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DIVISION OF
ADMINISTRATIVE
HEARINGS

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SWIRE PROPERTIES, INC. and CITY
OF MIAMI,

Petitioners,

vs.

BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND and
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents,

and

SAVE THE MANATEE CLUB, INC. and
FRIENDS OF THE EVERGLADES, INC.,

Intervenors.

AT

JHC

OGC CASE NO. 01-0605
DOAH CASE NO. 01-3217

JLJ-CLOS

CONSOLIDATED FINAL ORDER

On October 24, 2002, an Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order in this formal administrative proceeding. Copies of the Recommended Order were served upon counsel for the Petitioners, Swire Properties, Inc. ("SPI") and the City of Miami ("City"); Respondents, Board of Trustees of the Internal Improvement Trust Fund ("Trustees") and the Department of Environmental Protection ("DEP"); and the Intervenors, Save the Manatee Club, Inc. ("SMC") and the Friends of the Everglades, Inc. ("FOE"). A copy of the DOAH Recommended Order is attached hereto as Exhibit A. The matter is now

before the Trustees and the Secretary of DEP for final agency action pursuant to the “concurrent permit review” provisions of § 373.427, Florida Statutes (“Fla. Stat.”).

BACKGROUND

The issue in this case is whether the Petitioners’ joint application, as amended in June of 2001, for a regulatory permit from DEP and related lease of sovereign submerged lands from the Trustees (“Amended Application”) should be granted or denied. The Amended Application seeks permission from DEP and the Trustees to construct and operate a multi-use commercial marina facility on the western shoreline of Brickell Key and on adjoining sovereign submerged lands in Biscayne Bay.

Under the Amended Application, the proposed marina would have a total of 68 boat slips. Thirty-five of the slips would be limited to sailboats, and the remaining 33 slips would be for use by powerboats. Six of the powerboat slips would be dedicated to exclusive use by the City’s Marine Patrol Unit. In addition to the six powerboat slips, SPI is also proposing to provide 2,000 square feet of office and storage space to the City’s Marine Patrol officials.

Brickell Key is a man-made island created by the deposit of spoil from channel dredging of the Intracoastal Waterway. Brickell Key is located just southeast of the confluence of the Miami River and Biscayne Bay and is within the boundaries of the City. The island is connected with the mainland to the west by a four-lane bridge.

~~Brickell Key is privately owned and has been partially developed. The developed~~
portions of the island include existing high-rise condominium buildings, office buildings, retail shops, and a hotel.

Brickell Key is also located within the Dade County portion of the Biscayne Bay Aquatic Preserve ("BBAP"). The BBAP, covering portions of Dade and Monroe Counties, was created in 1974 by the enactment of Chapter 74-171, Laws of Florida. See § 258.165, Fla. Stat. (Supp. 1974), subsequently amended and renumbered as current § 258.397, Fla. Stat. The marina project, as described in the Amended Application, would cover a total of 49,100 square feet of sovereign submerged lands in the BBAP.

A prior version of the Petitioners' joint application was denied by a vote of the Trustees at a meeting held on March 13, 2001. Based on this action of the Trustees, DEP issued a consolidated notice of intent to deny both the lease and the related Environmental Resource Permit. The Petitioners then filed a timely Petition for Administrative Hearing and the matter was referred to DOAH for a formal hearing. Administrative Law Judge, J. Lawrence Johnston ("ALJ"), was assigned by DOAH to preside over the case. The referral to DOAH included an existing Petition to Intervene filed by SMC, which was granted by the ALJ. The ALJ also granted a subsequent Petition to Intervene filed on behalf of FOE.

The Joint Response to [DOAH's] Initial Order reflected that settlement negotiations were being conducted between the parties that would hopefully resolve the matter now before the ALJ. This Joint Response also stated that an amended application was expected to be presented to the Trustees for their consideration in ~~October of 2001. The Amended Application was considered by the Trustees on~~

November 27, 2001, and the Trustees again voted to deny the Petitioners' request to lease sovereign submerged lands in the BBAP for their proposed marina facility.

DEP then filed a Notice of Agency Position advising the ALJ that the modified marina project as described in the Amended Application would comply with standards and criteria applicable to environmental resource permits. Nevertheless, DEP also advised the ALJ that the Amended Application did not meet the more stringent criteria of the Trustees governing leases of sovereign submerged lands in the BBAP. The ALJ thus held a DOAH final hearing in this case on September 4-5, 2002. In excess of 10 witnesses testified at the final hearing. A majority of those witnesses were qualified as experts in various matters related to the proposed marina project.

The ALJ entered his Recommended Order in this case on October 24, 2002.

The Recommended Order includes the following findings and conclusions of the ALJ:

1. The evidence at the final hearing was not sufficient to show an "extreme hardship" unique to the Petitioners [as required by § 258.397(3)(a), Fla. Stat., and defined in Rule 18-18.004(11), F.A.C.] (Finding of Fact Nos. 30-34; Conclusions of Law No. 70)
2. The Petitioners did not prove that the law enforcement component of the proposed marina project is "required for the protection of the health and safety of the public." To the contrary, the greater weight of the evidence was that there are reasonable alternatives. Thus, the Petitioners did not establish that the marina project is a "public necessity" [within the purview of Rules 18-18.004(11) and 18-18.004(22), F.A.C.] (Finding of Fact Nos. 35-39; Conclusions of Law No. 72-73)
3. The Petitioners did not prove that the combination of environmental, ~~economic, and social benefits of the marina project as proposed in the~~ Amended Application would clearly exceed the environmental, economic, and social costs [under Rule 18-18.004(20), F.A.C.]. Thus, the Petitioners did not prove that the proposed marina project is "in the public interest" [as required by § 258.397(3)(a), Fla. Stat.] (Finding of Fact No. 56; Conclusion of Law No. 74)

Exceptions to the Recommended Order were filed on behalf of the Petitioners on November 8, 2002. Separate Responses in opposition to the Petitioners' Exceptions were filed on behalf of SMC and DEP on November 13 and 18, 2002, respectively. The ALJ's recommendation that Petitioners' request for a lease of sovereign submerged in the BBAP be denied was subsequently brought before the Trustees for consideration pursuant to the provisions of § 373.427(2), Fla. Stat. The Trustees approved this Consolidated Final Order on January 28, 2003.

STANDARDS OF ADMINISTRATIVE REVIEW

Section 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 it has substantive jurisdiction." Accordingly, an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); Florida Public Employee Council, 79 v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Great deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." See, e.g., Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); State Contracting v. Dept of Transportation, 709 So.2d 607, 610 (Fla. 1st DCA 1998). ~~Furthermore, agency interpretations of statutes and rules within their~~
regulatory jurisdiction do not have to be the only reasonable interpretations. It is

enough if such agency interpretations are "permissible" ones. Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

Subsection 120.57(1)(l) also prescribes that an agency may not reject or modify 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 are evidentiary issues to be determined by 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.

In addition, a reviewing agency has no authority to make independent findings of fact in its final order that are not contained in the recommended order on review. See, e.g., North Port, Fla. v. Con. Minerals, 645 So.2d 485 (Fla. 2d DCA 1994); Inverness Convalescent Center v. Dept. of H.R.S., 512 So.2d 1011, 1015 (Fla. 1st DCA 1987).

~~The scope of agency review of a DOAH recommended order is limited to ascertaining~~

whether the administrative law judge's existing findings of fact are supported by competent substantial evidence of record. North Port, Fla., 645 So.2d at 487.

RULINGS ON THE PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

Exception No. 1

The Petitioners' first Exception objects to the ALJ's Findings of Fact 35, 38, and 39. These challenged findings pertain to the "public necessity" test and related "no other reasonable alternative" criteria for establishing an extreme hardship justifying the lease to the Petitioners of sovereign submerged lands in the BBAP. See Rules 18-18.004(11) and 18-18.004 (22), F.A.C. The ALJ found that the Petitioners failed to prove that the law enforcement component of the proposed marina facility is "required" for the protection of the public health and safety. The ALJ further found that there are other existing reasonable docking alternatives within the vicinity of Brickell Key for City Marine Patrol boats. The challenged factual findings of the ALJ are supported by competent substantial evidence of record. This competent substantial evidence includes the expert testimony at the DOAH final hearing of Sergeant Arthur Serig and Donald Keirn. (Tr. Vol. I, 215-225; Vol. II, 457-490)

The challenged findings of the ALJ are also supported by his related Findings of Fact 36-37, which were not objected to by the Petitioners. Finding of Fact 36 contains the unchallenged finding of the ALJ that the City's own witnesses conceded that the Petitioners' marina project is not essential to effective law enforcement by the Marine Patrol Unit. In his unchallenged Finding of Fact 37, the ALJ identifies an existing City ~~Marine Patrol office and docking facilities at nearby Watson Island, located about one~~
mile north of Brickell Key. The ALJ found that City Marine Patrol officers stationed at Watson Island could reach Brickell Key in 3-4 minutes in case of an emergency.

In addition, the BBAP rules defining this critical term "extreme hardship" require the Petitioners to show a "significant burden, unique to the applicant and not shared by [other] property owners in the area" (emphasis added). See Rule 18-18.004(11), F.A.C. In his unchallenged Finding of Fact 24, the ALJ found that any "burden" attributable to the lack of access to marina facilities on Brickell Key is not unique to the Petitioners, but is also shared by all residents on the island and by other City residents.

The Petitioners' expert witness, Leonard Nero, did render an opinion at the final hearing of the existence of a "significant burden, unique to the applicant," which would purportedly satisfy the extreme hardship criteria of BBAP Rule 18-18.004(11) in this case. However, in his unchallenged Findings of Fact 29-34, the ALJ expressly discounted the credibility of this testimony of Mr. Nero. The ALJ stated in Finding of Fact 30 that:

Petitioners' expert went from detecting no significant, unique burden as of April 2002, to testifying at the final hearing to a significant unique burden. He testified that his view changed when he "took off the blinder of the rule" and reviewed past BOT decisions on submerged lands applications. However, all of those decisions were decided under this same rule, and none support a finding of significant, unique burden in this case.

As noted in the Standards of Administrative Review, a reviewing agency should not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. Furthermore, the ALJ's decisions to accept the testimony of one expert and reject the 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).

In view of the above, the Petitioners' Exception No. 1 is denied.

Exception Nos. 2 and 3

In these two related Exceptions, the Petitioners object to Findings of Fact 42, 48, 56, and Conclusion of Law 74. Findings of Fact 42, 48, and 56 contain findings by the ALJ that the projected environmental benefits of the proposed marina project are limited and do not clearly exceed the environmental costs of the project under BBAP Rule 18-18.004(20), defining the critical term "public interest." These factual findings support the ALJ's related Conclusion of Law 74 that the proposed marina project is not "in the public interest" as required by § 258.397(3)(a), Fla. Stat.

A primary argument made by the Petitioners is that challenged factual findings and legal conclusion of the ALJ are inconsistent with DEP's stated position in the DOAH proceeding that the proposed marina project would comply with environmental standards applicable to regulatory permits. However, the Petitioners' "inconsistency with agency position" argument is rejected for the following reasons:

1. DEP's position in the DOAH proceeding was that, although the Amended Application would comply with environmental standards applicable to a DEP regulatory permit, it did not comply with the more restrictive requirements governing leases of ~~sovereign submerged lands in the BBAP. This statement of DEP agency position is~~

accurately quoted by the ALJ on page 6 of his Recommended Order. Current § 258.397(3)(a), Fla. Stat., expresses the clear intent of the Legislature that:

“[n]o further . . . lease of sovereignty submerged lands in the preserve shall be approved by the board of trustees, except upon the showing of extreme hardship on the part of the applicant and a determination . . . that such . . . lease is in the public interest.” (emphasis added)

There are no similar requirements in the statutes and rules governing environmental resource permitting requiring the Petitioners to demonstrate an “extreme hardship” in order to be entitled to issuance of a regulatory permit from DEP.

2. The ALJ's conclusion that the Petitioners did not establish that the marina project's “demonstrable environmental benefits which would accrue to the public at large would clearly exceed all demonstrable environmental costs” does not involve an interpretation of DEP rules relating to environmental resource permitting. Instead, this crucial determination of the ALJ involves an interpretation of the Trustees' rules relating to leases of sovereign submerged in the BBAP. See Rule 18-18.004(20), F.A.C. Consequently, a stipulation by DEP that the marina project would meet the environmental criteria applicable to regulatory permits did not preclude DEP from asserting that the marina facility would not comply with environmental standards set forth in the Trustees' rules relating to leases of sovereign submerged in the BBAP.

3. The Petitioners also object to the last sentence of the ALJ's Finding of Fact 48 stating that “it is possible for adverse impacts to manatees to result even with compliance with the Miami-Dade County Manatee Protection Plan.” However, this finding of the ALJ is supported by the expert testimony of Carol Knox at the DOAH final hearing. (Tr. Vol. II, 513-520). Ms. Knox, an Environmental Specialist III with the Fish and Wildlife Conservation Commission, was qualified to testify at the final hearing as an expert in reviewing coastal permits for potential impacts on manatees.

4. The Petitioners cite Save Anna Maria, Inc. v. Fla. Dept. of Transportation, 700 So.2d 113 (Fla. 2d DCA 1997); and Collier Development Corp. v. Dept. of Environmental Regulation, 592 So.2d 1107 (Fla. 2d DCA 1991), as case law supporting their Exceptions. However, the Petitioners' reliance on these two decisions is misplaced. Neither the Save Anna Maria or the Collier Development Corp. case involved an application for a lease from the Trustees of sovereign submerged lands in the BBAP or in any other Florida Aquatic Preserve. Therefore, interpretations of the "public interest" criteria of § 253.397, Fla. Stat., and BBAP Rule 18-18.004(20) were not at issue in the appellate decisions in Save Anna Maria or Collier Development Corp.

5. The Petitioners further contend that the Intervenors, SMC and FOE, take the case as they find it and are thus bound by DEP's stated agency positions on the environmental issues related to the requested regulatory permit. However, page 6 of the Recommended Order contains an unchallenged procedural ruling by the ALJ that, notwithstanding the Notice of Agency Position filed by DEP, "SMC and FOE (Intervenors) did not abandon their position that Petitioner still did not meet the [environmental] criteria for a regulatory permit." Moreover, SMC's Motion to Intervene, identifying its concerns that the proposed marina project would adversely impact manatees, was granted by the ALJ on August 27, 2001. SMC was thus a party to the DOAH proceeding over eight months prior to the filing of DEP's Notice of Agency Position in May of 2002 and over a year prior the parties' filing of the Pre-Hearing Stipulation on August 30, 2002.

6. The Petitioners rely on the DOAH final order in Hillsborough County Hospital Authority v. Tampa General Hospital, 14 FALR 1640 (DOAH 1992), in support of their argument that SMC and FOE are bound by DEP's agency position that the Amended Application complies with environmental criteria related to regulatory permits. In the Tampa General Hospital case, Healthsouth was allowed to intervene at the beginning of the DOAH final hearing and then attempted to raise issues not previously raised in the parties' pleadings. In contrast, SMC's motion to intervene, alleging that that the Petitioners' marina project would adversely impact manatees, was granted by the ALJ over a year prior to the time that the matters at issue at the DOAH final hearing were identified in the parties' Pre-Hearing Stipulation. Therefore, the Petitioners' suggestion that the DOAH final order in the Tampa General Hospital case is controlling authority in this proceeding is rejected.

Based on the above, the Petitioners' Exception Nos. 2 and 3 are denied.

Exception No. 4

In their final Exception, the Petitioners object to the ALJ's Conclusion of Law 71. In Conclusion of Law 71, the ALJ correctly observed that one of the means by which the Petitioners attempted to prove "extreme hardship" in this case was by relying on the portion of BBAP Rule 18-18.004(11) providing that an extreme hardship "may be inherent in public projects which are shown to be a public necessity" (emphasis added). ~~The ALJ also concluded that the law enforcement component of the marina project may~~
be desirable, but the evidence did not prove that it is a "public necessity."

Section 258.397, Fla. Stat., and Chapter 18-18, F.A.C., pertaining to the BBAP, are within the regulatory jurisdiction of the Trustees. Consequently, the Trustees have the primary authority and responsibility to enforce and interpret these statutory and rule provisions. The ALJ's interpretations of the terms "extreme hardship" and "public necessity" are permissible interpretations consistent with the Trustees' interpretations. Such statutory and rule interpretations by the ALJ and the Trustees are not "clearly erroneous" and should not be overturned. Falk, 614 So.2d at 1089.

The Petitioners suggest that the BBAP "extreme hardship" and related "public necessity" requirements may be satisfied by the less stringent standard of the marina project being "reasonably necessary to improve public safety." This suggestion is rejected. Rule 18-18.004(22) defines the term "public necessity" as meaning:

works or improvements required for the protection of the health and safety of the public, consistent with the Act and these rules, for which no other reasonable alternative exists (emphasis added).

The Petitioners would have the ALJ and the Trustees redefine the term "public necessity" in this case to mean any "works or improvements reasonably necessary to improve public safety." However, in his unchallenged Conclusion of Law 72, the ALJ rejected the Petitioners' broader view of "public necessity" and concluded that the facts of this case do not pass the stricter standard imposed by BBAP Rule 18-18.004(22). Neither the ALJ nor the Trustees have the authority to amend and expand the above-~~quoted rule definition of "public necessity" as suggested by the Petitioners in order to~~ justify the requested lease of sovereign submerged lands in the BBAP.

In any event, the Recommended Order on review does not contain any findings or related conclusions by the ALJ that the Petitioners' proposed marina project is "reasonably necessary to improve public safety." As noted in the Standards of Administrative Review, the ALJ is the "trier of the facts" in this § 120.57(1) formal proceeding. Accordingly, neither the Trustees nor DEP are authorized to modify the Recommended Order by adding new findings of fact supporting an ultimate conclusion that the proposed marina project is "reasonably necessary to improve public safety."

In view of the above rulings, the Petitioners' Exception No. 4 is denied.

CONCLUSION

No applicant has an absolute right to lease sovereign submerged lands in the BBAP. To the contrary, in the year 1974, the Florida Legislature expressed its clear intent that Biscayne Bay should thereafter be preserved in an essentially natural condition. See current § 258.397(1), Fla. Stat. This legislative intent was further explicated by restrictive statutory language stating that no further lease of BBAP sovereignty lands should be approved by the Trustees, except upon a showing of "extreme hardship" on the part of the applicant and a determination that the lease is "in the public interest." See current § 258.397(3) (a), Fla. Stat.

One of the principles of statutory construction is that statutes containing criteria for receiving entitlements from governmental entities are to be construed strictly against ~~the applicant and in favor of the government. See, e.g., Environmental Trust v. Dept. of~~
Environmental Protection, 714 So.2d 493, 497 (Fla. 1st DCA 1998); 3 Sutherland
Statutory Construction, § 63.02 (5th Ed. 1992). Therefore, any doubts as to whether the

requested lease of sovereignty lands in the BBAP meets the stringent requirements imposed by the Legislature should be resolved against the Petitioners. When the BBAP statutes and rules are strictly construed in light of the findings of fact in the Recommended Order on review, the Trustees concur with the ALJ that the Petitioners have not shown that their proposed marina project in Biscayne Bay meets the “extreme hardship” and “public interest” criteria established by the Legislature.

The Recommended Order does not contain any findings or conclusions by the ALJ that the proposed marina project would violate any environmental standards applicable to the issuance of a regulatory permit by DEP. Nevertheless, since the Trustees have determined that the Petitioners’ Amended Application does not meet the criteria for a lease of sovereign submerged lands in the BBAP, their joint application for the issuance of an environmental resource permit by DEP must also be denied. See § 373.427(3), Fla. Stat.; Rule 62-343.075(2), F.A.C. Accord Miami Beach Rod and Reel Club, Inc. v. Dept. of Environmental Protection, 19 FALR 3380 (Fla. DEP 1997).

IT IS THEREFORE ORDERED:

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

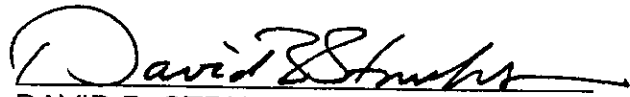
B. The Petitioners’ Joint Application No. 13-0132744-001, as amended in June of 2001, seeking authorization to lease sovereign submerged lands in the Biscayne Bay Aquatic Preserve from the Trustees is DENIED.

C. The Petitioners' related request in Joint Application No. 13-0132744-001, as amended in June of 2001, for the issuance of an environmental resource permit by DEP is also DENIED.

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 29 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 1/29/03
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:

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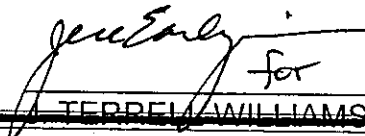
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J. Lawrence Johnston, Administrative Law Judge
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this 30 day of January, 2003.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


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