10-10-03

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

LEE MADDAN,

Petitioner,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

AP

OGC CASE NO. 02-1740
DOAH CASE NO. 03-1499

RAH-CLOS

FINAL ORDER

An Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("Department") in this formal administrative proceeding. A copy of the Recommended Order is attached hereto as Exhibit A. The Recommended Order indicates that a copy thereof was served upon counsel for the Petitioner, Lee Maddan ("Maddan"). Exceptions to the Recommended Order were filed on behalf of Maddan and the Department, and a Response to Maddan's Exceptions was filed on behalf of the Department. The matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On August 29, 2002, Maddan submitted an application to the Department (No. 46-0199306-001-EE) requesting authorization to place a modular home on a fill pad located in Lake Blake in Okaloosa County, Florida. By letter dated September 27,

2002, the Department notified Maddan that "the pad represents unauthorized fill, which has been placed in jurisdictional waters and is currently under review by the Department's Enforcement Section." Maddan received notice on August 30, 2002, of the Department's denial of his application, and timely filed a request for administrative hearing. On April 28, 2003, Maddan's request was forwarded to DOAH, and Administrative Law Judge Richard A. Hixson ("ALJ") was assigned to preside over the case (DOAH Case No. 03-1499).

On May 13, 2003, the Director of District Management for the Northwest District Office of the Department issued a Notice of Violation ("NOV") and Orders for Corrective Action against James E. Moore, Santa Rosa II, Inc., Santa Rosa III, Inc., and Lee Maddan, Respondents.[1] In Count I of the NOV, the Respondents were charged with placing fill in the landward extent of waters of the State, and pedestrian foot bridges over waters of the State, without a Wetland Resource Permit. In Count II, the Department alleged that it had incurred expenses in investigating the matter. The Department sought a total administrative penalty and economic benefit of $2500 against the corporate owners, and a total administrative penalty and economic benefit of $5000 against Maddan. The Orders of Corrective Action required removal of the fill and pedestrian footbridges and replanting of the affected area.

On May 21, 2003, the Respondents filed a timely Demand for Administrative Hearing, accompanied by a Motion for Consolidation with DOAH Case No. 03-1499. On June 2, 2003, this Demand was forwarded to DOAH and assigned DOAH Case No. 03-2040. Without objection, the ALJ entered an order consolidating the two cases for hearing.

[1] In an amendment to the NOV dated June 9, 2003, Mr. Moore was removed as a respondent.

On July 17, 2003, the parties filed a Joint Prehearing Stipulation in this case, agreeing to certain facts and applicable law for purposes of the DOAH proceedings. On July 22-23, 2003, the ALJ held a formal administrative hearing in this case in Shalimar, Florida. His Recommended Order was entered on October 10, 2003.

RECOMMENDED ORDER

In the Recommended Order, the ALJ found that Lake Blake contained State jurisdictional wetlands. The ALJ concluded that the Department did not abuse its discretion in denying Maddan's application for authorization to place a modular home on a fill pad located in Lake Blake, because Maddan had failed to establish that his past[2] and proposed[3] activities in Lake Blake were exempt from permitting requirements. Accordingly, the ALJ recommended that the Department enter a final order denying Maddan's application.

RULINGS ON MADDAN'S EXCEPTIONS

Exception No. 1 (Factual)

In the first of three Exceptions directed to asserted "error(s) as to the facts," Maddan states that Lake Blake is isolated from, and not contiguous to, any other water body. Maddan states further that Lake Blake is connected to waters of the state by a "buried storm water pipe" which "exchanges water with waters of the state on infrequent occasions."

The agency's scope of review of the facts is limited to ascertaining whether the ALJ's factual findings are supported by competent, substantial evidence. City of North

[2] These past activities included the construction of two unpermitted pedestrian footbridges, the placement of unpermitted fill in a finger of Lake Blake, and the placement of unpermitted fill within a 20-foot by 25-foot area characterized by the Department as a lacustrine wetland (Tr. Vol. 1, pp. 48, 59).
[3] This consisted of the proposed placement of a modular home on the unpermitted fill pad.

Port, Fla. v. Consolidated Minerals, Inc., 645 So. 2d 485, 487 (Fla. 2d DCA 1994). Here, Dr. John Tobe, who was accepted as an expert in wetland delineation and jurisdictional determination for waters of the State, testified at the final hearing on behalf of the Department. Dr. Tobe conducted a site investigation at Lake Blake for purposes of determining whether it was appropriate to for the Department to exercise dredge and fill regulatory jurisdiction over the subject property. Dr. Tobe and his wetland delineation team determined that, for jurisdictional purposes, Lake Blake was connected to the waters of the State by reason of the Lewis Street culvert which ultimately discharges into Cinco Bayou. (Finding of Fact ¶ 41).

Stacy Owens, a Department Environmental Specialist, also testified. She "documented water flowing from Lake Blake through the Lewis Street culvert" on two separate site visits in 2002 (October 29 and November 5) and five additional site visits in 2003 (May 20, June 20, June 23, June 27, and July 8). (Finding of Fact ¶ 46). During those times, the area "was not experiencing abnormally excessive rainfall events." (Finding of Fact ¶ 46).

Lastly, Maddan testified on his own behalf at the final hearing. It was Maddan's testimony that, "in his personal observation over many years," Lake Blake "generally discharges excess stormwater into the Lewis Street culvert only as a result [of] a significant rainfall event," (Finding of Fact ¶ 47).

Based upon this evidence, the ALJ found that "Lake Blake discharges water into the Lewis Street culvert at regular intervals. The water discharged from Lake Blake ultimately is released through the Okaloosa County stormwater drainage system into the surface waters of Cinco Bayou, a water body of the State of Florida." (Finding of

Fact ¶ 48). The ALJ further found that "Lake Blake is connected to the surface waters of Cinco Bayou, and regularly exchanges water with Cinco Bayou." (Finding of Fact ¶ 48).

These factual findings are supported by the testimony of Ms. Owens, who observed water flowing from Lake Blake through the Lewis Street culvert. (Tr. Vol. 1, pp. 64-67.) They are further substantiated by a videotape taken by Ms. Owens on June 27, 2003, showing the flow of water from Lake Blake into the Lewis Street culvert (Department Exhibit 15). Certified copies of records for rainfall from the Florida Climate Center (Department Exhibit 9) support the ALJ's determination that, at the times when Ms. Owens documented water flow during her site visits to Lake Blake, the area was not experiencing abnormally excessive rainfall events. The ALJ's findings regarding the regular exchange of water between Lake Blake and Cinco Bayou are thus supported by competent, substantial record evidence. Accordingly, Exception No. 1 (Factual) is denied.

Exception No. 2 (Factual)

In this Exception, Maddan asserts that he met his burden, if any, to satisfy the requirement of Rule 62-312.050(1)(g), Florida Administrative Code (F.A.C.), that--if filling a "finger" of Lake Blake meets the test of construction of a seawall--such activity does "not violate existing water quality standards." Maddan asserts that, because Dr. Tobe's report (Department Exhibit 6) "established that the western portion of the Blake Lake had a higher water quality than the eastern lake," and Maddan's "installation of the pedestrian footbridges and the back fill for the 'seawall' occurred in the western lake," any burden to prove that existing water quality standards would not be violated was

met.

Exemption provisions must be strictly construed against the party claiming the exemption and in favor of the public. Robinson v. Fix, 151 So. 512 (Fla. 1993); Pal-Mar Water Management District v Martin County, 384 So. 2d 232 (Fla. 4th DCA 1980). Here, the ALJ did not find that Maddan's filling of a finger of the lake constituted the construction of a seawall. (Finding of Fact ¶ 55). Rather, he determined that "Lake Blake does not qualify for an exemption from the DEP's dredge and fill permitting jurisdiction." (Finding of Fact ¶ 58). The ALJ also accurately observed that the record contains "no evidence that such filling of Lake Blake was ever subjected to appropriate water quality tests, much less meeting such water quality tests as well as the other requirements of this exemption." (Finding of Fact ¶ 55). Therefore, Exception No. 2 (Factual) is denied.

Exception No. 3 (Factual)

In Exception No. 3 (Factual), Maddan states that he "properly applied for an exemption pursuant to 62-312," which was denied "not on the water quality standards, but on the separate issue that a mobile home could not be placed on filled materials in waters of the state." The Recommended Order addresses exemptions claimed by Maddan under Ch. 62-312, F.A.C. The first claimed exemption, set forth in Rule 62-312.050(4), Florida Administrative Code, is "for dredging or filling in waters which are contained in those artificially constructed stormwater treatment and conveyance systems designed solely for the purpose of stormwater treatment and that are regulated by the Department or the water management district." As to this exemption provision, the parties' Joint Pretrial Stipulation reflects that, "[i]n the 1950's the then owner of the

Property began excavating a [borrow] pit within the bounds of the Property, which excavations continued until the late 1970's." The record evidence also supports the ALJ's conclusion that Lake Blake was not "designed solely for the purpose of stormwater treatment," and therefore "cannot qualify for this exemption." (Finding of Fact ¶ 54). Thus, water quality was not the basis for the ALJ's determination that Lake Blake did not qualify for an exemption pursuant to Rule 62-312.050(4).

The second claimed exemption involves Rule 62-312.050(1)(g), F.A.C. Rule 62-312.050(1)(g) provides an exemption for the "construction of seawalls or riprap, including only that backfilling needed to level land behind the seawalls or riprap, in artificially created waterways where such construction will not violate existing water quality standards, impeded navigation or adversely affect flood control." With respect to this exemption provision, the ALJ accurately observed that the record contains "no evidence that such filling of Lake Blake was ever subjected to appropriate water quality tests, much less meeting such water quality tests as well as the other requirements of this exemption." (Finding of Fact ¶ 55).

Therefore, there is competent substantial evidence in this case supporting the ALJ's conclusion that Lake Blake did not qualify for an exemption pursuant to either Rule 62-312.050(4) or Rule 62-312.050(1)(g) from the Department's dredge and fill permitting jurisdiction. (Finding of Fact ¶ 58). For the foregoing reasons, Exception No. 3 (Factual) is denied.

Exception No. 1 (Legal)

In this Exception, Maddan asserts that the ALJ erred by failing to find that Lake Blake was exempt from the Department's dredge and fill jurisdiction pursuant to Rule

62-25.020(1). However, Chapter 62-25, F.A.C., pertaining to regulations of stormwater discharges, is not applicable to this proceeding. In fact, Maddan did not assert the applicability of Chapter 62-25 in this case. See Joint Pretrial Stipulation, § 2 (Law Applicable in Northwest District of Florida).

Rather, as Maddan stipulated, Chapter 62-312, F.A.C. applies in this case. See id. To qualify for an exemption from dredge and fill jurisdiction based upon an "artificially constructed stormwater treatment and conveyance [system] designed solely for the purpose of stormwater treatment . . . that [is] regulated by the Department or the water management district," the specific requirements of Rule 62-312.050(4), F.A.C., must be satisfied. The record supports the ALJ's conclusion that the requirements of Rule 62-312.050(4) were not satisfied by Maddan in this case. Rather, the record reflects that Lake Blake, which originated as a borrow pit, was not designed solely for the purpose of stormwater treatment, and is not regulated as such by the Department or a water management district. Therefore, Exception No. 1 (Legal) is denied.

Exception No. 2 (Legal)

In this Exception, Maddan asserts that the ALJ erred in determining that, "[u]nder the evidence presented, DEP's interpretation [pursuant to Rule 62.312.030(2)(c), F.A.C.,] that the excavated stormwater drainage system constitutes a 'series of excavated water bodes' cannot be deemed 'clearly erroneous' and is therefore entitled to great deference." In making this determination, the ALJ correctly applied the rule of construction that "[a]n agency's interpretation of its own rules and regulations is entitled to great weight, and shall not be overturned unless the interpretation is clearly erroneous." Golfcrest Nursing Home v. State, Agency for Health Care Admin., 662 So.

2d 1330, 1333 (Fla. 1st DCA 1995) (citing Orange Park Kennel Club, Inc. v. State, Dep't of Business & Professional Regulation, 644 So. 2d 574 (Fla. 1st DCA 1994)). "This is true even if that interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation." Id. (citing State, Bd. of Optometry v. Florida Soc'y of Ophthalmology, 538 So. 2d 878, 885 (Fla. 1st DCA 1988)).

Here, the record supports the ALJ's determination that the Department "established by a preponderance of the evidence that Lake Blake is directly connected to Cinco Bayou by a series of underground pipes exiting a culvert in Lake Blake . . . ." (Conclusion of Law ¶ 70), and that the installation of such pipes "required the excavation of land." (Finding of Fact ¶ 18). Rule 62-312.030(2), F.A.C. (Jurisdiction), provides that "surface waters of the state are those waters listed below and excavated water bodies . . . which connect directly or via an excavated water body or series of excavated water bodies to [listed waters]." Both Dr. Tobe and Ms. Owens testified as to the direct connection between Lake Blake and Cinco Bayou. (Tr. Vol. 1, pp. 113-14, 132; 140-48.)

The record thus supports the ALJ's conclusion that Lake Blake is directly connected to Cinco Bayou by a series of underground pipes. The record further supports the ALJ's conclusion that the Department's interpretation that buried pipes or culverts, like ditches, are "excavated water bodies" for purposes of Chapter 62-312, F.A.C., is not clearly erroneous. Therefore, Exception No. 2 (Legal) is denied.

Exception No. 3 (Legal)

This Exception appears to raise two separate constitutional challenges. First, Maddan appears to be raising a facial challenge to the constitutionality of section 373.4145, Florida Statutes (2002) (Interim part IV permitting program for the Northwest Florida Water Management District). This statutes provides, in pertinent part, that, "[w]ithin the geographical jurisdiction of the Northwest Florida Water Management District, the permitting authority of the department under this part shall consist solely of the following . . . ." Maddan appears to assert that application of the criteria contained in section 373.4145, Florida Statutes, "denies Maddan equal protection under the law" in violation of section 373.421, Florida Statutes, which requires the adoption of a "unified statewide methodology for the delineation of the extent of wetlands."

However, in the parties' Joint Pretrial Stipulation, Maddan stipulated, without objection, to the applicability of § 373.4145, and did not assert this constitutional challenge during the administrative hearing. Therefore, he cannot raise it for the first time in an Exception to the Recommended Order. Moreover, even if Maddan had raised this issue at hearing, "[t]he Administrative Procedure Act does not purport to confer authority on administrative law judges or other executive branch officers to invalidate statutes on constitutional or any other grounds." CWA, Local 3170 v. City of Gainesville, 697 So. 2d 167, 170 (Fla. 1st DCA 1997).

Second, Maddan raises a facial challenge to the constitutionality of Rule 62-312.045, F.A.C., which provides, in pertinent part, that "[i]solated areas that infrequently flow into or otherwise exchange water with a described water body are not intended to be included within the dredge and fill jurisdiction of the Department." Specifically,

Maddan asserts that he is denied equal protection because the Department applies a different standard to lakes[4] than that which applies to "intermittent streams" as set forth in Rule 62-312.030(d), F.A.C. This D.E.P. rule provides an exemption, inter alia, for an intermittent stream, defined as a stream which "flows only at certain times of the year, flows in direct response to rainfall, and is normally an influent stream except when the ground water table rises above the normal wet season level."

Maddan's challenge to the validity of Rule 62.312.045, F.A.C., is beyond the subject matter jurisdiction of this formal administrative proceeding under sections120.569 and 120.57(1), Florida Statutes. A challenge to the validity of a duly adopted agency rule must be brought by petition filed directly with DOAH pursuant to section 120.56, Florida Statutes. Based upon the foregoing, Exception No. 3 (Legal) is denied.

Exception No. 4 (Legal)

This Exception raises a facial challenge to the constitutionality of Rule 62-312.030(e), F.A.C., which exempts natural lakes "where one person, other than the state, owns the entire lake to its landward extent as delineated by applicable Department rule." Specifically, Maddan asserts that he is denied "equal protection under the law when the Department applies different standards to artificially created ponds as opposed to natural lakes." Maddan's challenge to the validity of Rule 62-312.030(e) is beyond the subject matter jurisdiction of this formal administrative proceeding under sections120.569 and 120.57(1), Florida Statutes. As stated above, a challenge to the validity of a duly adopted agency rule must be brought by petition filed

[4] Dr. Tobe testified that, in interpreting Rule 62.312.045, F.A.C., the Department uses the "common English definition of infrequent," which "means rare." (Tr. Vol. 1, p. 134).

directly with DOAH pursuant to section 120.56, Florida Statutes. Accordingly, Exception No. 4 (Legal) is denied.

Exception No. 5 (Legal)

In his fifth Exception, Maddan challenges Rule 62-312.060(5)(d), F.A.C., which incorporates section 403.918, Florida Statutes, which has been repealed. Maddan asserts that such incorporation of the provisions of a repealed statute violates due process, because "[i]t is difficult for the average individual and the typical attorney to find a copy of a ten year old repealed statute." There are several flaws to this argument.

First, the parties agreed in their Joint Prehearing Stipulation that:

> The permitting side of this consolidated case . . . is specifically governed by § 403.918, Fla. Stat. (1991) (repealed), which provides:
>
> > (1) A permit may not be issued ... unless the applicant provides the department with reasonable assurance that water quality standards will not be violated.
> > ...
> > (2) A permit may not be issued ... unless the applicant provides the department with reasonable assurance that the project is not contrary to the public interest.
>
> The law applicable in the Northwest District of Florida that governs this case has its source in § 373.4145, Fla. Stat. (2002), entitled "Interim part IV permitting program for the Northwest Florida Water Management District." Thereby the 1993 Legislature provided that, "[w]ithin the geographical jurisdiction of the Northwest Florida Water Management District, the permitting authority of the department under this part shall consist solely of the following ...". Among other things, this specifically included Rule Chapter 17-312, F.A.C. (now codified as Rule Chapter 62-312), which governed the Department's wetland resource (i.e., dredge and fill) permitting at the time and which, by reason of the statute, therefore continues to govern the Department's wetland resource permitting in the Northwest District of Florida. See §§ 373.4145(1) & (1)(b); see also, e.g., Rule 62-312.010 ("... the provisions of this part shall only apply to activities in the geographical territory of the Northwest Florida Water Management District ...").

Thus, Maddan stipulated to applicability of the provision which he now seeks to challenge. Moreover, the record reflects that, in this case, Maddan did not apply for, and the Department did not analyze Maddan's entitlement to, a dredge and fill permit. (Tr. Vol. 1, pp. 28-29). Therefore, Maddan's due process challenge to Rule 62-312.060(5)(d) is inapposite.

Second, in advancing this argument, Maddan relies on assertions (specifically, that "[i]t is difficult for the average individual and the typical attorney to find a copy of a ten year old repealed statute") which are not part of the administrative record. In this agency review phase of the formal administrative proceeding, I function not as a fact-finder or investigator, but in a quasi-judicial role. See Ridgewood Properties, Inc. v. Dept. of Community Affairs, 562 So. 2d 322 (Fla. 1990). Consequently, my consideration of the ALJ's Recommended Order is limited to a review of the matters contained in the DOAH record.

Third, section 373.4145, Florida Statutes ("Interim part IV permitting program for the Northwest Florida Water Management District") specifically adopts Chapter 17-312 [now, 62-312] of the Florida Administrative Code. Therefore, this Exception is, at bottom, a facial challenge to the constitutionality of section 373.4145. Again, in the Joint Pretrial Stipulation, Maddan stipulated to applicability of this section, and failed to raise this constitutional issue at hearing. However, even if Maddan had raised this issue at hearing, the ALJ did not have authority to invalidate the challenged statute on that ground in this § 120.57(1) formal proceeding. CWA, Local 3170, 697 So. 2d at 170. Therefore, for the reasons stated, Exception No. 5 (Legal) is denied.

Exception No. 6 (Legal)

In his sixth Exception, Maddan asserts that, "based upon the stipulated facts which established that Maddan's activities were exempt under the provisions of 62-312.030 . . . ," the ALJ erroneously relied on Rule 62-312.010, F.A.C., in entering his Recommended Order. Again, Rule 62-312.010 is specifically referenced in that part of the Joint Pretrial Stipulation reflecting the law applicable to the Northwest District of Florida.

Moreover, insofar as Maddan maintains that he has proven entitlement to an exemption from dredge and fill permitting requirements based upon the stipulated facts, the record does not support this assertion. Rather, the record supports the ALJ's Conclusions of Law reflecting that Maddan failed to establish any exemption pursuant to Rule 62-312.050(1)(g), (pertaining to construction of seawalls which does not violate water quality standards); Rule 62-312.050(4) (regarding stormwater treatment and conveyance systems designed solely for the purpose of stormwater treatment and regulated by the Department or a water management district); section 403.031(13), Florida Statutes (pertaining to "waters owned entirely by one person other than the state"); section 403.812, Florida Statutes (applicable to "stormwater management systems . . . designed, constructed, operated and maintained for stormwater treatment, flood attenuation or irrigation"); or "any other exemption." (Finding of Fact ¶ 56; Conclusions of Law ¶¶ 73-77). Accordingly, Exception 6 (Legal) is denied.

Exception No. 7 (Legal)

In his last Exception, Maddan asserts that the Recommended Order "is in error when it places the burden on Maddan to prove that his activities violated water quality."

This Exception is apparently directed to Finding of Fact ¶ 55, in which the ALJ addresses Maddan's claimed exemption pursuant to Rule 62-312.050(1)(g), and observes that the record contains "no evidence that such filling of Lake Blake was ever subjected to appropriate water quality tests, much less meeting such water quality tests as well as the other requirements of this exemption." (Finding of Fact ¶ 55).

In the Joint Prehearing Stipulation, the parties stipulated (in pertinent part), that, "if Lake Blake is determined to be connected to waters of the state," then Maddan has the burden of "establishing that [his] activities in the surface waters and wetlands at Lake Blake are otherwise exempt from dredge and fill permitting." This stipulation reflects the correct allocation of the burden of proof where an exemption to dredge and fill permitting requirements is asserted. Cf. Robbins v. Webb's Cut Rate Drug Co., 16 So. 2d 121, 123 (Fla. 1943) ("It is incumbent on those relying on an act for protection to bring themselves within the specifications laid down...."); In re Estate of Livingston, 172 So. 2d 619, 620 (Fla.2d DCA 1965) ("[G]enerally an exception to a statute must be proven by the one seeking to establish it.").

Rule 62-312.050(6), to which Maddan refers in this Exception, does not shift that evidentiary burden. Rather, this rule preserves the Department's right to take appropriate enforcement action with respect to an otherwise exempt activity if the Department can prove that the activity has caused water pollution. See Rule 62-312.050(6) (providing, in pertinent part, that "[n]othing in this section shall prohibit the Department from taking appropriate enforcement action to abate or prohibit any activity otherwise exempt from permitting pursuant to this section if the Department can

demonstrate that the exempted activity has caused water pollution in violation of Chapter 403, F.S."). Accordingly, Exception No. 7 (Legal) is denied.

RULING ON DEPARTMENT'S EXCEPTION

The Department has filed a single Exception, to ¶ 67 of the Recommended Order (Conclusion of Law). The Department states that paragraphs 65-67 of the Recommended Order mirror the language contained in ¶ 2, under "Agreed Law," in the parties' Joint Prehearing Stipulation (compare Joint Prehearing Stipulation at pp. 11-13 with RO at pp. 25-27). However, a portion of the parties' agreed law on this point was omitted from the Recommended Order (compare Prehearing Stipulation at pp. 12-13, ¶ (b), with RO at p. 27, ¶ 67). In its Exception, the Department requests that the omitted portion be included by amendment to Conclusion of Law ¶ 67 of the "Recommended Order," making it consistent with the Joint Prehearing Stipulation. As thus amended, Conclusion of Law ¶ 67 would read as follows:

PERMITTING

67. As for the permitting side of this consolidated case, such is specifically governed by Section 403.918, Florida Statutes (1991) (repealed), which provides:

> (1) A permit may not be issued ... unless the applicant provides the department with reasonable assurance that water quality standards will not be violated.
> ...
> (2) A permit may not be issued ... unless the applicant provides the department with reasonable assurance that the project is not contrary to the public interest. However, for a project which significantly degrades or is within an Outstanding Florida Water, ... the applicant must provide reasonable assurance that the project will be clearly in the public interest.

(a) In determining whether a project is not contrary to the public interest, or is clearly in the public interest, the department shall consider and balance the following criteria:

1. Whether the project will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project;

5. Whether the project will be of a temporary or permanent nature;

6. Whether the project will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project. ...

*** *** ***

This repealed statute continues to apply to dredge and fill permitting in the Northwest District of Florida because Rule 62-312.060(5)(b), Florida Administrative Code, specifically requires that the Department "evaluate [any] proposed dredging or filling" in the geographical territory of the Northwest Florida Water Management District in accordance with Section 403.918 (1991) and Section 403.919, Florida Statutes (1991). See Section 373.4145 ("Interim part IV permitting program for the Northwest Florida Water Management District") adopting Chapter 17-312 [62-312], Florida Administrative Code.

The omitted reference correctly states the law applicable to dredge and fill permitting in the Northwest District. Accordingly, Department's Exception No. 1 is granted.

CONCLUSION

It is therefore ORDERED:

A. As modified above, the ALJ's Recommended Order is otherwise adopted in its entirety and incorporated by reference herein.

B. Permit Application No. 46-0199306-001-EE, wherein Maddan requested authorization to place a modular home on a fill pad located in Lake Blake, is 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 21 day of November, 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.

CLERK

11/21/03
DATE

CERTIFICATE OF SERVICE

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

James E. Moore, Esquire
The Moore Law Firm, P.A.
P.O. Box 746
Niceville, FL 32588

Ann Cole, Clerk and
Richard A. Hixson, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Charles T. Collette, Esquire
Robert W. Stills, Jr., Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 21st day of November, 2003.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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