STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN M. WILLIAMS, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	Case No. 02-4406

FINAL ORDER

This case was heard by David M. Maloney, Administrative Law Judge of the Division of Administrative Hearings, on May 7 and 8, 2003, in Destin, Florida.

APPEARANCES

For Petitioner: Parker B. Smith, Esquire
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For Respondent: Robert Stills, Jr., Esquire
Department of Environmental Protection
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STATEMENT OF THE ISSUE

Whether Respondent John M. Williams deposited fill in waters of the state without a permit from the Department of Environmental Protection. If so, what is the appropriate corrective action and penalty?

PRELIMINARY STATEMENT

On November 15, 2002, the Department of Environmental Regulation ("DEP" or the "Department"), by a "Request for Assignment of Administrative Law Judge and Notice of Preservation of Record," notified the Division of Administrative Hearings ("DOAH") that it had received a petition for an administrative proceeding. The Secretary of DEP "having decided not to act as hearing officer," DEP accordingly requested that the matter be assigned to an administrative law judge to conduct all necessary proceedings.

Attached to the notification was a document entitled "Verified Petition for Administrative Proceeding," submitted by counsel for John M. Williams. The petition requested a formal hearing in connection with matters set forth in a Notice of Violation and Orders for Corrective Action (the "NOV") served on or about July 16, 2002, on Mr. Williams.

The NOV, attached to the verified petition, charged that DEP in February 2001 had determined that Mr. Williams had constructed a septic tank in a flood plain wetland, adjacent to the Choctawhatchee River, without authorization from the Department and in violation of Rule 62-312.060(1), Florida Administrative Code. The NOV further ordered that the septic tank be removed and that Mr. Williams pay $1,750 (the sum of an

administrative fine, economic benefit of non-compliance and costs to the Department.)

The request of DEP was honored. The matter was assigned DOAH Case No. 02-4406 and an administrative law judge was designated to conduct the proceedings. The matter was set for hearing in March 2002. In the meantime, the matter was transferred to the undersigned administrative law judge and was continued to May 7 and 8, 2003.

At final hearing, Petitioner testified and presented the testimony of two witnesses: David Gurganus and Charles Riley. Petitioner offered 15 exhibits marked as P1-P15. All were admitted into evidence. The Department called four witnesses to the stand: Gary Woodiwiss; Jack Wu, P.E.; Rod Maddox; and John Tobe, Ph.D., an expert in wetland delineation and identification. Twenty one exhibits, marked as R1 through R21 were offered by DEP. All were admitted into evidence.

On May 20, 2003, DEP filed a memorandum of law that states, "[i]n summation, Chapter 62-312 and 62-340 Florida Administrative Code are the appropriate provisions for dredge and fill activities in surface waters and wetlands located in the geographical jurisdiction of the Northwest Florida Water Management District . . . ." The Department requested, therefore, that the rules and statutes attached to its Request for Judicial Notice submitted March 10, 2003, and re-submitted

March 27, 2003, be officially recognized. In response to the memorandum, Petitioner stated that he "agrees with the position of the Department (Respondent) concerning the law applicable to this case." Petitioner's Submission of Law Applicable to Case, filed June 13, 2003. An Order was entered on June 16, 2003, granting the Department's request and setting July 1, 2003, as the deadline for filing proposed orders.

The transcript was filed on June 4, 2003. Petitioner filed a timely Proposed Final Order. The Department opted not to file a proposed order and filed a notice of its intention not to do so on July 15, 2003. This Final Order follows.

FINDINGS OF FACT

Mr. Williams and the Cowford Subdivision

1. Petitioner John M. Williams is a retired mechanic. In 1992, he became acquainted with the Cowford subdivision in Walton County, near Bruce, Florida. The subdivision fronts the Choctawhatchee River.

2. Mr. Williams purchased lot 29 of the subdivision. Three or four years later, he bought lot 30. All told, Mr. Williams paid approximately $47,000 for the lots, an electric power line and an "above-ground" septic tank. The purchase price of the lots was $38,000. Running an electric line and installation of an electric light pole cost about

$4,000. Mr. Williams paid about $5,000 for the septic tank and its installation.

3. Mr. Williams' ultimate goal in purchasing the lots and adding the improvements was to build a house on the property for use in his retirement.

Attempt to Obtain the Necessary Permits

4. The septic tank was not purchased by Mr. Williams until after he had obtained a permit for its construction.

5. At the county offices where he went to obtain the necessary permit, he was "sent over to the power company." (Tr. 216). At hearing, he described what happened there:

> I paid my money to get my power and they -- well, they informed me . . . once I got my power on I had 6 months to get my septic tank in the ground or they would turn my lights off.
>
> So here I had a $3,500 light pole put up and I couldn't very well see this thing going down. So, I went ahead to the Health Department.

(Id.) Mr. Williams' testimony is supported by a Walton County Environmental Health Notice dated March 8, 1999, that states, "The Walton County Building Department will not be issuing approval for power for any residence until final approval of the septic system is obtained from the Walton County Environmental Health Office." P7, the first page after Page 3 of 3, marked in the upper right hand corner as PAGE 10.

6. At the Health Department, on April 12, 1999, Mr. Williams applied for an "Onsite Sewage Treatment and Disposal System" permit on a form bearing the following heading:

> STATE OF FLORIDA
> DEPARTMENT OF HEALTH
> ONSITE SEWAGE DISPOSAL SYSTEM
> APPLICATION FOR CONSTRUCTION PERMIT
> Authority; Chapter 381, FS &
> Chapter 10D-6, FAC

P7, page 1 of 3. According to the form, he paid the $200 fee for the permit on April 29, 1999. The payment was made within a month or so after the installation of the power line.

7. An attachment to the "Walton County Environmental Health Onsite Sewage Treatment and Disposal System Application," made out by Mr. Williams on April 12, 1999, contains the following warning:

> OTHER AGENCY PERMITS:
> As the owner or agent applying for an OSTDS permit it is my responsibility to determine if the proposed development is in compliance with the zoning requirements of Walton County. I further assume responsibility to obtain any applicable permits from other State and Local Government Agencies.

P15, page 2. (emphasis supplied) (See also P7, the second page after Page 3 of 3, marked in the upper right hand corner as PAGE 11).

8. On May 5, 1999, about three weeks after Mr. Williams submitted the construction permit application, the site where

the septic tank would be installed was evaluated by an EH Specialist, an inspector. On the same day, an Onsite Sewage Treatment and Disposal System Construction Permit was issued for an "above-ground" 900-gallon septic tank.

Installation

9. With county personnel present and under county supervision, the septic tank was installed on a ridge on Mr. Williams property about 17 feet above mean sea level. Fill dirt was brought onto the site and placed on top of the tank to create a septic tank mound. No dredging of the property was done in connection with the installation.

Chance Discovery

10. After a complaint was registered with DEP about dredge and fill activity on one of the lots near Mr. Williams, Gary Woodiwiss, then an environmental specialist in the Department assigned to conduct inspections in Walton and Holmes Counties, visited the Cowford subdivision in July 2000.

11. During the visit, Mr. Woodiwiss noticed the septic tank mound on Mr. Williams' property and that the mound, in part, consisted of fill dirt. Being of the opinion that the both the fill dirt and the septic tank system constituted "fill" and that the fill may have been deposited in jurisdictional wetlands, that is, "waters of the state," Mr. Woodiwiss consulted with DEP personnel about the status of the site and

DEP jurisdiction. Ultimately, DEP determined that the site of the septic tank mound, within the flood plain of the Choctowhatchee River, was jurisdictional wetlands. The Department took action.

DEP Action

12. On November 16, 2000, Mr. Woodiwiss issued a memorandum to the DEP file with regard to "John Williams. Unauthorized Fill in Flood Plain." The memo states:

> Site is located next to Charles Riley who is the subject of Department action for filling jurisdictional wetlands. Williams was erroneously given a permit by Walton County health Dept. to install a septic system in 1999, which he subsequently installed. I visited the site with the administrator for the septic tanks program in Walton and she indicated that they would pay for the installation of a new system on a new lot for Mr. Williams.
>
> I recommend that the removal of the system and relocation of the inhabitants of the lot to an area outside of the immediate flood plain.

P6. (emphasis supplied)

13. Five days later, on November 21, 2002, a warning letter was generated by Mr. Woodiwiss under the signature of Bobby A. Cooley, Director of District Management for DEP. The letter advised Mr. Williams as follows:

> Recent Department survey data established at your property has determined that your entire lot is below the mean annual flood line of the Choctawhatchee River and is

> subject to dredge and fill jurisdiction of the Department. Any construction on the property including placement of a mobile home, septic tank and drainfield or other structures must first receive a dredge and fill permit from the Department. Preliminary assessment of your proposed development of the property indicates that you may not meet the public interest criteria of Chapters 403 and 373 Florida Statutes for qualifying for a permit.

R5. By this letter the Department informed Mr. Williams both that he was in violation of the law by not having secured a permit for the filling of the site and warned that, on the basis of a preliminary assessment, it was not likely that he would be eligible for an after-the-fact permit. The assessment of whether the site was eligible for a permit was re-stated in writing again, but with added certainty in a Compliance Assessment Form (the Form) prepared by DEP personnel. In Section V. of the form, there appears, together with the signature of the "Section Permit Processor and a date of "11/09/2000", the following:

> Project is not permittable due to type of wetland system being impacted and project must not be "Contrary to the Public Interest". The project could affect the public health, safety and welfare and property of others. The project is of a permanent nature.

P13.

14. Although the permit processor entered her assessment on November 9, 2000, and other sections of the form were entered

on November 1, 2000, by Mr. Woodiwiss, the Compliance Assessment Form bears a final date of February 1, 2001. The Form shows the "Event Chronology" that led to the issuance of the NOV. The chronology, consistent with the testimony at hearing, reveals the following:

> **25 Jul.00.** Complaint inspection for fill in wetlands on adjacent lot. Found isolated fill areas in a slough and adjacent to an apparent upland area. Vegetation is 100% jurisdictional but soil is composed of alluvial deposits in ridge like configurations, one of which the respondent wished to live on. Solicited the jurisdictional team for a district assist in determining jurisdiction.
>
> **21 Aug.00.** District assist. Hydrologic indicators and vegetation present in sufficient quantities to establish jurisdiction. John Tobe PhD. Requested that the mean annual flood be established on the site in order to augment his determination.
>
> **October 11, 2000.** District assist by Bureau of Survey and mapping and the establishment of a survey line of the 2.33 year (16.42 feet above MSL) mean annual flood elevation on the adjacent violation site. The whole site is clearly under the MAF, which extends approximately 200 meters up grade towards SR 20. The elevation of the MAF is consistent with hydrological indicators (porella pinnatta) that indicate such a flood elevation, as reported in previous studies.
>
> **November 7, 2000.** Met with Crystal Steele and Mike Curry of Walton County DOH to establish why Mr. Williams has a septic tank permit. They indicated that the permit was issued in error and that they would require the system to be moved. Ms. Steele stated that the County would pay for Mr. Williams

> to have a new system installed on another site because of the oversight. There are currently two moveable vehicles on the site, one of which is connected to the system, the other has a contained service for sewage.
>
> **November 21, 2000.** WLI [presumably Warning Letter Issued]
>
> **November 27, 2000.** Call to Mr. Williams. He wants to get money back or swap property for higher. I advised him to approach the owner Mr. Martin and make his situation known.
>
> **January 22, 2000.** Mr. Williams has refused to remove the fill and requests an NOV.

P13, (emphasis supplied)

MAF and Wetland Delineation

15. There was considerable testimony introduced at hearing about establishment of the mean annual flood ("MAF") line for the purpose, among others, of its relationship to the elevation of the septic tank mound. The issue stemmed, no doubt, from Dr. Tobe's request that MAF be established in order to "augment his determination" with regard to DEP jurisdiction based on employment of the methodology in DEP's wetland delineation rule, see paragraph 13, above.

16. Resolution of the issue is not necessary to augment the determination that all of lots 29 and 30 of the Cowford subdivision are located in wetlands that constitute "waters of the state." That the septic tank and the fill dirt were deposited on wetlands under the jurisdiction of DEP was clearly

established by Dr. Tobe in his testimony at trial and the evidence in support of it. Petitioner concedes as much in his Proposed Final Order.

Environmental Harm and Human Health Exposure

17. Wetlands whose surface area is covered by the septic tank mound have been filled. The filling has caused environmental damage. An assessment of the damage was not offered at hearing but it appears from this record that the damage is minimal.

18. During the time the septic tank has been on Mr. Williams' property, it has never been below the flood waters of the Choctawhatchee River and therefore has not yet caused direct hazard to human health.

Corrective Action and Penalty

19. It will be expensive to remove the septic tank; the expense will be more than the cost of installation. Petitioner fears, moreover, that it will render his property worthless.

20. There is no evidence that Petitioner's violation of Department permitting requirements was willful. He has no history of violations previous to this one.

21. Options to continued retention of a septic system through use of a portable wheeled waste remover or use of an upland drain field on another property are either not viable or so problematic as to be impractical.

DEP Modification of its Position

22. At the outset of the hearing, DEP announced that it no longer intended to seek civil penalties of $1,500 as it had intended when the NOV was issued. All that is sought by DEP by way of corrective action or penalty is removal of the septic tank and monetary reimbursement for the cost of the investigation of $250 (see Tr. 9, lls. 17-25, and Tr. 10, lls. 1-5.)

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569 and 120.57, Florida Statutes.

24. "If a person timely files a petition challenging a notice of violation, . . . [t]he department has the burden of proving with the preponderance of the evidence that the respondent is responsible for the violation. No administrative penalties should be imposed unless the department satisfies that burden. Following the close of the hearing, the administrative law judge shall issue a final order[1] on all matters . . . ." Section 403.121(2)(d), Florida Statutes.

25. The Department has carried its burden of proving by a preponderance of the evidence that the violation charged in this case occurred.

26. "Unless specifically exempt, permits shall be required for . . . filling . . . or placing of material in, on or over waters of the state listed in Rule 62.312.030, F.A.C." Rule 62.312.060, Florida Administrative Code.

27. "'Filling' is the deposition, by any means, of materials in waters of the state." Rule 62-312.020(11), Florida Administrative Code.

28. Section 403.031(13), Florida Statutes, defines "[w]aters" as "rivers, lakes, streams, springs, impoundments, wetlands, and all other waters or bodies of waters, including fresh, brackish, saline, tidal, surface, or underground waters." (emphasis supplied)

29. There is no question that Mr. Williams filled wetlands on Lot 29 of the Cowford Subdivision in Walton County by deposition of a septic tank and dirt fill in the form of a septic tank mound without a permit. This was clearly established by his own testimony and by the testimony of DEP personnel, including Dr. Tobe. The only question is what should be the appropriate corrective action and penalty.

30. The deposition of the septic tank and the dirt fill would not have been eligible for a permit. Just as Mr. Williams now recognizes that the property filled was wetlands under the jurisdiction of DEP, he recognizes that his "project" would not have been eligible for DEP permitting. The appropriate

corrective action since the project could not have been permitted is removal of the septic tank system and all of the dirt fill that constitutes the septic tank mound.

31. Nonetheless, Mr. Williams argues for a fine rather than an order of removal because of the expense in removing the tank in what has already become an expensive proposition and because of the likelihood, in his view, that without the septic tank, he will not be able to use his property at all.

32. As much sympathy as Mr. Williams' argument produces, particularly since the County issued the septic tank construction permit in error and actually supervised the installation of the tank, it would not be appropriate to allow the septic tank to remain. The septic tank and the dirt fill in the mound in which it sits must be removed.

33. Mr. Williams was shown to be nothing other than a law-abiding citizen who attempted to obtain what he thought was appropriate governmental permission for installation of a septic tank. The septic tank construction permit application that he filled out warned that it was his responsibility to obtain any other necessary state permits. Balancing his failure to discover that he needed to obtain a permit from DEP for his filling activity, and that he would not be able to obtain such a permit and therefore not be able to install the system, however, is that the septic tank construction permit was issued by

governmental authorities in error and the error was compounded when the County supervised the installation of the septic tank system.

34. Mr. Williams has no past history of violations and the septic tank has not yet imperiled human health. It is appropriate under the circumstances for the Department not to seek civil penalties. As was stated at hearing, removal of the septic tank at Mr. Williams' expense is punishment enough. The state is entitled to be reimbursed $250 for the cost of the investigation.

ORDER

Wherefore, it is ordered that Mr. Williams remove the septic tank system and all fill dirt associated with it from the lots owned by him in the Cowford Subdivision in Walton County and that he reimburse the Department of Environmental Protection $250 for its costs associated with this case.

DONE AND ORDERED this 28th day of July, 2003, in Tallahassee, Leon County, Florida.

DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of July, 2003.

ENDNOTE

1/ There is uncertainty as to whether this order should be a recommended order or a final order. See the last sentence in Section 403.121(2)(d). It may be that DEP's decision not to pursue administrative penalties announced after the commencement of final hearing concomitantly retains DEP's final order authority. On the other hand, issuance of a NOV seeking administrative fines may have fixed the status of DOAH proceedings culminating in a final order. In any event, the parties have acquiesced to the issuance of a final order: Mr. Williams by filing a Proposed Final Order and DEP by not filing any proposed order and by not otherwise asserting retention of final order authority.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.