STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

VINCENT R. D'ANTONI, JR.,

Petitioner, DOAH CASE NOS. 99-1916
99-2861

vs. OGC CASE NOS. 99-0161
99-0160

DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
and DAVID BOSTON

Respondents.
_____/

FINAL ORDER

I. Background

These consolidated cases involve an approval of proposed work by Respondent, David Boston (Boston), under a noticed general permit to fill 4,000 square feet of an isolated wetland to facilitate construction of a single family home (DOAH Case No. 992861, OGC Case No. 99-0160), an application by Boston for an environmental resource permit to construct 96 linear feet of riprap revetment with 3,500 square feet of fill behind the riprap revetment, and an application by Boston for a sovereign submerged lands authorization for a private dock of less than 1,000 square feet, all of which are located at a site located on the St. Johns River in Duval County, Florida (DOAH Case No. 99-1916, OGC Case No. 99-0161). Some of the work to fill in the isolated wetland has already been completed, but work has been suspended pending the outcome of this administrative proceeding. The dock is exempt from the requirements for a regulatory permit under section 403.813(2)(b) of the Florida Statutes and rule 40C-4.051(1 l)(g) of the Florida Administrative Code.[1] The St. Johns River is a Class III waterbody.

The Petitioner, Vincent R. D'Antoni, Jr. (D'Antoni), is an adjacent property owner. He claims that the fill in the isolated wetland on Boston's lot will cause flooding on D'Antoni's lot, and that the proposed dock will interfere with the use of his own dock.

A hearing on the consolidated cases was held on September 28, 1999, January 27, 2000, and February 21, 2000, before an administrative law judge (ALJ) with the Division of

Administrative Hearings (DOAH). On March 22, 2000, the ALJ submitted his Recommended Order to the Department of Environmental Protection (Department). The ALJ recommended that the Department grant the application for an environmental resource permit for the construction of the riprap revetment, and approve a sovereign submerged lands proprietary consent of use for the dock. The ALJ further recommended that the Department confirm that the filling in the isolated wetland for the construction of a single family home qualifies for a general permit under rule 62-341.475(1)(f), provided that a condition be added to the noticed general permit requiring Boston to install an underground culvert with a yard drain that would convey water from D'Antoni's lot to an area of cypress trees on the other side of Boston's lot. The purpose of the culvert is to maintain the drainage from D'Antoni's lot across Boston's lot that existed before any fill was placed.

No exceptions to the Recommended Order were timely filed. D'Antoni requested leave to file late exceptions. The request was denied by an order entered on April 21, 2000. A copy of the order denying the request is attached as Exhibit A. A copy of the Recommended Order is attached as Exhibit B.

Under chapter 373 of the Florida Statutes, I have jurisdiction to enter this final order on the application for the regulatory individual and noticed general environmental resource permits. Under rule 18-21.0051 of the Florida Administrative Code, I have delegated jurisdiction from the Board of Trustees of the Internal Improvement Trust Fund to enter this final order on the proprietary authorization to use sovereign submerged lands. For the reasons discussed in detail below, I concur in and accept the ALJ's recommendation, except as clarified in Part VI below.

As a preliminary matter, I note that when an ALJ's findings of fact are supported in the record by competent substantial evidence, I am bound by those findings and may neither reject them nor reweigh the evidence. See Dunham v. Highlands County School Board, 652 So.2d 894, 896 (Fla. 2d DCA 1995); Dietz v. Florida Unemployment Appeals Commission, 634 So.2d 272, 273 (Fla. 4th DCA 1994); Florida Department of Corrections v. Bradley, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987); Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); Sec. 120.57(1)(1), Fla. Stat. (1999). Nor may I rejudge the credibility of testimony. See Brown v. Criminal Justice Standards and Training Commission, 667 So 2d 977, 979 (Fla. 4th DCA 1996). However, in an area of law over which the Department has substantive jurisdiction, as long as I state with particularity the reasons for rejecting an ALJ's conclusion of law and find that my substituted conclusion is as reasonable, or more reasonable, I am not bound by the ALJ's conclusions of law.

Sec. 120.57(1)(1), Fla. Stat. (1999). See also, Harloff v. City of Sarasota, 575 So.2d 1324, 1328 (Fla. 2d DCA 1991), review denied, 583 So.2d 1035 (Fla. 1991).

II. Regulatory permit for placement of riprap and associated filling

The ALJ found that D'Antoni withdrew his objection to the regulatory permit for the riprap and associated filling of 3,500 square feet behind the riprap (Finding of Fact No. 3). This finding is supported in the record by competent substantial evidence (Transcript, February 21, 2000, at 11). Therefore, the regulatory permit for the riprap and associated filling is no longer at issue, and I accept the recommendation that the permit for the riprap and associated filling should be granted.

III. Proprietary approval for dock

As noted above, the dock is exempt from any requirement for a regulatory permit. However, Boston must still obtain any required proprietary approval to construct the dock on sovereign submerged lands. Sec. 403.813(2), Fla. Stat. The ALJ found that D'Antoni produced no evidence regarding the dock (Finding of Fact No. 3). After my review of the record, I concur with this finding. The ALJ also found that D'Antoni admitted that the dock will have no adverse environmental impacts (Finding of Fact No. 3; Response to DEP Request for Admission No. 5). Of course, Boston, as the applicant, has the burden of proof in establishing that the dock meets all the requirements for a proprietary approval. Florida Department of Transportation v. J.W.C. Co., 396 So.2d 778, 787-88 (Fla. 1st DCA 1981). I note that the record contains competent substantial evidence that the dock meets all proprietary requirements (Testimony of Michael Eaton, Transcript, January 27, 2000, at 17-18). Accordingly, the ALJ's finding of fact and conclusion of law that the proprietary authorization for the dock should be approved is supported in the record by competent substantial evidence. Therefore, I accept the recommendation that the proprietary authorization for construction of the dock on sovereign submerged lands be approved.

IV. Fill of isolated wet/and for construction of single family residence under noticed general permit 62-341.475(1)0

At the hearing, D'Antoni contended that the fill in the isolated wetland exceeded the 4,000 square feet allowed under rule 62-341.475(1)(f), and that the fill impeded the conveyance of a stream, river, or other water course in violation of the limiting condition in rule 62-341.475(2)(c). The ALJ found that the fill in the isolated wetland did not exceed 4,000 square

feet, and that it did not impede the conveyance of a stream, river, or other water course (Findings of Fact No. 12 and the finding in paragraph 24 that "there is no stream, river, or other watercourse within the meaning of DEP rules or statutes on the isolated wetland"). These findings are supported in the record by competent substantial evidence (Testimony of Eaton, Transcript, January 27, 2000, at 17-18). As noted above, an additional 3,500 square feet of fill was placed behind the riprap, but such fill was approved under the regulatory permit for placement of the riprap and is not relevant to the issue of whether the 4.000 square feet limitation under rule 62-341.475(1)(f) was exceeded. Accordingly, the placement of the fill in the isolated wetland complied with the limiting conditions of rules 62-341.475(1)(f)4 and 62-341.475(2)(c).

V. Imposing an additional condition on the Noticed General Permit

As noted above, the ALJ recommended that an additional condition be added to the noticed general permit authorization under rule 62-341.475(1)(f). Noticed general permits are not issued, but are established by rule. In general, a person wishing to utilize a noticed general permit is only required to provide the Department with a written notice and a description of the proposed work. Fla. Admin. Code R. 62-341.201(1) & 62-343.090(1). If the Department does not notify the applicant within 30 days that the activity may not be conducted under the noticed general permit, the applicant is free to commence the activity. Fla. Admin. Code R. 62-341.090(1)(d).[2]

In addition to the fact that all noticed general permits are established by rule, all general and specific conditions for the noticed general permits are also established by rule. See Fla. Admin. Code R. 62-341.215 (establishing general conditions for all noticed general environmental resource permits) and Fla. Admin. Code R. 62-341.475(1)(f) 1 through 4 and 62-341.475(2)-(5) (establishing specific limiting conditions for this noticed general permit). It is well established that an agency is bound by its substantive rules unless and until it repeals or amends them. See Cleveland Clinic v. Agency for Health Care Administration, 679 So.2d 1237, 1241-42 (Fla. 1st DCA 1996); Arbor Health Care Company v. Agency for Health Care Administration, 654 So.2d 1020, 1021 (Fla. 1st DCA 1995); Decarion v. Martinez, 537 So.2d 1083, 1084 (Fla. 1st DCA 1989). Accordingly, in general, the Department may not unilaterally add any specific or general limiting conditions to a noticed general permit over and above those established by the rule. In this case, however, the applicant did not file an exception to the ALJ's recommendation that the additional condition be required. When a party does not file exceptions to a recommended order, the

party is bound by the provisions of the recommended order. Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987).

I note that there is nothing in the record that specifies the location or design capacity of the underground culvert that the ALJ recommends. It is clear, however, that the ALJ is recommending that the underground culvert be designed to convey water from D'Antoni's lot to an area of cypress trees on the other side of Boston's lot with sufficient capacity to maintain the drainage from D'Antoni's lot across Boston's lot that existed before the fill was placed. I conclude that this is a fair and equitable condition that can be imposed in this case because Boston did not file exceptions to this recommendation of the ALJ.

VI. Clarification of the ALJ's reference to "non jurisdictional" wetlands

Paragraph No. 5 on page 6 of the Recommended Order states as follows:

> At the river end of the D'Antoni, Boston, and Henderson lots is an area of contiguous wetlands. Until 1995, DEP regulated those wetland areas and this prevented D'Antoni and Henderson from placing any fill in those areas. Under DEP's current wetland delineation rule, however, such areas are non jurisdictional, and any placement of fill at the river end is outside the purview of DEP's jurisdiction. (emphasis added).

Although the last sentence of paragraph 5 is characterized as a finding of fact, it is actually an erroneous conclusion of law in an area over which the Department has substantive jurisdiction. Whether a statement is a finding of fact or conclusion of law is not determined by how it is characterized in the recommended order. Rather, it is determined by the true nature and substance of the determination or ruling. See J.J. Taylor Companies, v. Department of Business and Professional Regulation, 724 So.2d 192, 193 (Fla. 1st DCA 1999); accord Goin v. Commission on Ethics, 658 So.2d 1131, 1138 (Fla. 1st DCA 1995); Battaglia Properties v. Land and Water Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1994). Therefore, as long as I state with particularity the reasons for rejecting an ALJ's conclusion of law and find that my substituted conclusion is as reasonable, or more reasonable, I am not bound by the ALJ's conclusions of law. Sec. 120.57(1)(1), Fla. Stat. (1999). See also, Harloff v. City of Sarasota, 575 So.2d 1324,

1328 (Fla. 2d DCA 1991), review denied, 583 So.2d 1035 (Fla. 1991).

Under the new methodology for delineation of wetlands ratified by the legislature in section 373.4211 of the Florida Statutes, the Department has jurisdiction over both contiguous and isolated wetlands. Secs. 373.4211 & 373.414, Fla. Stat. (1999); Fla. Admin. Code R. 62-340.3 I find that this substituted conclusion of law is as reasonable, or more reasonable, than the conclusion of the ALJ. Therefore, the last sentence of paragraph 5 of the Recommended Order is rejected. In so doing, I note that the erroneous conclusion of law in paragraph 5 the Recommended Order is harmless error in this case because it does not affect the validity of the ALJ's recommendations.

VII. Conclusion

D'Antoni withdrew his objection to the regulatory permit for the riprap and associated fill behind the riprap. Therefore, the regulatory permit for the riprap and associated fill is no longer at issue and the permit will be issued. D'Antoni presented no evidence regarding the dock, and admitted that the dock will have no adverse environmental impacts. The record contains competent substantial evidence that the dock meets all requirements for proprietary approval. Accordingly, the proprietary authorization for the dock will be approved. The fill in the isolated wetland for the construction of a single family residence meets all the requirements of rule 62-341.475. I accept the ALJ's recommendation that an additional condition be required that Boston construct an underground culvert with a yard drain to convey water from D'Antoni's lot to an area of cypress trees on the other side of the Boston's lot with sufficient design capacity and location to maintain the drainage from D'Antoni's lot across Boston's lot that existed before the fill was placed. This is a fair and equitable condition that may be required in this case because Boston did not file an exception to the ALJ's recommendation.

ACCORDINGLY IT IS ORDERED THAT:

1. The Recommended Order is adopted except as noted in Part VI of this order.

2. The application for an environmental resource permit for the construction of the riprap revetment and associated fill behind the riprap is granted in accordance with the Notice of Permit Issuance dated January 21, 1999, DEP File No. 16-147338-002-ES.

3. The proprietary consent of use to construct the dock on sovereign submerged lands is approved.

4. The request to use the regulatory noticed general permit under rule 62 341.475(1)(f) to fill the isolated wetland to construct a single family home is approved, subject to the condition that Boston construct an underground culvert with a yard drain to convey water from D'Antoni's lot to an area of cypress trees on the other side of Boston's lot with sufficient design capacity and location to maintain the drainage from D'Antoni's lot across Boston's lot that existed before the fill was placed.

DONE AND ORDERED this 4 day of May 2000.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

_____

DAVID B. STRUHS, Secretary
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3000

ENDNOTES

1/ Rule 40C-4.05(11)(g) has been adopted by reference by the Department under rule 62-330.200(2)(c) of the Florida Administrative Code.

2/ In the case of the notice general permit under rule 62-341.475(1)(f), the applicant may not commence work until the Department has provided written notice that the applicant qualifies for the general permit. Fla. Admin. Code R. 62-341.475(3).

3/ An exception exists within the geographical territory of the Northwest Florida Water Management District where, because of the provisions of section 373.4145, the Department lacks jurisdiction over isolated wetlands.

NOTICE 0F RIGHTS

Any party to this proceeding has the right to seek judicial review of the final order pursuant to section 120.68 of the Florida Statutes, by the filing of a notice of appeal pursuant to rule 9.110 of the 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.

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was mailed to the following person on this 5th day of May 2000.

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The Honorable Donald R. Alexander
Administrative Law Judge
Division of Administrative Hearings
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STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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Exhibit A

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

VINCENT R. D'ANTONI, JR.,

Petitioner, DOAH CASE NOS. 99-1916
99-2861

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION, and DAVID BOSTON

Respondents.
_____/

ORDER DENYING LEAVE TO FILE LATE EXCEPTIONS

On March 22, 2000, the ALJ submitted his recommended order in these consolidated cases to the Department of Environmental Protection (Department). Under section 120.57(1)(k) of the Florida Statutes and rule 28-106.217 of the Florida Administrative Code, the deadline for parties to file exceptions to the recommended order vas April 6, 2000. On April 13, 2000, D'Antoni transmitted by facsimile to the Department's counsel a letter dated April 12, 2000, requesting leave to file late exceptions. The request did not include any proposed exceptions, and as of the date of this order none have been received by the Department. As excusable neglect for not timely filing exceptions, D'Antoni states that the administrative law judge said he had thirty days to file exceptions, and that he didn't have time to prepare exceptions because he had been in Texas the last wee}; of March and the first week of April.

The time period for filing exceptions to recommended orders is not jurisdictional and the Department may consider late filed exceptions if the party filing the exceptions shows excusable neglect in failing to timely file the exceptions. Hamilton County Board of County Commissioners v. Department of Environmental Regulation, 587 So.2d 1378 (Fla. 1st DCA 1991). In ruling on D'Antoni's request to file late exceptions, I note that the recommended order at page 16 clearly states that any except-ions to the recommended order must be filed with the Department within 15 days from the date of the recommended order. D'Antoni's request for leave to file late exceptions does not claim that he did not timely receive the recommended order. I

further note that D'Antoni has not cited to the record in support of his statement that the administrative law judge told him that he had thirty days to file exceptions. Neither has D'Antoni included an affidavit or other sworn statement in his request for leave to file late exceptions.

A determination that excusable neglect exists is at least partially based on a factual determination, and cannot be based solely on a motion. "A party . . . must set forth facts explaining or justifying the mistake or inadvertence by affidavit or of her sworn statement." B.C, Builders supply Co. v. Maldonado, 405 So 2d 1345, 1368 (Fla. 3d DCA 1981) (emphasis added). See also Schauer v. Coleman, 639 So.2d 637, 638 (Fla. 2nd DCA 1994); SuperAmerica of Florida v. Department of Environmental Protection, 18 FALR 2029, 2034 (DEP 1996). A party appearing pro se is still required to establish excusable neglect. See generally Florida Specialized Carriers, Inc. v. Tierra Construction Co., 632 So.2d 282 (Fla. 5th DCA]994) (excusable neglect to set aside a default judgment); Robinson v. City of Tampa, 573 So.2d 1024 (Fla. 2nd DCA 1991) (excusable neglect to set aside a default judgment). For all of the above reasons, D'Antoni's request for leave to file late exceptions is denied.

ACCORDINGLY IT IS ORDERED THAT:

D'Antoni's request for leave to file late exceptions is DENIED.

DONE AND ORDERED this 21 day of April 2000.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

_____
DAVID B. STRUHS, Secretary
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3000

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of-the foregoing was mailed to the following persons on this 21 day of April 2000.

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Exhibit B

The DOAH Recommended Order, is not attached.