995.

_____
Agency Clerk