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DIVISION OF ADMINISTRATIVE HEARINGS

**STATE OF FLORIDA**
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**STANLEY DOMINICK, VINCE EASEVOLI, KATHERINE EASEVOLI, JOHN EASEVOLI, PAULA EASEVOLI, TOM HODGES, ELAINE HODGES, HANY HAROUN, CHRISTINE HAROUN, MARTHA SCOTT, and MARIANNE DELFINO,**

**Petitioners,**

**vs.**

**LELAND EGLAND and DEPARTMENT OF ENVIRONMENTAL PROTECTION,**

**Respondents.**

AT

**OGC CASE NO. 01-0606**
**DOAH CASE NO. 01-1540**

JLJ-Closed

## 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 thereof were served upon counsel for Petitioners, Stanley Dominick, Vince Easevoli, Katherine Easevoli, John Easevoli, Paula Easevoli, Tom Hodges, Elaine Hodges, Hany Haroun, Christine Haruoun, Martha Scott, and Marianne Delfino (collectively referred to as "Petitioners"), and counsel for the Co-Respondent, Leland Egland ("Egland"). Exceptions to the Recommended Order and a Motion to view Video Tape were filed on behalf of the Petitioners. The Petitioners also filed a Request for Oral Argument in connection with their Exceptions to Recommended Order. A

Response in opposition to the Petitioners' Exceptions was subsequently filed on behalf of DEP. The matter is now before the Secretary of DEP for final agency action.

## BACKGROUND

The issue in this case is whether Egland is entitled to an environmental resource permit from DEP to restore a mangrove slough in the Florida Keys. The restoration project includes the filling of an illegally dredged channel and the planting of additional mangrove trees in the slough. The site of the proposed restoration project is between Florida Bay and a formerly "land-locked" lake or pond ("South Lake") on Key Largo. Egland's residential property on Key Largo includes a "southerly contiguous 50 feet" where the mangrove slough was illegally dredged.

At some undesignated point in time, hand tools were used to deepen the mangrove slough in question and to trim mangrove trees without a permit being issued by DEP or by any other regulatory agency. The illegal dredging and trimming enabled small boats to pass through this portion of the mangrove slough. This area of the mangrove slough was further deepened by "prop-dredging" from boat traffic.

In 1998, Egland received a Cease and Desist Order from the Army Corps of Engineers("ACOE") accusing him of illegally dredging in his "southerly contiguous 50 feet." This Order from the ACOE directed Egland to restore the mangrove slough to its previous condition. The U.S. Environmental Protection Agency ("EPA") also notified Egland that he could be liable for monetary civil penalties if he refused to comply with the Cease and Desist Order. The ACOE and the EPA also informed Egland that he might have to obtain a permit from DEP to be authorized to fill the dredged channel.

In response to these actions of the ACOE and EPA, Egland filed an application with DEP to restore the dredged channel with fill and rip-rap. In April of 2001, DEP's South District Office executed a notice of intent to issue an Environmental Resource Permit ("Permit") to Egland. The Permit authorizes Egland to restore the illegally dredged channel using approximately 120 cubic yards of fill material. The size of the fill area would be 102 feet long by 12 feet wide by 2.5 feet deep. The Permit also requires Egland to plant eighty (80) red mangrove trees in the affected area of the slough.

The Petitioners then filed a timely Petition for Administrative Hearing ("Petition") challenging DEP's notice of intent to issue the Permit to Egland. The Petitioners also filed a Motion to Abate based on a pending state circuit court complaint for declaratory and injunctive relief to establish Petitioners' rights in and to the project area. DEP subsequently referred the Petition and Motion to Abate to DOAH and Administrative Law Judge, J. Lawrence Johnston ("ALJ"), was assigned to the case. The circuit court case filed by the Petitioners was not resolved resulting in a final hearing being held by the ALJ in this administrative proceeding on July 11-12, 2002.

## RECOMMENDED ORDER

The Recommended Order now on administrative review was entered by the ALJ on November 25, 2002. The Recommended Order includes the following unchallenged findings and conclusions of the ALJ:

> 1. Egland provided reasonable assurance that the proposed filling of the illegally dug channel would not degrade the water quality of Florida Bay, an "Outstanding Florida Water."[1] To the contrary, Egland's proposed restoration project will likely improve the water quality of Florida Bay. (FOF No. 25; COL Nos. 35)

[1] The ALJ did not make a factual finding in his Recommended Order that Egland was involved in this illegal activity.

2. The illegally dredged channel is an "artificial waterbody" and is not a part of the Florida Keys Outstanding Florida Waters. See Rule 62-302.700(9)(i)13.c, F.A.C. Also, the proposed restoration of the channel will not violate any water quality standards in the channel area or in South Lake. (COL Nos. 36, 39)

In his Finding of Fact No. 23, the ALJ also found that Egland provided reasonable assurance that the proposed restoration of the illegally dug channel will not adversely affect manatees or their habitats. This finding of fact of the ALJ, relating to manatees or their habitats, was the primary basis of the Petitioners' Exceptions to Recommended Order.

## RULINGS ON THE PETITIONERS' MOTIONS

The Petitioners' Motion to View Video Tape is granted, and the video tape admitted into evidence as Petitioners' Exhibit 12 was viewed in the course of preparing this Final Order. The Petitioners' Motion for Oral argument is denied. There are no provisions in the Administrative Procedure Act or the Uniform Rules authorizing a reviewing agency to hold a hearing to allow oral argument on a party's Exceptions to Recommended Order. See § 120.57(1)(k), Fla. Stat.; Rule 28-106.217, F.A.C. In addition, the short time period allowed for the entry of an agency final order after exceptions to a recommended order and responses to the exceptions are filed do not facilitate the scheduling of oral argument on a party's exceptions.[2]

## RULINGS ON THE PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

### Preface

Prior to ruling on the Petitioners' Exceptions, it is appropriate to summarize the standards of administrative review of DOAH recommended orders by a state agency.

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[2] DEP's Response to Petitioners' Exceptions was timely filed on December 19, 2002. Pursuant to § 120.60(1), Fla. Stat., a Final Order must be entered in this case no later than January 9, 2003 (45 days after the ALJ submitted his Recommended Order).

Subsection 120.57(1)(l), Fla. Stat., authorizes an agency to reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules over which the agency "has substantive jurisdiction." However, subsection 120.57(1)(l) prohibits an agency from rejecting or modifying the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." Accord Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Wash & Dry Vending Co. v. Dept. of Business Regulation, 429 So.2d 790 (Fla. 3d DCA 1983).

A reviewing agency may not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Maynard v. Unemployment Appeals Commission, 609 So.2d 143, 145 (Fla. 4th DCA 1992). Such matters raise evidentiary issues within the province of the administrative law judges, as the triers of the facts. Heifitz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); Wash & Dry Vending Co., 429 So.2d at 792.

First Exception

The Petitioners' first unnumbered Exception objects to Finding of Fact No. 23, which closes with the ALJ's statement that "Egland provided reasonable assurance that his proposed restoration project will not harm or adversely affect manatees or their habitats."[3] Although designated as one the ALJ's "Findings of Fact," I am of the view

[3] On page 7 of their Exceptions, the Petitioners' erroneously cite to the ALJ's Finding of Fact No. 10 as the source of this statement relating to manatees and their habitats.

that this challenged statement actually constitutes a mixed assertion of fact and law involving an interpretation by the ALJ of the "public interest" criteria of § 373.414(1)(a), Fla. Stat., in light of his related factual findings.

The ultimate determination of whether a permit applicant has provided reasonable assurance that a proposed project does not violate applicable environmental standards or public interest criteria is a decision that must be made in the final analysis by this agency, not by an administrative law judge. Moreover, DEP has substantive jurisdiction and primary responsibility to interpret and "balance" the public interest criteria set forth in § 373.414(1)(a), Fla. Stat. Nevertheless, I find no fault with the ALJ's statutory interpretation or his related conclusion that the evidence in this case provides reasonable assurance that Egland's proposed restoration project will not adversely impact manatees or their habitats and is clearly in the public interest.

I also conclude that there is competent substantial evidence in the DOAH record to support the portions of the ALJ's "Finding of Fact" No. 23 that are true factual findings. This competent substantial evidence includes the provisions of Specific Conditions 3 and 4 of the Permit (DEP Ex. 25). These Permit Specific Conditions impose various monitoring and other precautionary requirements that must be complied with by Egland to "ensure that manatees are not adversely affected by the construction activities authorized by the Permit." One Permit Specific Condition requires Egland to be responsible for ensuring that no manatees are located in South Lake prior to any construction activities.

This competent substantial evidence also includes the expert testimony at the DOAH final hearing of Carol Knox and Edward Barnham. Ms. Knox, an Environmental

Specialist III with the Florida Fish and Wildlife Conservation Commission, was accepted by the ALJ as an expert on the impacts of dredge and fill projects on manatees and their habitats. Mr. Barnhan, an Environmental Manager with DEP, was accepted by the ALJ as an expert in marine biology and the environmental impacts of dredge and fill projects on wetlands and surface waters. Both Ms. Knox and Mr. Barnham were of the opinion that Egland's proposed restoration of the illegally dug channel portion of the mangrove slough would not have an adverse impact on manatees or their habitats (Tr. Vol. 1, pages 119-123; Vol II, pages 57-72).

A primary contention of the Petitioners is that the ALJ erred by allowing Ms. Knox to testify as an expert on the subject of the potential impact on manatees and their habitats of the channel filling proposed by Egland. However, the ALJ's decisions to accept the expert testimony of one witness and reject the expert testimony of another are evidentiary rulings that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence from which the underlying factual findings could be reasonably inferred. See Collier Medical Center v. State, Dept. of HRS, 462 So.2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

The Petitioners also contend that Ms. Knox's involvement with the review by DEP of Egland's permit application was too limited to provide a sufficient factual basis for any credible expert testimony in this case. Nevertheless, the sufficiency of the facts required to form an expert opinion normally resides with the expert; and any purported deficiencies in such facts require a weighing of the evidence, a matter also within the sound discretion of the ALJ as the trier of the facts. Gershanik v. Dept. of Prof.

Regulation, 458 So.2d 302, 305 (Fla. 3rd DCA 1984), *rev. den.*, 462 So.2d 1106 (Fla. 1985).

Based on the above rulings, the Petitioners' unnumbered Exceptions objecting to the ALJ's determination that the mangrove slough restoration project "will not harm or adversely affect manatees or their habitats" and his acceptance of Carol Knox as an expert witness at the DOAH final hearing are denied.

Second Exception

The Petitioners also make a related argument that the ALJ erred by allowing Ms. Knox to testify as an "undisclosed rebuttal witness" for DEP. However, the transcripts of the DOAH proceedings do not reflect that the Petitioners' counsel specifically objected to Ms. Knox's testimony at the final hearing on the ground that she was not a proper rebuttal witness. Consequently, this rebuttal testimony of Ms. Knox is a part of the record in this case and should be considered by the ALJ along with any other evidence of record. See, e.g., Tri-State Systems, Inc. v. Dept. of Transportation, 500 So.2d 212, 213 (Fla. 1st DCA 1985), rev. denied, 506 So.2d 1041 (Fla. 1987) (evidence admitted without objection at a DOAH hearing becomes part of the evidence in the case and is usable as proof just as any other evidence).

In addition, the issue of the propriety of rebuttal testimony at a DOAH final hearing does not appear to be a matter within the "substantive jurisdiction" of this agency under subsection 120.57(1)(l), Fla. Stat. See, e.g., Florida Power & Light Co. v. State, Siting Board, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997) (Benton, J. concurring) (concluding that one of the purposes of the 1996 amendments to Ch. 120, Fla. Stat., was to preclude an agency from thereafter rejecting evidentiary and procedural rulings

of an administrative law judge). See also Barfield v. Dept. of Health, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001) (concluding that the Board of Dentistry lacked substantive jurisdiction to reject a portion of a recommended order containing an administrative law judge's ruling that certain documents were inadmissible hearsay evidence).

In view of the above, the Petitioners' unnumbered Exception objecting to Ms. Knox's testimony at the DOAH final hearing on the basis that she was not previously disclosed as a rebuttal witness by DEP is denied.

Third Exception

The Petitioners' third and final unnumbered Exception objects to the ALJ's Finding of Fact No. 10. The Petitioners contend that the ALJ's factual findings relating to another possible access by manatees to South Lake other than through the illegally dug channel at issue in this proceeding is purely speculative and is not based on competent substantial evidence. However, the ALJ's factual findings in paragraph 10 of the Recommended Order appear to be reasonable inferences based on the testimony of Edward Barham and Carol Knox at the DOAH final hearing (Tr. Vol. I, pages 124-125; Vol. II, pages 71-72). I decline to substitute my judgment for that of the ALJ as to the weight that should be given to this testimony.

I also view these challenged findings, pertaining to another possible access by manatees to South Lake, to be "subordinate" factual findings. These subordinate findings are not essential to the ultimate determination that Egland provided reasonable assurance in this case that his proposed restoration project would not adversely affect manatees or their habitats. Consequently, the Petitioners' final Exception objecting to the ALJ's Finding of Fact No. 10 is denied.

## CONCLUSION

The Petitioners are to be commended for their concern that the proposed filling of the man-made channel could have an adverse effect on manatees or their habitats. Nevertheless, a DOAH final hearing was held in this case that lasted for almost two days. The ALJ heard the testimony of more than 10 witnesses, including specialists from DEP and the Florida Fish and Wildlife Conservation Commission. The transcripts of the final hearing indicate that a major portion of the cumulative testimony of the witnesses addressed this significant issue of whether the filling of the channel would adversely affect manatees or their habitats.

After hearing the testimony of all the witnesses, the ALJ determined that Egland had provided reasonable assurance that the proposed restoration project will not harm or adversely affect manatees or their habitats. In order to reject this key determination of the ALJ, I would have to rule that there is "no competent substantial evidence" in the entire DOAH record supporting his factual findings on manatees and their habitats. I am of the view that a ruling of this magnitude is not warranted in this case.

"Competency" of evidence refers to its admissibility under legal rules of evidence. "Substantial" requires that there be some (more than a mere iota or scintilla) relevant evidence having definite probative value as to each essential element of the matter at issue. See, e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm., 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996). Paragraph 23 of the Recommended Order reflects that the ALJ relied primarily on the expert testimony of Carol Knox and Edward Barham as evidentiary support for his determination that Egland's proposed restoration project will not adversely affect manatees or their habitats. I conclude that this

cumulative testimony of Ms. Knox and Mr. Barham at the DOAH final hearing constitutes "more than mere iota or scintilla" of relevant evidence in the DOAH record supporting the ALJ's challenged findings on manatees and their habitats.

IT IS THEREFORE ORDERED:

1. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated by reference herein.

2. The Department is directed to ISSUE Environmental Resource Permit No. 44-0170257-001-ES to Egland, subject to the terms and conditions set forth in the Permit document executed by the South District Office on April 3, 2001.

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 9 day of January, 2003, 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.

Heather Chapman 1/9/03
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:

Andrew M. Tobin, Esquire
Post Office Box 620
Tavernier, FL 33070

John A. Jabro, Esquire
90311 Overseas Highway, Suite B
Tavernier, FL 33070

Ann Cole, Clerk and
J. Lawrence Johnston, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Tallahassee, FL 32399-1550

and by hand delivery to:

Francine M. Ffolkes, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 10TH day of January, 2003.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

for

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