STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Petitioner,	)	
vs.	)	**OGC CASE NO. 00-0696**
	)	**DOAH CASE NO. 00-2391**
WILLIE R. GAINEY,	)	
Respondent.	)	

FINAL ORDER

An administrative law judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP") in this formal administrative proceeding. A copy of the Recommended Order is attached hereto as Exhibit A. The Recommended Order indicates that copies were served upon counsel for DEP and upon the *pro se* Respondent, William R. Gainey ("Respondent"). Exceptions to the Recommended Order were filed on behalf of DEP and by the Respondent. Responses were filed on behalf of DEP to the Respondent's Exceptions. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

On March 28, 2000, DEP filed a Notice of Violation ("NOV") and Orders for Corrective Action asserting that an unpermitted earthen dam had been constructed

across an unknown creek in jurisdictional wetlands located on property owned by the Respondent in Bay County, Florida. It is undisputed that the earthen dam was constructed in late 1999 or in January of 2000 by a relative of the Respondent. The Respondent timely challenged the NOV and Orders for Corrective Action, and the matter was referred to DOAH for a formal administrative hearing. Administrative Law Judge, Claude B. Arrington ("ALJ"), was assigned to preside over the case. A formal hearing was held by the ALJ on February 15, 2001. The relief sought by DEP is that the Respondent be ordered to remove the earthen dam and to pay the sum of $750.00 for costs incurred by DEP during the investigative phase of this matter.

RECOMMENDED ORDER

The Recommended Order now on review was entered by the ALJ on March 29, 2001. Included in the Recommended Order are legal conclusions by the ALJ that:

1. The subject unnamed creek on Respondent's property constitutes "surface water" and "waters of the state" within the meaning of sections 373.019(16) and (17), Florida Statutes.

2. Construction of the earthen dam constitutes "filling" in waters of the state within the meaning of section 373.403(14), Florida Statutes, and Rule 62-312.020(11), Florida Administrative Code.

3. The subject area is a historical wetland, regardless of any prior mosquito control dredging activities therein. Thus, § 373.4211(25), Florida Statutes, does not exempt the construction of the earthen dam from the permitting requirements of Chapter 62-312, Florida Administrative Code.[1]

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[1] The ALJ's citation to subsection 373.4211(25), F.S., referencing Rule 17-340.750, F.A.C., is misplaced. Section 373.4145, F.S., regulating dredge and fill permitting within the geographical jurisdiction of the NWFWMD, directs the agencies to only apply Rules 17-340.100 through 17-340.600 F.A.C. (now renumbered as Rules 62-340.100 through 62-340.600, F.A.C.). The correct citation to the current mosquito control exception to regulatory jurisdiction of DEP in the geographical jurisdiction of the NWFWMD is Rule 62-312.030(2)(g), F.A.C.

4. The Respondent violated the provisions of §§ 373.430(1)(b) and 403.161(1)(b), Florida Statutes, by failing to obtain a permit from DEP prior to the construction of the earthen dam.

5. DEP has the authority to require the Respondent to remove the earthen dam from the subject site pursuant to the provisions of §§ 403.061(8) and 403.121, Florida Statutes.

The ALJ concluded, however, that DEP failed to establish that it was entitled to the reasonable costs and expenses of investigating this matter. The ALJ ultimately recommended that DEP "enter a final order adopting the findings and conclusions herein and requiring the Respondent to remove the remaining portions of the earthen dam by non-mechanical means."

RULINGS ON DEP'S EXCEPTIONS

Exception No. 1

DEP's first Exception objects to Conclusion of Law No. 18 of the Recommended Order wherein the ALJ concludes that the provisions of subsection 373.129(6), Florida Statutes, do not apply to administrative proceedings. DEP contends that administrative proceedings are expressly incorporated by reference into § 373.129 pursuant to the provisions of subsection 373.129(7).

Section 373.129, Florida Statutes, is a statutory provision within the scope of DEP's regulatory duties and powers. Therefore, DEP has the primary responsibility for the interpretation of this statute. See Public Employees Relations Comm. v. Dade County Police Benevolent Assn., 467 So.2d 987, 989 (Fla. 1985); Suddath Van Lines v. Dept. of Environmental Protection, 668 So.2d 209, 213 (Fla. 1st DCA 1996); Florida Public Employee Council, 79 v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Section 373.129(7) gives DEP the authority to enforce the provisions of part IV of Chapter 373, Florida Statutes, "in the same manner and to the same extent as provided in ss. 373.430, 403.121(1) and (2), 403.131, 403.141 and 403.161" (emphasis supplied). Section 403.121(2), specifically incorporated by reference into § 373.129 pursuant to the provisions of subsection 373.129(7), deals exclusively with administrative remedies given to DEP. Section 403.121(2) provides in pertinent part that DEP shall initiate an administrative proceeding by "serving a written notice of violation on the alleged violator by certified mail," which was done in this case. Furthermore, the Respondent timely requested a formal administrative hearing challenging this notice of violation, which is also authorized by section 403.121(2).

The ALJ's legal conclusion that § 373.129(6) only applies to judicial proceedings would thus render meaningless the related provisions of § 373.129(7) expressly incorporating by reference the "administrative proceedings" provisions of § 403.121(2). It is a fundamental rule of statutory interpretation that the Legislature is not presumed to have enacted legislation that has no purpose, and statutory provisions should thus be read in a manner to not render a portion thereof meaningless. See, e.g., Unruh v. State, 669 So.2d 242, 245 (Fla. 1996). A related rule of statutory interpretation is that full effect should be given to all statutory provisions by construing related provisions in harmony with one another. Forsythe v. Longboat Key Beach Erosion Control District, 604 So.2d 452, 455 (Fla. 1992).

I conclude that the portion of § 373. 129(6) authorizing the recovery of "investigative costs" applies to both court actions and administrative proceedings by virtue of the related provisions of § 373. 129(7) incorporating by reference the

provisions of § 403.121(2). Accordingly, DEP's Exception No. 1 is granted and the ALJ's Conclusion of Law No. 18 is rejected.[2]

Exception No. 2

DEP's second Exception objects to Conclusion of Law No. 20, wherein the ALJ concluded that DEP "presented no evidence that the manner by which Mr. Keisker computed Petitioner's expenses is authorized by statute or rule or that such computation represents Petitioner's reasonable costs and expenses within the meaning of Section 403.141(1), Florida Statutes." Section 403.141 is also a statute within the scope of DEP's regulatory duties and powers, and this agency has the primary responsibility of interpreting the provisions of this statute (see the cases cited above). I conclude that the investigative costs sought by DEP in this case are also authorized pursuant to the portion of § 403.141(1) providing that "whoever commits a violation specified in s. 403.161(1) is liable to the state for . . . reasonable costs and expenses of the state in tracing the source of the discharge, in controlling and abating the source and pollutants, and in restoring the air, waters, and property."

The case of Department of Environmental Protection v. Mertens, 18 FALR 468 (Fla. DEP 1996) involved a similar administrative enforcement action where DEP filed a notice of corrective action against Mertens arising out of dredge and fill activities in state waters without an appropriate permit. In the Mertens final order, DEP adopted the DOAH recommended order containing legal conclusions of an administrative law judge that DEP was entitled to the proposed corrective action and that DEP's costs and expenses of tracing and abating the violation and pollution source were also

[2] I conclude that my legal conclusion is more reasonable than the ALJ's legal conclusion which was rejected. See § 120.57(l), F.S.

recoverable pursuant to § 403.141. Id. at 474. I find the Mertens administrative decision to be compelling precedent for the proposition that § 403.141(1) also provides statutory authority for the recovery by DEP of its "reasonable costs and expenses" incurred in the course of tracing, controlling, and abating the source of pollution in this case.

I also agree with DEP's contention that the ALJ erred by concluding that DEP "failed to establish its reasonable costs and expenses of investigating this matter." DEP correctly notes in its Exception that this conclusion is inconsistent with the ALJ's unchallenged Finding of Fact No. 9, which reads as follows:

> Mr. Kaiser testified that he calculated Petitioner's investigative costs based on the amount of time he expended in investigating this matter multiplied by his hourly rate of pay. In calculating his hourly rate of pay, he took his annual salary and added to that 52 percent for fringe benefits. He then divided that sum by 2000, which represents 50 work weeks of 40 hours per week. He used 50 weeks to calculate the hourly rate to adjust for two weeks of paid vacation. Based on his calculations, Mr. Keiser testified that Petitioner [DEP] incurred costs and expenses in excess of $750.00 during its investigation of this matter.

DEP also relies on its Exhibit No. 4 admitted into evidence at the DOAH final hearing as additional evidence supporting the reasonableness of its costs and expenses. DEP Exhibit No. 4 is a written summary detailing the calculation of DEP's costs and expenses incurred during the investigative stage of this case.

I am of the view that the ALJ's unchallenged Finding of Fact No. 9 and DEP's Exhibit No. 4 constitute substantial competent evidence of record supporting the conclusion that DEP established at the DOAH final hearing that it incurred reasonable investigative costs of $750.00 in the course of tracing, controlling, and abating the source of pollution in this case.

Based on the above rulings, DEP's Exception No.2 is granted and the ALJ's Conclusion of Law No. 20 is rejected.[3]

Exception No. 3

DEP's third and final Exception does not object to any findings or conclusions of the ALJ in the Recommended Order on review. Instead, DEP objects to the ALJ's failure to set a specific time limit in his Recommended Order for removal of the remaining portions of the earthen dam by non-mechanical means. In this case, however, a specific time limitation of 30 days for completion of the removal of the earthen dam is set forth in DEP's NOV and Orders for Corrective Action, which are affirmed in this Final Order. Therefore, I find no reversible error on the part of the ALJ in not reiterating this 30 day time limitation in the body of the Recommended Order. DEP's Exception No. 3 is thus denied.

RULINGS ON RESPONDENT'S EXCEPTIONS

Exception No. 1

The Respondent's first Exception alleges that DEP's actions in this case constitute a violation of § 298.23, Florida Statutes, by taking the Respondent's land without compensation. However, the Respondent's reliance on § 298.23 in this administrative proceeding is misplaced. Section 298.23 applies to actions by water management districts and drainage districts in connection with acquiring rights-of-way over private properties. The subject administrative proceeding arises out of a notice of violation and related order issued by DEP seeking corrective action and damages against the Respondent pursuant to §§ 373.129(6), 373.430(1), 403. 121(2),

[3] I conclude that my legal conclusion is more reasonable than the ALJ's legal conclusion which was rejected. See § 120.57(l), F.S.

403.141(1), and 403.161(1), Florida Statutes. Accordingly, the provisions of § 298.23 are not implicated in this case.

Moreover, claims of governmental agencies taking private lands without just compensation to the owners raise real property issues that are beyond the jurisdiction of administrative proceedings. See Bowen v. Dept. of Environmental Regulation, 448 So.2d 566, 568 (Fla. 2d DCA 1984) (concluding that inverse condemnation actions cannot be adjudicated by administrative agencies), aff'd, 472 So.2d 460 (Fla. 1985). The Brown decision has been cited as controlling precedent in an agency final order entered in the administrative case of Batell v. Dept. of Environmental Regulation, 14 FALR 1507, 1511 (Fla. DER 1992). Accordingly, Respondent's Exception 1 is denied.

Exception Nos. 2 A and 2 B

These two Exceptions object to portions of the ALJ's Finding of Fact No. 3. Exception 2A objects to the ALJ finding that DEP's employee, Victor Keisker, "met informally with Respondent at Respondent's request." Exception 2B objects to the ALJ's finding that Mr. Keisker "took soil samples, surveyed the plant life of the area, [and that] his visit was not intended to be an official determination that the subject property was within the Petitioner's jurisdiction." I conclude that the challenged findings of fact are based on reasonable inferences drawn by the ALJ from the testimony presented at the DOAH final hearing by Mr. Keisker.

I further conclude that Respondent's Exception 2B, essentially disagreeing with the weight given by the ALJ to the testimony of Mr. Keisker, raises an evidentiary issue within the province of the ALJ as the "fact-finder" in this administrative proceeding. See Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA

1997); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985) (concluding that a reviewing agency may not reweigh the evidence presented at a formal administrative hearing or judge the credibility of witnesses). I decline to substitute my judgment for that of the ALJ as to the weight to be given to the testimony of Mr. Keisker.

In any event, I agree with the observation set forth in DEP's Response to Exceptions that none of the ALJ's challenged factual findings in numbered paragraph 3 of the Recommended Order affect the ultimate disposition of this case. The Respondent's Exceptions 2A and 2B are thus denied.

Exception No. 2C

The Respondent's Exception 2C objects to the portion of the ALJ's Finding of Fact No. 5 stating that the "greater weight of the credible, competent evidence established that Respondent's property contains an unnamed creek that is located in an area of historically natural wetlands that was likely excavated in the 1970's by the local Mosquito Control District." The Respondent essentially contends that the ALJ's finding that the subject area was likely excavated by the local Mosquito Control District means that the area cannot contain a "creek" or other waterbody within the permitting jurisdiction of DEP.

Nevertheless, the ALJ found in his Finding of Fact No. 5 that the subject area consists of "natural wetlands [that] drain and connect into Rogers Pond and Calloway Bayou, which are Class III waters of the State of Florida." The ALJ observed in his related Conclusion of Law No. 14 that "[a]lthough there was evidence that the local Mosquito Control District had excavated the subject area, the subject area is a historical

wetland that was not created by the mosquito control activities." The quoted portions of the ALJ's Finding of Fact No. 5 and Conclusion of Law No. 14 appear to be amply supported by the expert testimony at the DOAH final hearing of Victor Keisker, Jeffery Rabinowitz, and James Douglas Gilmore, Jr. The Respondent's own witness, Mr. Gilmore, even testified that he was familiar with DEP's rules on wetlands and thought that the subject area was "wetlands" under DEP's rules (Tr., Vol. II, p. 221).[4]

The ALJ's crucial legal conclusion that the earthen dam is located in an existing wetlands area not created by mosquito control activities is adopted in this Final Order. Therefore, the Respondent's suggestion that DEP does not have regulatory jurisdiction over the site of the earthen dam because it is located in a "ditch" excavated in the course of mosquito control activities is without merit and is rejected. I thus conclude that the subject wetlands are not excepted from DEP's regulatory jurisdiction under Rule 62-312.030(2)(g), Florida Administrative Code.

In view of the above rulings, Respondent's Exception 2C is denied.

Exception No. 3

The Respondent's final Exception essentially repeats his prior argument that the subject wetlands are not within DEP's regulatory jurisdiction because the subject earthen dam is located in a mosquito control ditch, rather than in a natural creek or stream. The Respondent also again raises his prior contention that his property has been taken without any compensation. These arguments have been rejected in the

[4] "Wetlands," over which DEP has permitting jurisdiction, are defined in pertinent part by statute and rule to mean "those areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils." See § 373.019(22), F.S., and Rule 62-340.200(19), F.A.C.

above rulings denying the Respondent's Exception Nos. 1 and 2C.

I concur with and adopt in this Final Order the ALJ's key conclusions that the earthen dam at issue in this case is located in an existing wetlands within DEP's regulatory jurisdiction, and that construction of this earthen dam was an activity requiring a dredge and fill permit from this agency. I also concur with the ALJ's ruling that the Respondent's allegations that the Florida Dept. of Transportation, Bay County, and the City of Callaway have infringed on his property rights due to the subject area being impacted by drainage from a road right-of-way raise real property "taking" issues beyond the jurisdiction of this administrative proceeding.

Based on the matters set forth herein and in the prior rulings above, the Respondent's Exception No. 3 is denied.

CONCLUSION

Having reviewed the Recommended Order and other pertinent matters of record, and being otherwise duly advised, it is ORDERED that:

A. The Recommended Order, as modified above, is adopted and incorporated by reference herein.

B. DEP's Notice of Violation and Orders For Corrective Action issued to Respondent on March 28, 2000 are hereby affirmed, and Respondent is directed to comply with the terms thereof.

C. Within 30 days of the effective date of this Final Order, the Respondent shall complete the removal by non-mechanical means of the remaining portions of the earthen dam at issue in this case.

D. Within 30 days of the effective date of this Final Order, the Respondent shall pay to DEP the sum of $750.00 for its investigative expenses incurred in the course of tracing, controlling, and abating the source of pollution in this case. Payment shall be made in the form of a cashier's check, certified check, or money order made payable to the "Florida Department of Environmental Protection."

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 22 day of June, 2001, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

DAVID B. STRUHS
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.

Chapman 6/22/01

CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

Willie R. Gainey
833 West Pierson Drive
Lynn Haven, FL 32444

Ann Cole, Clerk and
Claude B. Arrington, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Lynette Ciardulli, Esquire
Ashley D. Foster, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 25th day of June, 2001.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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